1. Introduction

Following his earlier article, “The Annexation of Korea Never Took Place”¹ (in the July and August, 1998 issues of this magazine), Professor Yi Tae-jin at Seoul National University published [another] article, “Only the Treaties for the Invasion of Korea Were Anomalous” (in the March 1999 issue of this magazine). These articles conveyed to Japanese readers the results of his research on the issue of how to define Japan’s domination

¹ Yi Tae-jin used the word, bulsŏngnip (j. fuseritsu), that can be translated as “invalid” for smoother reading. However, the translators prefer the somewhat awkward expression, “failure to come into being,” in the sense that its existence as well as legal validity are to be denied.
of “Chōsen” (Korea). [Yi] presented the reasons for judging the old treaties including the treaty of annexation of Korea to be null and void, and also the rationale for [his] assertion of “illegality” of the “colonial rule” in the period from 1910 to 1945.

Yi Tae-jin maintains that the Japanese-Korean Protocol [of February 1904] (k. ūijōngsŏ, j. giteisho) and the Agreement [of August 1904] (k. hyŏpchōngsŏ, j. kyōteisho) ([collectively] known in Japan as the First Japanese-Korean Agreement), the “Coerced” 1905 Agreement (j. Itsushi Rokuyaku, k. Ŭlsa Nogyak) (the Second Japanese-Korean Agreement), the Korean-Japanese Agreement [of 1907] (the Third Japanese-Korean Agreement), the “Coerced” Treaty of Annexation (The Treaty of Annexation of Korea), and all other treaties and international agreements that were signed in 1904-1910 between Japan and Korea were not only forced [upon Korea] without mutual consent but there also were procedural defects in the way they were made as well as flaws in their forms. He argues that they were, therefore, null and void and they failed to come into being from the outset. Accordingly, the annexation of Korea by Japan was not valid, and Korea was not a colony, during 1910-1945, but it was under forcible occupation. Relying on military force, Japan controlled Korea as colony—a [case of] “illegal” colonial control. Therefore, Yi Tae-jin concludes, the Japanese government should apologize for the “illegality” [of its acts] and must, at the same time, pay commensurate reparations.

Yi Tae-jin’s assertion apparently represents a historian’s version of those views in Korea that declare the old treaties to be null and void, thereby automatically rendering [the creation of the Korean] colony illegal. It is related to the criticism directed at Murayama Tomiichi. In October 1995, Murayama, then prime minister, expressed “a sense of deep reflection (hansei) and regret” as he undertook a “political and moral evaluation of the [Japanese] rule that was based on the Korean annexation treaty.” Yet, he stated later at the National Diet that “it was [his] understanding that the
Korean annexation treaty was concluded and put into effect in a legally valid manner, under historical circumstances such as international relations and the like at that time.”

Yi Tae-jin contends that there are two types of absurd statements (mōgen) by the Japanese political leaders about the annexation of Korea:

1. The annexation was ultimately for peace in the East, so there are no moral or legal problems.
2. There are moral and ethical responsibilities for aggression but no problems exist in a legal sense.

The first type was the view held by the Japanese at the time of the annexation, and it has been passed on to the rightwing of the Liberal Democratic Party—the source of absurd remarks even today. On the other hand, the second type has abandoned the peace-in-the-East thesis and admits to a moral blunder but persists in denying any legal problems. Yi denounces the second type as being complementary to the first type. The “Murayama statement” is said to be a good example of the second type, which is shared in Japan by the “progressive” intellectuals as well. It appears that I am one of the so-called “progressive intellectuals” for I have written, a short while before the “Murayama statement,” that the old treaties were valid and the colonial rule was legal albeit coercive, in my book, The Annexation of Korea (Iwanami shinsho, 1995).

Those who deny the validity of the treaties, including Yi Tae-jin, apparently consider the admission of the invalidity of the Korean annexation treaty and other treaties from the time of their inception and similar admission of the “illegality” of the colonial rule due to the absence of a legal basis to be a barometer to measure the degree of Japan’s remorse over the “past.”

Since the end of the World War II, the former colonial powers and suzerains including Japan continually claimed that colonial rule had been legal, therefore, there was no need to apologize or to accept any reparation responsibilities. They did not even try to
reflect on their past deeds. Isn’t Yi’s assertion following the same logic as the ex-colonial powers, only on the reverse side? In other words, there should be apologies and reparations in a case of “invalid” treaty and “illegal” colonial rule, but there is no need for apologies or reparations in a case of “valid” treaty and “legal” colonial rule. I question whether such logic that allows no middle ground would really be useful for the “settlement of the past.”

Let us suppose that invalidity of the treaty and illegality of colonial rule were judged to be factually correct, and apologies and reparations were offered to South and North Korea. It then might lead someone to argue that Japan needs not apologize or pay reparations to Taiwan since the latter was made a colony in an effective and legal manner following the signing of the peace treaty by Japan and China at the end of the Sino-Japanese War in 1895.

Needless to say, justice should prevail through judicial judgment in numerous cases of unlawful behavior committed by Japan in its colonies, such as those involving military comfort women, forcible abduction of laborers and so on. But, if we separate the “illegal colonial rule” from the “legitimate colonial rule” and hold only the former accountable, are we not failing to meet the challenges of dismantling and overcoming colonialism—a task we face today all across the globe which nevertheless has been neglected since the end of World War II?

My position is that the former colonial or suzerain powers should apologize and pay reparations after undergoing a process of thorough self-reflection (hansei) regarding “morally wrong (futōna)” colonial rule. [In fact,] there is no justifiable colonial rule. Any colonial rule is “morally wrong,” in the sense that men controlled the mind of fellowmen in another country, or a nation subjugated another nation, whether such acts were perpetrated “illegally” or not. Only then would the “settlement of the past” have been accomplished.

On the basic moral issues surrounding past colonialism I would limit myself to these observations I have made above. In this
article, I would like to reexamine from a historical (historiographical) point of view, as Yi Tae-jin has, the alleged procedural mistakes in the making of the treaties and the alleged flaws in the treaty form since Yi attempted to verify these alleged irregularities as the causes for denying the validity of the old treaties upon which Japan’s “illegal (fuōna)” colonial rule was based.

Although my comments are primarily focused on Yi’s articles in the July and August 1998 issues of this magazine, I will also mention, when necessary, *Japan’s Forcible Occupation of the Empire of Great Han* edited by Yi (*Kkach’i*, [Seoul], 1998) in which he provides more detailed analyses. Due to space limitation, I have to wait for a future opportunity to comment on his article in the March 1999 issue of this magazine.

### 2. The Treaty Form

Yi’s thesis on the invalidity of the old treaties is based on the examination of historical source materials. He contends that important political agreements that transfer a nation’s diplomatic and internal jurisdictions to another nation must be concluded in the form of formal treaties at the highest level of formality (*kakushiki*) and must be accompanied by appropriate documents such as full powers and the instrument of ratification. None of the treaties Japan had forced upon Korea since the outbreak of the Sino-Japanese War met such standards. Yi then declares that these treaties are, therefore, without any legal force.

Sakamoto Shigeki’s critical comment on this question stated that “the parties to an agreement are free, under international law, to choose the format of such agreement. Although there are certain established practices, the content of the agreement does not
determine the format” (“Japan and Korea Should Not Fall into the Pitfalls of the Old Treaties” in the September 1998 issue of this magazine). Yi rejected, in his aforementioned article in the March 1999 issue of this magazine, Sakamoto’s critique and reiterated that, after having examined various treaties signed in the period between the 1870s and 1910, the treaties that Japan had imposed on Korea while it was engaged in the process of invading Korea lacked the essential requirements of treaties, and, therefore, could not be accepted as legally binding treaties.

Yi Tae-jin attaches great importance to the presence or the absence of full powers and the provisions for ratification as essential requirements for a treaty. This writer will present below a few examples of how contracting parties have decided on this matter.

During 1906-1907, Japanese minister to Russia Motono Ichirô and Russian foreign minister Izvolsky were negotiating the Japanese-Russian Treaty of Commerce and Navigation (signed on July 28, 1907), the Japanese-Russian Fishery Agreement (signed on the same day), and the First Japanese-Russian Agreement (signed on July 30), simultaneously. Full powers and the ratification provision were required for the first two. However, in regard to the First Japanese-Russian Agreement which included, from a historical viewpoint, far more important contents, the Japanese side requested to sign it without exchanging full powers and the Russian side agreed to it. As the result the Japanese-Russian Agreement including a secret agreement that was signed at the same time was concluded in the form that did not require full powers issued by the head of state to the official who would sign the document. Instead, the governments entrusted the signer with the responsibility and no exchange of the instruments of ratification took place.

In the case of the Japanese-French Agreement (signed on June 10, 1907) also, the Japanese side proposed, and the French side agreed, to dispense with the full powers in favor of authorization
by the government, and to adopt the form that did not require the exchange of ratification instruments.

As Japan and Korea negotiated in January 1904 the Japanese-Korean Protocol that was to be signed on February 23 of the same year, full powers were considered necessary. Accordingly the Korean side issued it while the Japanese minister to Korea Hayashi Gonsuke asked his government for full powers. Subsequently, the Korean side requested to dispense with it. Hayashi then asked the Japanese government for an authorization to sign, but not for full powers. Here a clear distinction is made between full powers issued by the emperor and an authorization of full powers given by the government.

In other words, the form of a treaty to be concluded is not prescribed by its content but by an agreement between the negotiating parties.

According to Various Countries’ Procedures for Concluding Treaties and Other International Commitments (1924) prepared by Bureau of Treaty of the [Japanese] Ministry of Foreign Affairs, Japan observed the following three types of treaty making procedures and treaty formats:

I. “Treaty concluded in the form requiring the exchange of ratification.”

II. “International commitment concluded with the sanction of the emperor.”

III. “International commitment concluded by the government alone without requiring the emperor’s sanction.”

(Roman numerals are added by the author.)

There were 53 treaties and agreements Japan and Korea had concluded before the annexation of Korea. Among them, only two, the Japanese-Korean Treaty of Amity (signed on February 26, 1876) and its sequel (signed on August 20, 1882), belonged to the above mentioned Type (I), namely, the treaty requiring ratification. All others belonged to Types (II) and (III), or the agreements
between the governments. For the negotiations leading to the Chemulp’o Treaty (signed on August 30, 1882) and the Hansông [Seoul] Treaty (signed on January 5, 1885) that were signed in the aftermath of the 1882 Mutiny and the 1884 Coup respectively, full powers were issued but these treaties required no ratification. We may then conclude that the Japanese-Korean treaties signed during the Meiji period did not customarily require the issuance of full powers and the provision for ratification. Therefore, the Second Japanese-Korean Agreement [the “Protectorate Treaty” of 1905] was not the only treaty that dispensed with full powers and the ratification document. We must then reconsider the thesis that the absence of these two documents has rendered the treaty null and void.

3. The Reasons Why the Second Japanese-Korean Agreement is Null and Void

With regard to the Second Japanese-Korean Agreement, Yi Tae-jin states the following as the basis for denying its validity:

(a) Absence of the commission granting full powers to the signer of this agreement.
(b) The document should have carried the title of “treaty” because it was a protectorate treaty. But even the title of “convention” was not written on the original copy of the signed document.
(c) The [Korean] emperor did not ratify the treaty.

Yi says that “the absence of full powers and the instrument of ratification, and the many other defects (the lack of title [Unno’s note]) in the treaty text make it obvious to anybody that this treaty is without legal force.” We will examine these points.
(a) The Absence of Full Powers

The signers of the Second Japanese-Korean Agreement were “Hayashi Gonsuke, Minister Extraordinary and Plenipotentiary” and “Pak Che-sun, Foreign Minister.” It is true that the Japanese emperor did not issue to Hayashi full powers. Hayashi’s title, “Minister Extraordinary and Plenipotentiary,” is the minister’s official title and does not mean that he had been granted the full powers to sign a specified treaty. The Japanese cabinet decided on October 27, 1905 “to entrust Minister Hayashi with full powers to conclude the treaty.” But it was not a decision to ask the emperor to issue full powers. It meant, instead, that the granting of full powers was done at the level of the government. A minister or an ambassador submits, upon his arrival, his credentials issued by the head of his country to the head of the receiving country. He conducts negotiations under instructions from his government and, with the latter’s approval, he can sign his name on a document in accordance with his official capacity as the nation’s representative.

Similarly Pak Che-sun who signed for the Korean side did not receive full powers from the Korean emperor. From the beginning, the Japanese government intended to omit the exchange of full powers and the ratification documents, but instead, to follow the aforementioned Type (II) that required only the approval of the two emperors. It also anticipated that Foreign Minister Pak would sign for the Korean side. Therefore, Itô Hirobumi who was sent to Seoul as Ambassador Extraordinary on a special mission to persuade the Korean emperor strongly urged the emperor at a private audience on November 15 “to summon the foreign minister immediately and command him to conclude the negotiations promptly on the basis of Minister Hayashi’s proposal and arrange for formal signing.” (This and following statements are based on “The Record of the Private Audience” attached to Itô’s written report that is contained in Nihon gaikô bunsho (Japanese Diplomatic Papers), Vol. 38, No. 1.) Itô was demanding that the negotiations should begin between Minister Hayashi and Foreign
Minister Pak.

Yi Tae-jin narrates that “although Special Envoy Itō requested, at his audience with Emperor Kojong, the appointment, by an imperial ordinance, of the Korean plenipotentiary ... the emperor did not accede to Special Envoy Itō’s request that an imperial ordinance be issued to grant full powers to a minister plenipotentiary (sic).” However, according to the aforementioned “Record of Private Audience,” what Itō asked of the emperor was not a written imperial ordinance or full powers but an “imperial command” ordering Foreign Minister Pak to negotiate and sign. It probably was not impossible, given the threatening circumstances bearing upon the emperor, to pressure him to issue full powers, but such a granting was not necessary because the decision had already been made to adopt Type (II) that required no full powers. Under Itō's pressure, the emperor had to reply that “the foreign minister should conduct a series of negotiations with the Japanese minister and submit the results to the government which in turn should formulate a decision that would be submitted for our approval” and that “the measures should be taken promptly.”

On [November] 16, the day after Itō’s audience, the “negotiations” began, nominally between Minister Hayashi and Foreign Minister Pak.

As a rule, the minister of foreign affairs, as well as the prime minister, are presumed to be in the position to represent their country to the outside world. Yi Tae-jin notes that “Pak Che-sun’s title is listed only as the minister of foreign affairs” as he signed the Second Japanese-Korean Agreement. Also according to Yi, “it should be noted that neither ‘Resident-General Marquis Itô Hirobumi’ nor ‘Prime Minister and the Second Order of Merit Yi Wan-yong’, the two signatories to the Third Japanese-Korean Agreement [1907], listed the title of the plenipotentiary.” However, there are examples of a prime minister, or a foreign minister, signing their names on treaty documents that have been worked out through mutual agreement without the benefit of the formal
full powers, as would an ambassador, a minister or a resident-general.

Before we cite the absence of full powers as a critical defect of the Second Japanese-Korean Agreement that should nullify the agreement itself, there must be a general recognition that full powers is a *sine qua non* for the signing of a treaty. However, as we have noted above, such documents are not usually issued in Types (II) and (III) although Type (I) requires them. The Second Japanese-Korean Agreement that Japan imposed on Korea belonged to Type (II) requiring no full powers. Therefore, there is no basis for Yi Tae-jin’s assertion.

(b) The Title of the Second Japanese-Korean Agreement

Yi Tae-jin points out that the two signed original texts of the Second Japanese-Korean Agreement, one in *Kyujang’gak* (the successor to the old Royal Archive) of Seoul National University and the other, in *Gaikō shiryō kan* (Diplomatic Archives) of the Japanese Foreign Ministry, bear no title (the name of the treaty), and he declares that the title, “Japanese-Korean *Kyōyaku* (Convention),” was arbitrarily added by the Japanese side. This is an issue that has been overlooked by those of us, including myself, who usually examined only the published collections of historical sources bearing the titles of the treaties.

Yi Tae-jin states that “it is axiomatic that a treaty that affects the sovereignty of a nation such as the transfer of diplomatic power should be a formal treaty [English word “treaty” in the original]. (p. 97 in the aforementioned book edited by Yi Tae-jin) There are also some others who have written that a protectorate treaty should be a “treaty” [English term in the original]. These arguments are based partly on *Hogkokurōn* (A Study on the Protectorate), authored in 1906 by Professor Ariga Nagao (international law) of Waseda University. Regarding the Second Japanese-Korean Agreement, Ariga wrote, “It took the form of the so-called agreed memorandum (*Dōbun tsūchō*) that was signed by
the Korean foreign minister and the Japanese minister exercising the normal prerogatives of their offices. It was not a formal treaty for which the two parties sent representatives with full powers who then negotiated and signed it, and which was ratified by the sovereigns of the two nations.” He further stated, “Similar protectorate treaties between other foreign countries have mostly taken the format of a formal treaty.” However, out of 11 treaties that France had signed, according to the appendix that Ariga attached to his book, seven used the title of “treaty” while four were recorded as “convention[s].” It is not correct to say, as Yi Tae-jin does, that “there is hardly any example where [the title] “convention” was used in a political project such as the transfer of diplomatic power.” Ariga’s “formal treaties” included “conventions.” Moreover, even if there are certain omissions in the procedures followed for the conclusion of the treaty, we should note the following statement of Ariga: “On the question of whether there is any difference in the [legal] force of a formal treaty and that of a less formal arrangement (ryakushiki torikime), there is not the slightest difference in their actual binding force upon the government.”

Furthermore, Yi Tae-jin noticed that the first line of the signed original text of the Second Japanese-Korean Agreement where the title should have been entered was left blank, and surmised that “the Japanese side had first aimed at [concluding] a ‘treaty for entrusting Korea’s diplomatic affairs’ but could not write in the title because suitable conditions could not be arranged for it.” Yi went on to say, “the omission of the title of the treaty signified that the treaty was, at the end, incomplete (mikan), or that it was not concluded as initially intended.” (Yi Tae-jin, op. cit., p.102)

Certainly *Japanese Diplomatic Papers*, Vol. 38, No.1, contains documents that used the treaty titles such as “treaty entrusting Korea’s diplomatic affairs” in several places. But these examples apply only to the telegrams sent by Minister Hayashi to Acting Foreign Minister Katsura Tarō (concurrently Prime Minister) in
the period between November 17 when the treaty was imposed [on Korea] and November 19. Since they were not used in the instructions sent by the Japanese government, they should be understood only as convenient names that Hayashi chose in accordance with the content of the agreement.

From the very beginning, the Japanese government prepared for a Type (II) agreement between the governments, not for a Type (I) treaty. This can be clearly deduced from the fact that the subject of the sentence in the preamble of the draft agreement submitted to the [Japanese] cabinet on October 27 is the governments [the author’s emphasis] of the two countries, or that, at the end of the draft document, the signers were said to be “signing their names to this agreement [the author’s emphasis] after having been properly authorized by their respective governments.” Yi Tae-jin’s contention that a “treaty entrusting Korea’s diplomatic affairs” had failed is simply a fiction.

The Japanese government decision not to use the Type (I) treaty form requiring ratification was perhaps due to a fear of Korean resistance intent on preventing ratification of the treaty or intervention by the third countries that might develop in the period after the signing of the treaty but before the exchange of the instruments of ratification.

In addition, the signed original texts of the first Japanese-Korean agreement and the Korea annexation treaty are also without their titles. In line with the notation that “there are instances of omitting the title from the signed text of an international agreement” (“Report on the Conclusion, Ratification and Promulgation of the Treaty” by The First Section, Bureau of Treaty), no title appears in [the signed texts of] the First and the Second Japanese-British Alliance Treaties (1902 and 1905), Treaty on Trade between Japan and India (1904), the Japanese-Russian Peace Treaty (1905), The First Japanese-Russian Agreement (1907), and the Japanese-Chinese Agreement on Chientao (1909). The Second Japanese-Korean Agreement is not the only example
of the treaty text without the title.

In any case, the Second Japanese-Korean Agreement is called the Japanese-Korean Agreement (j. kyōyaku) in Japan, and the Korean-Japanese Treaty (k. hyŏpgsang choyak) in Korea, and published in their respective official gazettes under these names. Yi Tae-jin contends that there was a certain “ex post facto treatment” that was “commonly applied to all agreements that Japan had imposed on Korean empire after the Russo-Japanese War.” (Yi Tae-jin, ed., op. cit., p. 78) He lists: (1) the Japanese-Korean Protocol was signed on February 23, 1904. But two days later, on February 25, Japanese foreign minister Komura Jutarō telegraphed to Minister Hayashi Gonsuke in Korea the text of a draft agreement that Komura himself had prepared with an instruction that the [new] text should be used. (2) Regarding the first Japanese-Korean agreement, Japan merged two previously signed memoranda and, “in the process of notifying the American and British governments, suddenly changed the title to an ‘Agreement’ [English word “agreement” in the original].” (3) The Second Japanese-Korean Agreement was also given a name ex post facto [after the conclusion of the agreement] as discussed earlier. On the basis of these examples, Yi coined the term, “ex post facto treatment,” in depicting the “alteration” of the treaty by Japan that verged on “deception.”

However, the document cited by Yi as the draft agreement that Foreign Minister Komura had instructed Hayashi to use was in fact a reply that Hayashi sent to Komura on the 25th in response to Komura’s inquiry, on the 24th, regarding the preamble and the signer of the agreement. Yi committed an error of mistaking the sender of the telegram for the addressee, and misconstrued the telegram as Komura’s instruction designating the title, preamble, date and the signer. This case, therefore, cannot be the first example of the “ex post facto treatment” and Yi’s error needs correction.

In the case of the First Japanese-Korean Agreement, a
memorandum dealing with the first item (regarding the employment of a financial adviser) that partly amended the Japanese draft and the second item (regarding the employment of a foreign affairs adviser) was signed on August 19, 1904. The signers were “Minister Extraordinary and Plenipotentiary Hayashi Gonsuke” and “Foreign Minister Yi Ha-yŏng and Finance Minister Pak Chŏng-yang”. The third item (regarding prior consultation with the representative of the Japanese government on matters of diplomatic affairs) was deferred due to Korean opposition. On the 22nd, Minister Hayashi went to the imperial palace, explained in detail directly to the emperor who was in his sickbed “the necessity for the agreement and requested His Majesty’s consent and approval.” On the next day, 23rd, Acting Foreign Minister Yun Ch’i-ho notified Korea’s consent to Hayashi. Thereupon, “all three articles” including the first and the second items that had been signed on the 19th, “were combined and signatures and seals were affixed,” according to Hayashi’s report to Foreign Minister Komura. The signers were “Hayashi Gonsuke, Minister Extraordinary and Plenipotentiary” and “Yun Ch’i-ho, Acting Foreign Minister.” Technically, the memorandum dated the 19th and the agreement dated the 22nd are separate with different sets of signers, and the former [the memorandum] may be presumed to have lost its force on the 22nd. Nevertheless, it was not a case of combining two memoranda into a repackaged “agreement.”

According to telegrams exchanged between Hayashi and the Japanese foreign ministry, this agreement was called Kyōyaku [agreement] since the 23rd. It was made public as the Japanese-Korean Kyōyaku in the Japanese official gazette (September 5), and as a “Hyŏpchŏngsŏ (j.: Kyōteisho) in the Korean official gazette (September 9). The signed document of this agreement, usually referred to as the First Japanese-Korean Agreement, is simple and brief without any title, preamble, or statement regarding authorization for negotiating and signing the agreement. The Japanese government defined it as an agreement
based on Article 6 of the Japanese-Korean Protocol, signed on February 23, 1904 which read: “details that are not specified in but related to this agreement shall be decided through negotiations between the representative of the Empire of Japan and the foreign minister of the Empire of Korea.” It was presumably a Type (III) agreement between governments.

(c) Emperor Kojong’s Ratification

It seems that there is some confusion on the matter of ratification. It arises from equating erroneously ratification as a diplomatic act (the exchange of the instrument of ratification or the notification of ratification) and ratification by the treaty making authority under domestic law (the imperial sanction). Of course, they are interrelated; there cannot be diplomatic ratification without ratification by the treaty making authority. However, if the distinction is not made clear, we may commit the error of pointing at the absence of the instrument of ratification qua diplomatic document as an evidence that there was no imperial ratification (sanction). Needless to say, the signers of the treaty document were not the Japanese or Korean emperor. Nevertheless, “the resolution to urge Japan to seek correct historical understanding of the coercive treaties signed between the Korean empire and the Japanese empire”, adopted by the National Assembly of the Republic of Korea on October 16, 1995 in order to confirm the invalidity of the old treaties, stated that “the original documents confirm the fact that the so-called Five Ŭlsa Treaties [five agreements signed in 1905] lacked the signature and the seal of Emperor Kojong who then had the power to make treaties.” This resolution gives the erroneous impression that it was customary that the emperor himself affixed his name on the treaty document.

As mentioned earlier, the Second Japanese-Korean Agreement was not a treaty requiring ratification; hence, there were no diplomatic documents of ratification. I would like to believe that
when Yi Tae-jin stated, “there was no instrument of ratification,” he was merely saying that it was a treaty in violation of the constitution because it lacked the imperial sanction required under the domestic constitution.

On the basis of his recent research results, Yi Tae-jin mentions that Emperor Kojong did not approve the Second Japanese-Korean Agreement and made as many as six appeals to America and other world powers for help in nullifying the treaty. Yi calls it the emperor’s “campaign to invalidate the forced Ülsa Treaty.” However, the Japanese government at that time stuck to its line that the emperor had sanctioned the treaty.

Another chronicle appended to the official report of mission submitted by Special Envoy Itō, “Record of the Signing of the New Japanese-Korean Agreement” described the signing of the treaty as follows:

Late at night of November 17, 1905, Itō and Hayashi negotiated with the Korean ministers and five of them (the Five Traitors in the Year of Ülsa [1905]) accepted the draft agreement. But they requested some changes and additions to the text. Itō accepted [their request], made amendments, and asked that the treaty text be submitted to the throne. The emperor then requested that “there should be an additional statement to the effect that this treaty shall be abrogated when Korea attains wealth and power sufficient to maintain its independence.” Thereupon Itō added the following phrase to the preamble of the agreement: “until such time when Korea’s attainment of wealth and power shall be ascertained.” Itō then “had the agreement resubmitted for imperial inspection. The emperor expressed his full satisfaction.”

It appears that the emperor realized that the treaty could not be rejected any longer, and hoped for a recovery of the lost diplomatic powers by attaching a time limit and restricting the force of the treaty. Itō, being so crafty, chose to consider that the emperor’s approval had been obtained in exchange for a vaguely worded revision.

Itō arrived in Seoul in March 1906 as the first resident-general.
Four months later, on July 2, he had a private audience with the Korean emperor that lasted three hours. Itô sharply questioned the emperor who had consistently ignored the role of the resident-general and had refused to acknowledge the validity of the agreement. According to *The Record of Resident-General Itô’s Private Audience*, Itô’s words were:

“This agreement was concluded, as Your Majesty is aware, with imperial sanction after wording and other changes have been incorporated in deference to Your Majesty’s wishes. Then, why am I hearing stories that allege that Your Majesty does not recognize my duties as the resident-general dispatched by the imperial government of Japan in accordance with the said agreement? I, therefore, demand to be informed of Your Majesty’s views on the matter.”

Itô was demanding here a reconfirmation of the fact that the Second Japanese-Korean Agreement had accommodated the Korean emperor’s requests for modification and had secured the emperor’s consent and approval. The emperor had no choice but to respond as follows:

“The agreement of last year was indeed concluded, as you have just stated, after textual changes were incorporated in compliance with Our wishes. ... Please be assured that We have no intention of not recognizing the resident-general.”

Although Yi Tae-jin flatly declares that the emperor’s “consent” as described in “memoirs and the chronicles of audiences” are “totally unbelievable,” and even if we admit to the existence of some distortions in the Japanese records, it would be impossible to refute these events in their entirety.
4. The Contention that the Korean Annexation Treaty Failed to Come Into Being

Yi Tae-jin maintains that the Korean Annexation Treaty also failed to come into being because of the irregularities in the procedures for concluding the treaty and in its form. In the past, the contention that the annexation treaty was without force or that the annexation failed to come into being had been based on the logic that, since the Second Japanese-Korean Agreement was without force or had failed to come into being from the outset, the annexation treaty that “came into being” on the basis of the Second Japanese-Korean Agreement was also null and void. For example, the aforementioned resolution by the Korean National Assembly on October 16, 1995 declared that the “the so-called Seven Treaties in the year of Chŏngmi (1907)” and the so-called “Korean-Japanese Treaty on Annexation” were made by coercion on the basis of the so-called “Five Treaties in the Year of Ülsa (1905).” The resolution went on to say, “hence, they [the treaties of 1907 and 1910] too are null and void from the beginning.”

Yi, on the other hand, contends that the Korean annexation treaty itself “contained fatal shortcomings (j. kekkan).” Yi continues: this was the case despite “the utmost care with which Japan, endeavored, from the beginning, to put the annexation treaty in a perfect form ... in the belief that the perfect form that fully meets the formal requirements for this treaty would also resolve all the shortcomings of the previous agreements.” It appears that Yi’s purpose is to deflect any attempt to affirm the validity of the annexation on the basis of the validity of the annexation treaty even in the event that the First, Second and Third Japanese-Korean agreements would be found to be null and void. “The fatal shortcomings” that Yi mentions are two: (a) the
lack of authority for the signers of the Korean annexation treaty, and (b) fabrication of the Korean emperor’s “imperial message (ch’igyu; j. chokyu)” on the annexation. Let us now examine them.

(a) Authority of the Signers

The signers of the Korea annexation treaty were “Resident-General Viscount Terauchi Masatake” and “Prime Minister Yi Wan-yong.” According to Yi Tae-jin, those two individuals were not in the position to represent their respective countries and sign. He states his reason as follows:

“Under the Ŭlsa Treaty, the Resident-General’s task is ‘to manage the diplomatic affairs ... at the court of His Majesty, the Emperor of Korea.’ He, therefore, represents Korea’s exercise of diplomatic power. It is totally nonsensical that a man with such responsibility should sign the treaty as a representative of Japan. In addition, he was acting almost like a “regent” even in Korea’s internal administration due to the Chŏngmi Treaty (1907). Clearly, he could no longer represent Japan. As of 1910, the resident-general controlled both the diplomatic and the internal affairs of Korea, and Korea’s prime minister was, in fact, a subordinate of his. To have these two officials sign a treaty merging two disparate countries into one as representatives of their respective countries is a sheer nonsense.” (Yi Tae-jin ed., op.cit., pp. 199-200)

Let us begin with the argument that it is nonsensical that the resident-general who “represented Korea’s exercise of diplomatic power ... affixed his name and seal on the treaty as a representative of Japan.” Certainly Article III of the Second Japanese-Korean Agreement stipulated: “the Government of Japan shall appoint a resident-general who will serve at the court of His Majesty the Emperor of Korea as a Japanese representative. The resident-general shall reside in Seoul in order to administer primarily foreign affairs ... “This seems to be the reason why such a misunderstanding occurred.

It was, however, the Japanese government (the ministry of
foreign affairs), not the resident-general, that managed and controlled Korea’s diplomatic power. Article I of the Second Japanese-Korean Agreement reads: “the Government of Japan shall hereafter manage and control the foreign relations and affairs of Korea through the Ministry of Foreign Affairs in Tokyo.” Furthermore, Article II clearly stated, “henceforth, the Korean government agrees not to make any treaty or commitment of international nature without intermediation of the Government of Japan.” In other words, it was the Ministry of Foreign Affairs in Tokyo, or the Japanese government, that carried out Korea’s diplomatic functions for Korea. The original Japanese draft of Article III merely stated, “The Government of Japan shall post a resident-general to the court of His Majesty, the Emperor of Korea.” In the course of “negotiations” on November 17, however, Education Minister Yi Wan-yong requested, because of his concern over the resident-general’s intervention in Korea’s internal affairs, that a sentence, “[the resident-general] shall not intervene in the internal affairs” be inserted. Itō responded by inserting a substitute phrase, “the resident-general . . . in order to administer primarily foreign affairs.” It must be admitted that this insertion befuddled the logical consistency between Articles I and II, and Article III.

Komura Jutarō (foreign minister) was then in Beijing as ambassador extraordinary and plenipotentiary to negotiate the Japanese-Chinese Treaty (signed on December 22, 1905) on the Manchurian question. He became concerned lest the text of the Japanese-Korean Agreement might cause misunderstanding among foreign powers and cabled to Acting Foreign Minister Katsura Tarō: “My reading of the language of the Japanese-Korean Agreement that has just been concluded leads me to fear a possible misunderstanding that Korea’s foreign affairs will continue to be handled in Seoul by the resident-general albeit under the guidance and supervision of the foreign ministry in Tokyo.” Komura then suggested to clarify the parameters of the
resident-general’s diplomatic functions in a pending government ordinance on the organization of the residency-general.

As a result, Article III of the ordinance on the organization of the residency-general and the residency, promulgated on December 20, came to include the following restrictive delineation of the diplomatic functions of the resident-general: “The resident-general shall represent the Imperial Government of Japan in Korea, manage the affairs pertaining to the foreign consulates and foreign residents in Korea except for those that shall be handled by foreign representatives stationed in Japan, and supervise the work of business establishments in Korea that involve foreigners.”

The resident-general was a diplomat representing the Japanese government in Korea but his normal diplomatic activities were confined to “local affairs.” Yi was in error, therefore, in presuming that the resident-general was “the agent exercising Korea’s diplomatic power.”

Yi also calls it a nonsense that the resident-general and the premier of a puppet government, Yi Wan-yong, represented their respective countries at the time of signing of the Korean annexation treaty when the two individuals belonged to the same bureaucratic hierarchy as “a superior and a subordinate.” Such vertical relationship may have existed in reality. However, in a formal sense, they were the representatives of the Japanese and Korean governments, and they had to play their roles in the farce of signing the treaty.

(b) Fabrication of the “Imperial Message”

The process of concluding the Korean annexation treaty is described in good detail in Kankoku heigō shimatsu (The Beginning and the End of Annexation of Korea) which was the report of Governor of Chōsen [Korea] Terauchi Masatake, and

2. Included in Unno, ed., Kankoku heigō shimatsu kankei shiryō (Source Materials Related to the Beginning and the End of the Annexation of Korea) (Fuji Shuppan, 1998).
It was on August 16, 1910, that Terauchi who had prepared meticulous plans for the treaty signing including troop mobilization, invited Premier Yi Wan-yong to his official residence and entered into negotiations to prepare for the signing. Less than a week later, on the 22nd, the signing took place. During that week, Terauchi gave Yi the text of the draft treaty and even the draft imperial ordinance appointing Yi Wan-yong the plenipotentiary, and pressed the Yi Wan-yong cabinet to carry out the signing. There were no negotiations to speak of except for matters related to the honorific titles of the emperor, the former emperor, or the crown prince. Otherwise, things proceeded in strict accordance with the Japanese script.

Opposition within the Korean cabinet or hesitation on the part of senior court officials were suppressed by Terauchi and his company who resorted to deception, cajolery and so forth. At a council that met in the presence of the emperor, in the afternoon of the 22nd, full powers were issued to Yi Wan-yong in the form of an imperial edict. The conference ended when the emperor approved the draft treaty. The putative “negotiations” for the signing of the annexation treaty then took place with Premier Yi Wan-yong, and Minister of Agriculture, Commerce and Industry Cho Chung-üng for Korea and Resident-General Terauchi and Deputy Resident-General Yamagata for Japan in attendance at the official residence of the resident-general. At this time, an official letter was prepared on Yi Wan-yong’s request, separate from the treaty document, concerning the renaming of the country (to Chōsen; k. Chosŏn) and the status of the Korean imperial house (including the honorifics). Terauchi and Yi Wan-yong also signed their names (without affixing their seals) on a memorandum that the Japanese side had prepared in advance. This memorandum,

---
3. Edited by Yamamoto Shirô and published by Kyoto joshi daigaku (women's University) in 1980.
quoted below, is preserved in *Kyujang’gak* archive at Seoul National University and Yi Tae-jin stressed its importance:

Memorandum
1. The annexation treaty and the imperial ordinances of the emperors of both countries shall be promulgated simultaneously after mutual consultation.
2. Necessary procedures shall be taken immediately so that the above treaty and imperial ordinances can be promulgated at any time.

*August 22, the 43rd Year of Meiji*
Resident-General Viscount Terauchi Masatake

*August 22, the 4th Year of Yunghŭi*
Prime Minister Yi Wan-yong

Yi Tae-jin regards this document as “a memorandum wherein the representatives agreed to prepare and promulgate the two emperors’ imperial ordinances in lieu of the instruments of ratification.” He also considers that “the two delegates have pledged to treat the public dissemination of the two emperors’ ordinances on ‘the annexation’ together with the treaty text as having the effect of ratification.” However, an examination of the memorandum reveals no reference to any substitution for ratification. It is only Yi Tae-jin’s own dogmatic judgment that treats the imperial ordinances as being equivalent to the ratification documents.

In any event, an “imperial edict” (*shōsho*) of the Japanese emperor and an “imperial message” (*ch’igyu*; *j.* *chokuyu*) by the Korean emperor are issued at the same time as the promulgation of the annexation treaty as stipulated in the memorandum. However, Yi Tae-jin contends that the Korean “imperial message” had been fabricated by the Japanese side. His evidence is the following telegram of August 27 that Resident-General Terauchi sent to Premier Katsura and Foreign Minister Komura, included in
The text of the Korean emperor’s ordinance on Japan’s annexation of Korea has been finalized as shown in the enclosure. After the emperor’s approval today, it is to be announced on the 29th together with the annexation treaty.

Enclosure: The imperial ordinance (omitted by Unno)

In this document there is an editor’s footnote explaining that the enclosed imperial message is “an amended version” as reported in Telegram No. 51. In other words, there were Telegrams No. 50 and No. 51, both dated the 27th and sent by Terauchi. We also know that the “ordinance” included in Nihon gaikô bunsho was reported in Telegram No. 51 and it was a revised version. Yi Tae-jin’s interpretation is that “the Japanese premier and the foreign minister modified somewhat the text they had received from the resident-general and replied accordingly.” Therefore, Yi contends, the “imperial message” of the Korean emperor is a fabrication carefully prepared by the Japanese side. (Yi Tae-jin, ed., op. cit., p. 203)

However, according to materials in the diplomatic archives of the Japanese foreign ministry, Telegram No. 50 was sent from Seoul at 2:30 p.m. on the 27th, and received in “the ministry” at 1:35 a.m. of the 28th, while No. 51 was sent from Seoul at 6:55 p.m. of the 27th and received “in Tokyo” at 11:14 p.m. on the same day containing the message that “the text of the Korean emperor’s ordinance reported in the previous telegram has been amended as follows.” The difference between a message “received in the ministry” and another “received in Tokyo” is not clear. Assuming
their meanings are the same, the Telegram 51 was sent after No. 50 but reached “the ministry” before No. 50. It proves that the Telegram No. 51 cannot be the revised text as amended by the Japanese government. Because only a little more than five hours separated the sending of Telegrams 50 and 51, and also in view of the absence of a telegraphic reply from the foreign ministry to Terauchi, the contention that the Japanese government had a hand in revising and fabricating the “imperial message” drafted by Terauchi is difficult to accept. It is most likely that the altered passages (eight of them) in the text of the “imperial message” as reported in Telegram No. 50 had been agreed upon through “mutual consultation” between the Korean Office of Imperial Household and the Residency-General and reported each time to the Japanese government by Terauchi.

Yi Tae-jin cites one more piece of evidence to substantiate his argument that the “imperial ordinance had been fabricated” or that the Korean emperor had refused to sign the “imperial message”: the absence of the emperor’s personal name (Ch’ŏk) in his own handwriting that should have been placed above the imperial seal (“the seal of imperial command”) on the text of the “imperial message.” On this point, Yi Tae-jin considers two possible scenarios. First, “the imperial message” had been prepared and promulgated without his knowledge. Second, the Japanese side affixed the imperial seal alone because the emperor had refused to sign his name. In the event of the former, it constitutes “an act of fabrication of the ratification document” if the latter, the emperor had refused to ratify. In either event, Yi argues, “it cannot be established that annexation of Korea by Japan has been legally brought into being (hōteki seiritsu).” Yi goes on to “conclude that the annexation of Korea was not null and void; rather, it failed to come into being.”

Let us now reexamine Yi’s thesis by raising the following two questions:

First, Yi Tae-jin considers the format of “an imperial ordinance
(shōchoku)" to be identical with that of “an imperial message (chokuyu),” but I must say that the two are different. It was “an imperial message” that was promulgated at the time of the announcement of the annexation treaty, not “an imperial ordinance.” Yi treats them all as “imperial ordinances.”

Since November 18, 1907, the format of official documents in the Empire of Korea had been changed to match the Japanese model, according to Yi Tae-jin. The format of official documents in Japan at that time was prescribed in an ordinance on the format announced on January 31, 1907. According to this ordinance, the emperor’s expression of his intentions primarily in regard to imperial edicts (shōsho), statutes, imperial commands (chokurei), international treaties, the sovereign messages (kokusho), personal messages (shinsho), instruments of treaty ratification, commissions of full powers, commission of certification for officials sent abroad, commissions of honorary consul, and certificates for consuls abroad was to require an imperial directive (jōyu), personal signature, or affixing of the sovereign seal (kokujī) or the imperial seal (gyojī). However, in cases involving an imperial statement (chokugo) (issued orally on matters affecting the imperial household or the state) and an imperial message (chokuyu) (imperial statements containing directives) no specific format was prescribed even when they took the written form.

In Korea, an ordinance on official documents announced on November 21, 1894, stipulated the format for the statutes and the royal [later, imperial] commands (chokurei) but no special provision existed regarding imperial ordinances (shōchoku). By custom, personal signature of the sovereign (in the form of a registered personal seal known as Ōap which changed to the personal name written in the emperor’s own hand after November 1907) was placed first followed by affixing of the personal seal. Again, there was no specific provision for an imperial message.

Under these circumstances, the status of “an imperial ordinance (shōchoku)” and that of “an imperial message (chokuyu)” in terms
of the documentary format must have been totally different. What the Korean emperor was to issue when the Japanese emperor issued an imperial rescript on the annexation treaty was first referred to as “an imperial ordinance” in the Terauchi-Yi Wan-yong memorandum. It was suddenly changed to “an imperial message” (j. chokuyu; k. ch’igyu) at the time of its promulgation. The change from “an imperial ordinance” to “an imperial message” was possibly because there was no specified format prescribed for the imperial message.

If the absence of the emperor’s personal name in “the imperial message” on annexation is to be scrutinized, this message should be compared with other “imperial messages” issued in the same period, not with “an imperial ordinance” that bore the imperial name and seal as required.

Secondly, it is questionable, as I mentioned earlier, whether the “imperial message” on annexation should be considered as being equivalent to an instrument of ratification. Yi Tae-jin asserts that the Korean annexation treaty did not come into being because it was not ratified as shown by the absence of the emperor’s personal name written in his own hand. Yi’s statement pointing to the absence of the emperor’s name as an expression of his refusal to ratify is only a conjecture; so I shall not belabor the point. I will remind the reader here that it was the Japanese government’s plan to bypass the ratification process after the signing of the treaty and to make the treaty go into effect simultaneously with its announcement. Komatsu Midori who had been deeply involved in the treaty making project from the beginning of its planning in his capacity as a counselor and the director of foreign affairs in the Residency-General later wrote Chōsen heigō no rimen (Inside stories on the annexation of Korea) (1920). As Komatsu explained in his book, it had been decided to secure the approval of the two emperors before the signing, rather than submitting requests for formal ratification after the signing. At the time of the signing, therefore, the ratification as a domestic legal act had been
completed.

The Japanese emperor approved the treaty in the morning of the 22nd, the day of the signing. On the Korean side too, full powers that was handed to Yi Wan-yong in the format of an imperial ordinance at a council in the imperial presence held in the afternoon of the same day stated that the emperor “had decided to transfer the governance of Korea in its entirety to His Majesty the Emperor of Great Japan in whom We have the utmost confidence.” The text of the full powers was roughly the same as the draft imperial command on full powers that Terauchi had delivered to Yi Wan-yong on the 18th. It is unusual that a head of the state should issue full powers that recorded the recognition or the approval of a treaty text before commencing the negotiations to conclude the treaty. It appears that Terauchi had the full powers made public in the form of an imperial ordinance in order to demonstrate and publicize the fact that the emperor had already approved the treaty and the full powers had been issued. At the same time, Terauchi was aiming at seducing Yi Wan-yong whose responsibility as the signer of the treaty might appear weakened by the publication of the text of full powers. Once the emperor had recognized the annexation, the task for Yi Wan-yong whom he appointed as a plenipotentiary was simply “to consult and agree ... regarding those necessary articles and chapters,” assuming the eventual annexation.

The Korean annexation treaty that the Japanese government had prepared and the Korean side had accepted without any amendment took the extra care of stating in Article 8 that “this treaty has been approved by His Majesty the Emperor of Japan and His Majesty the Emperor of Korea, and it goes into force from the day of its promulgation,” an explicit statement of its having been approved already by the Japanese and the Korean emperors. It is for this reason that the treaty lacked any provision for its ratification and an exchange of the instruments of ratification qua diplomatic act was not necessary.
Moreover, if “the imperial message” on the annexation was to be considered as an instrument of ratification as Yi Tae-jin presumes, the rules on the format of official documents would have dictated the use of the seal of the state, not the seal of the imperial personal name.

5. Conclusion

In the preceding pages, I have reexamined with an eye of a positivist historian an article by Yi Tae-jin who is well known even in Japan as a positivist historian. I thought that a response to a positivist historian must employ hard evidence. The result is that I cannot accept Yi’s thesis that the old treaties including the Korean annexation treaty was null and void from the outset hence it had never come into being. I take the view that the old treaties, unjust as they were, were concluded in a legally valid way leading to Japan’s annexation and colonization of Korea. I may add in order to avoid misunderstanding that this does not in any way justify Japan’s colonial control of Korea. We cannot overemphasize how unjust it was, but colonization and colonial control that lacked even a modicum of justification were carried out through legally valid coercion.

The following summarizes my criticism of Yi Tae-jin’s article.

The nub of Yi’s thesis is to construct a model of normal procedures and format for treaty-making first, and then test if the historical facts are, or are not, in agreement with it. Any deviation from the model is judged to be defective for failing to meet the necessary conditions. And on that basis, a conclusion is reached terming these treaties to be null and void or having failed to come into being. In any science, such methodology ought to be employed. But in order for it to succeed, we must presume that
the constructed model is deduced from the facts and is truly scientific. In this regard, I must say that Yi’s normality-based model is plagued with obsession and betrays certain seemingly dogmatic aspects.

I have to mention next the incompleteness of his evidence. Much of that is due to his misreading of sources in the Japanese language and making judgment based on conjecture. I myself with an inadequate command of the Korean language have committed frequent errors of misreading publications and sources in the Korean language. This is not a serious problem, however, because these errors can be easily overcome through mutual consultation and critical comparison of research findings. The difficulty lies in the fact that joint Japanese-Korean historical research and exchanges are so underdeveloped that such opportunities are not fully available.

At present, there is a big gap between Yi Tae-jin and myself in the way we define “the past.” But the differences in our views are not located on parallel lines that never meet for I too have views similar to his that was expressed in the last concluding sentence, quoted below, of his article printed in the August 1998 issue of this magazine:

“The future of the relations between Korea and Japan will never be bright unless the state of Japan admit legally to the deception and the coercion committed in the process of robbing the Empire of Korea of its sovereignty and the mistakes of the “colonial” rule that, for thirty-six years, had shown extreme cruelty, and also pay reparations in whatever form as a practical manifestation of such admission.”

Translated by Joon Woo Hahn and Han-Kyo Kim