

International Legal Relations between Korea and Japan

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I. Introduction

The year 1985 is so-called the 20th anniversary of the normalization of Korea-Japan relations. In 1965, the treaties between Korea and Japan were concluded under increasing pressures from both domestic and international societies, with a conceptual hope that the abnormal relations of the past would be shifted at least to the genuine process of transition. This transition seems to have been made in a delicate balance between law and diplomacy in particular. Although the historical issues of abnormal relations between two countries were discussed during the long and lengthy talks since 1951 and carefully described in the treaties of 1965, it is still evident that the complexities and contradictions in interpretation of some basic provisions would strike the effectiveness and stability of treaty relations between them. I have thought it appropriate to review those problems in the light of law, because its scope is so wide and its consequences so uncertain as to cast doubts on the feasibility of its implementation in the future relations.

The motives behind the treaties are certainly political, but their embodiment in the treaties is meant to give them precisely legal force.⁽¹⁾ As a number of contradictions and the degree of confusion were apparently present from the very moment the problems first arose in 1951 when the normalization talks started, the vagueness of the language employed in formulating these series of treaty provisions has provided a situation where speculation is virtually unrest-

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(1) Krystina Marek, *Identity and Continuity of States in Public International Law* (Libraire Droz, 1968), p. 228.

rained even on legal lines. It may be said that the 1965 treaties achieved some political compromise on the critical issues at the cost of legal accuracy. Assuming, then, that amicable foreign policy does hardly apply where there is a clear difference of opinions on international legal rights and duties between the states concerned, it becomes of first importance to review what is and what is not the scope of interpretations left to Korea and Japan respectively. In this connection, I share the opinion with Mr. Jerold Adams who said that "it is only through the use of substantive treaty provisions that is possible to establish the extent of these relations and under what conditions these relations will be continued and terminated."⁽²⁾

Generally speaking, the methods of treaty interpretation—subjective, objective and teleological approaches—are not mutually exclusive.⁽³⁾ Any of the ambiguous or obscure meaning of the expressions employed in the treaty provisions would be interpreted in the direction of the 'genuine shared expectations' of the parties, otherwise it would give serious effect to the treaty objects and purposes. The shared expectations derive from the shared intentions, and the shared intentions may well be evidenced by the relevant *travaux préparatoires*. It is, however, regretted that the available *travaux préparatoires* may not serve in preventing further conflicts between two countries, because the difference of opinions during and after the conclusion of the 1965 treaties have been so evident.

For the purpose of legal analysis, I turn now from the brief survey on the past treaty relations between Korea and Japan, and their developments until the conclusion of 1965 treaties.

II. The Past Treaties Relations and International Instruments

Recently, Professor Ienaga Saburo (家永三郎) described the development of

(2) L. Jerold Adams, *Theory, Law and Policy of Contemporary Japanese Treaties* (Oceana, 1974), p. 199.

(3) Sir Ian Sinclair, *Vienna Convention on the Law of Treaties* (2nd ed., Manchester Univ. Press, 1984), p. 115; Sinclair suggested that the treaty interpretation is a process involving the deployment of analytical and other skills. See, *ibid.*, pp. 114-154.

Korea-Japan relations as follows: "Korea, the former independent State, was illegally incorporated into Japan by a series of the unequal and coercive treaties. Moreover, the division of Korea is directly related to the method of settling the results of World War II, in which the Korean peninsula was treated as a part of Japanese territory. However, no responsibilities for such situations have been sought between the Allied Powers and Japan nor between Korea and Japan."⁽⁴⁾ Among the series of treaties which provided the abnormal relations between Korea and Japan, the most critical ones are the Protectorate Agreement of 1905 and the Agreement of Union of 1910. By the latter treaty, Korea was formally annexed and made Japan's colony. In international community, this factual situation received the political recognition by major countries, but the acts of derecognition by those countries followed until the end of World War II. The Heads of the United States, China and the United Kingdom jointly declared that Korea should become free and independent, at Cairo in 1943. This pledge of Cairo Declaration was reaffirmed by the same powers at Potsdam in 1945. The Soviet Union subscribed to this Potsdam Declaration and also reaffirmed the pledge. A further step was made at Moscow in 1945 among them that "a provisional Korean democratic government should be set up for all Korea, with a view to the reestablishment of Korea as an independent state..."⁽⁵⁾ This pledge, without any modification or reservation, was accepted in 1945 by Japan in the instrument of the Unconditional Surrender and further confirmed it in 1951 by the Peace Treaty with Japan. By those acts of acceptance, the unilateral declarations acquired the legal binding forces as an international agreement between the Allied Powers and Japan. Especially by the Peace Treaty, the Allies obtained for Korea Japan's formal recognition of Korea's independence, and Korea was placed and treated in many ways like an Allied Power. This accumulation of unilateral acts concerning Korea and Japan

(4) Ienaga Saburo, *Senso Sekinin* (Responsibility for Waging War), (Iwanami, 1985, in Japanese), pp. 102-112.

(5) M.M. Whiteman, *Digest of International Law*, Vol. V (U.S. Government Printing Office), p. 102.

respectively imposed the rights and obligations upon these two countries and also provided a new relations between them.

Direct negotiations, however, were not promptly proceeded after the end of war. It started only in 1951 and spent more than 14 years to reach a new formal treaty relations. The treaties of 1965, however, were framed heavily on the basis of the Peace Treaty provisions. The heart of Korea-Japan problems is not the matter to be settled within the limit of peace settlement for the results of World War II, but the over-all questions arising from Japanese annexation and the consequences therefrom. This fundamental starting point is the prime source of complexities and contradictions in interpreting the basic provisions of the treaties.

III. Analysis on Certain Legal Issues

Among the scholars and government officials of both countries, aside from some practical problems of attaining meaningful changes in maintaining friendly relations, fairly deep analyses have been posed on the following questions. Some of them are oversimplification of legal logic which would be inconsistent with the principles of international law, or which would be inconsistent with the facts. And, not so strangely enough, their opinions usually serve only to justify the intentions or policies of their own country. The vagueness of the expression again made them completely possible. Thus, it does not mean that there remains no room for further discussions. All issues are interrelated as a whole but having individual norms.

1. "Already Null and Void" as Legal Term

Article II of the Treaty on Basic Relations stipulates that "It is confirmed that all treaties and agreements concluded between the Empire of Korea and the Empire of Japan on or before August 22, 1910 are already null and void." (underlines added) Each of the terms "null" and "void" in itself is highly controversial concept in law. In practice, it is true that "null" and

“void” are used as convertible terms and are used interchangeably.⁽⁶⁾ In general, however, there needs some distinction between them in terms of legal consequences, “null” simply means the state of no legal or binding force or validity.⁽⁷⁾ On the other hand, “void” is used in a strict sense and accurate sense; it means absolutely null as having no legal force or effect whatever. Or, it has also been defined as of illegal form.⁽⁸⁾ And however, it has been also said that “void”, in a less strict and accurate sense, is used to mean “voidable.” Even though the combination of the two legal terms are not new in international treaties, careful analysis is needed in this particular case. Do they constitute one legal concept, or are they two separate stipulations which are to be applied to different treaties concerned? Some raised questions whether these terms can be used as having same legal effects in domestic and international law.

Consensus seems to be made as to the general character of Article II that it is only “confirmation” clause which by itself creates no new legal effects. Opinions and reasonings are divided largely into two groups: The first argument, which supports Japanese view, is that the legal implication of Article II is a mere confirmation of an objective state of facts. In reasoning, opinions are divided two again. One claims that at the very moment of annexation, all the past treaties between two States had been terminated due to the non-existence of Korea, and the date of invalidation is 1910. On the other hand, the view like Japanese Government’s official opinion claims the year of 1945 when Korea became independent from Japan. These two arguments seem to be acceptable, if we analyze it only with the word “confirm”. But this argument should be justified in connection with the interpretation of “already null and void”. According to their logic, “null and void” implies only “avoidable” and then the stipulation can be rewritten as “already avoidable”. Then it would be entirely absurd to recognize the treaties which have fallen in the voidable state in the past. Moreover, if it is assumed that Korea was extinct legally and the present

(6) *Corpus Juris Secundum*, Vol. 66, p. 983.

(7) *Ibid.*, p. 982.

(8) *Ibid.*, Vol. 92, pp. 1021-1022.

Korea is newly born without identity to the old Empire, there would be no reason why such an agreement is necessary between these two States. Here, it should be emphasized that the distinction of the legal concepts of “null”, “void”, “voidable” and “termination” is of paramount importance so far as the consequences of invalidity are concerned.

The second argument rests on the strict concept of “void”. This view was presented by Korea during the negotiations, saying that the treaties referred to should be considered never to have come into force and as null and void from the beginning.⁽⁹⁾ This view also is not satisfactory. By nature and the circumstances at the time of conclusions, it should be admitted that some of them were effective in international law. As stated above, it would be reasonable if we consider some of them as “null” (the state of no validity) and the 1910 annexation treaty (and 1905 protectorate treaty) as “void”. If it is the agreed intentions of both parties in the 1965 Treaty that the provision connotes “void”, the annexation is void which was done against international law at the very time of doing it: and it was the mutual understanding that “void” in the text can be interpreted as “voidable”, the colonial annexation and the subsequent acts by Japan have been valid and effectual until they are avoided by this Treaty. So long as the Treaty chose the legal term “void” instead of “voidable”, it is rather natural and reasonable to interpret that the treaty provision implies and confirms the acts of the past annexation as of no effect at all and a nullity *ab initio* in its most ultimate sense. And then, the causes of “void” for those treaties should be evidenced. The contention is that the treaties, especially those of 1905 and 1910, were procured or concluded by such means of “duress” or “coercion” in defiance of such a norm *jus cogens*. If one rejects that the existence of such *jus cogens* in international law, and that an annexation based on a treaty signed by coercion is recognized as valid for the time being, it is still possible to demand that the *status quo ante* be restored.⁽¹⁰⁾ Professor Pae Jae-Schick is rather realistic as to the concept of “void act” and its reparations.

(9) Adams, *supra* note 2, p. 87.

(10) *Encyclopedia of Public International Law*, Vol. 3 (North Holland, 1981), p. 22.

From the historical facts and actual circumstances in the process of concluding the major treaties, such as the 1905 protectorate agreement and the 1910 annexation treaty, he assures that the treaties are invalid *ab initio* whichever doctrines (coercion to the representative or to the State herself) it may rely on. In reality, however, so long as the treaties imposed by coercion could keep their effectiveness with military forces, the effect of “nullity or cancellation” of treaties could not be realized until the forcible factors are replaced by others. This is the factor he cannot expect any retroactive effect from this provision. It is not clear whether he claims further reparations or compensations for the illegal acts (void act) committed by Japan within the affected country Korea. The other element to be considered with respect to the forcible acquisition of territory in the name of annexation is the recognition by third countries. It is evident that the acts of recognition by third states do not establish the legal validity of such an annexation, and that which is by nature “null and void” cannot be converted into a valid right by such recognition. Quite apart from legal significance, however, the political acts of the third states’ recognition sometimes leave the way open for the effects of passing time. Not always, but this time factor together with the third states’ recognition may provide the illegally lasting situations with the legal validity.

Let us now turn to the process of forcible acquisition of whole territory under the name of annexation. In 1938, Austria’s incorporation into Germany was possible by the fact that the Austrian President refused to sign the law and resigned his office, whereupon he was succeeded by Seyss-Inquart who signed it in the name of Austria.⁽¹¹⁾ In 1910, the Empire of Korea at that time was enforced to sign the treaty and also Japan influenced to establish a puppet government which finally agreed to annexation. The 1905 experience is more evident. In addition to the use of coercion, the treaty became effective without ratification of the King. In 1907, Ito Hirobumi made three requests to King Kojong through Lee Wan-Yong; it is that “the King Kojong should make the delayed

(11) Marek, *supra* note 1, p. 341.

ratification by signing with King's Seal on the 1905 Treaty."⁽¹²⁾ This is a clear evidence that the 1905 Treaty was never ratified by the King at least until 1907. This fact of non-ratification is well described in the Official Diary of King's Office, saying that "Foreign Minister Park Jae-Soon with (one or some) Japanese put the Seal of Foreign Ministry on the text of the Treaty without any permission by the Prime Minister and the King."⁽¹³⁾ With this invalid treaty, Japan immediately began to exercise the power for external affairs for Korea, and such actions were possible with the help of foreign countries. Among others, the King Kojong's dispatch of Korean envoys to The Hague Peace Conference in 1907 and the responses from Japan and foreign countries with regard to effectiveness of the Treaty prove it. The envoy's mission was to publicize the King's intention not to recognize the Treaty which was formally signed by Japanese appointed officials against His will.⁽¹⁴⁾ Similar protest with futile efforts was attempted by Min Yeung-Tchan in 1905; the record is that "... you(Min) stated to me (the U.S. Secretary of State, Elihu Root), in effect, that the treaty of Nov. 17, 1905, under which the direction of the external relations of Korea is to be conducted through the dept. of foreign affairs in Tokyo was procured from the Emperor of Korea by duress and should therefore be ignored..."⁽¹⁵⁾

With the above mentioned principles of international law and the evidences relevant to the 1905 and 1910 treaties, we can conclude that the term "already null and void" is better to be interpreted as of invalidity *ab initio*. If the use of force to a particular treaty conclusion is proved, then—according to the principle *ex injuria jus non oritur*—legal title can never be acquired by forcible means.⁽¹⁶⁾ The word "already" is only a product of political bargaining, it can never change the inherent character of "void" in this treaty.

(12) *Kojong Shidaesa* (in Korean) Vol. 6 for the year of 1907, p. 636.

(13) *Sungjungwon Ilki* (Kojong Kwangmu 9nyun, Eulsa 10wol by lunar calendar), pp. 552-556. This Archives clearly describes the circumstances and the facts of non-ratification of the so-called Protectorate Agreement of 1905 by the King Kojong in a detailed manner.

(14) Kuksa Pyunchan Uiwonhoi, *Hankuk Dokrip Undongsa* (Saryo 4 Imjungpyun), p. 44.

(15) *Papers Relating to the Foreign Relations of the United States* (1906, U.S. Government Printing Office), p. 629.

(16) *Encyclopedia*, *supra* note 10, p. 21.

2. Relevant Issues to "Void Acts"

Once the provision is interpreted as "nullity *ab initio*", there follows subsequent problems to be solved. This is the responsibility for damages arising from the "void" acts. When acts of abuse of power are exercised, it also is considered together. One of the most manifest abuse of power, which is too clearly void *ab initio*, occurred in September 4, 1909. On the date so-called the Kando Agreement was concluded between Japan and China. By this agreement, Japan recognized the Kando area as the territory of China. Even if the 1905 treaty is considered as effective, changes in territory cannot be included within the matters of external relations to be conducted by Japanese Government. Here, attention should be given to the Japanese intention that Japan already thought Korea had become integral part of her territory even one year before 1910 when the controversial annexation treaty was imposed. This is one of the examples which have not been treated in the 1965 Treaties.

Generally speaking, the responsibilities of Japan for the "void acts" and the consequences therefrom are mostly for the damages during the colonial period. The Japanese responsibilities for the results of World War II have been carefully discussed and solved only on the problems regarding the independent states and some of the colonies of Euro-American countries, while the responsibilities for the acts to the Japanese colonies at the time of war and the area which was under the colonial control before the outbreak of war have been excluded. This problem is located out of the 1965 treaties. Article II of the Property and Claims Agreement settled only the property, rights and interests between two countries.

3. Issues Relevant to Lawful Government

Article III of the Basic Relations Treaty is one of two most controversial provisions. The problems involved in these two provisions are, of course, interrelated to the interpretation of them. As the lengthy comments were made on the "void" issue, the issues in this article will be discussed briefly on the basis of the above conclusions. This Article stipulates that "It is

confirmed that the Government of the Republic of Korea is the only lawful Government in Korea as specified in the Resolution 195 (III) of the United Nations General Assembly." Interpretation of this provisions should be made in the context of whole international instruments concerning independence of Korea. This article comprises many aspects of one question as to "independent Korea." The problems of recognition, identity, continuity, succession, legitimacy, jurisdiction and others are mingled up with political considerations. I will start with the Japanese version of interpretation. In a district court decision on compensation case, the Court said, "it is reasonable to say that there are two Governments in one state on Korean peninsular. Therefore, the reconition of Korean independence under the Peace Treaty has to be interpreted as given to one State without deciding which one of two Governments should have been the legitimate one." (in 1957)⁽¹⁷⁾ In 1973, the other court decides that, "Korea is in an unusual situation which divides into two. Though Japan has not yet made *de jure* nor *de facto* recognition to North Korea, there is no unified Government and laws which govern whole territory in Korea. Therefore, the ROK and North Korea may well be treated as two different States."⁽¹⁸⁾ Official view of Japan seems to be that: By accepting the terms of Potsdam Declaration through the Unconditional Surrender, Japan recognized independence of Korea; In 1952, as of the effective date of the Peace Treaty Japan gave implied recognition to the ROK; And *de jure* recognition was given to the ROK with jurisdictional limitation and leaving the North Korean problem as blank. As to the state succession issue, opinions are divided. One extreme is that the Empire of Korea was legally extinct and therefore there is no legal links between the old and new Korea which will raise the problems of identity, continuity and succession between them. The other one recognizes legal links

(17) *Digest of Japanese Practice in International Law: (1) Recognition of States* (Nihon Koksai-mondai Kenkyusho, 1983) (in Japanese), p.69. Such a view was given by the Tokyo District Court decision on May 14 of 1957.

(18) Murase Shinya, Recognition and Laws concerning Aliens through the Japanese Court Decisions, *Ibid.*, p. 308. Professor Murase refered to the Kyoto District Court decision of 1973. Hanrei Times No. 299, p. 338.

but the ROK as a partial successor leaving the North Korean existence as future problem. It does not, however, mean that Japan departs from supporting the past annexation as legally effective.

On the other hand, Korea defends genuine link between the Empire of Korea and the Republic of Korea. She asserts that Korea never lost her sovereignty in legal sense. As the 1910 Treaty is void and therefore the annexation is void. And it is also illegal, because annexation was virtually forced occupation which is tantamount to quasi-belligerent occupation. Professor James Crawford presented an analytical view based on both the legal principles and the relevant facts in the course of reestablishment of Korea after the end of World War II. His comparison of the processes in establishment in two parts of Korea seems to have some links with the pledge in international instruments—the stipulation of “in due courses.” From the combination of Japanese of recognizing the independence of Korea and of recognizing the Government of ROK, unless a State could be independent without de jure Government representing it, we can easily get to the conclusion that Japan already recognized the R.O.K. as representing “all Korea.” repeatedly pledged in international instruments which Japan had accepted as they are. As a matter of fact, and as seen in history of international community, the feasibility of actual exercise of jurisdiction of the State over whole territory is another matter. Recognition of a partial jurisdiction in the U.N. Resolution and its acceptance in Basic Treaty implies the same interpretation. Under such framework of interpretation, the provisions of the series of 1965 agreements concerning the partial settlements within the jurisdiction will not hurt the legitimacy of the Government of the ROK and will not hurt the legitimacy of her representation for “all Korea”. When the Japanese Government official explained the significance of Japanese recognition on the ROK in 1952, he said “There are two Governments in Korean peninsular... Japan recognized the independence of Korea by this Treaty... The right to decide a legitimate Government among them belongs to the discretion of independent Japan... Considering the fact that the organizations of the United

Nations and 27 states recognized the ROK as legitimate Government, Japan would recognize the ROK as legitimate Government.”⁽¹⁹⁾ According to him, Japanese recognition on the ROK is a decision for *de jure* Government of whole Korean peninsular among two competing governments. As to the meaning of the U.N. Resolution, there is an opinion that the purpose and implications of the Resolution is to recognize the existence of a lawful government which is qualified to be a member of international community, and to affirm that the ROK is such a entity with an inevitable limitation to exercise her jurisdiction.

III. Conclusive Remarks

In the above, I have tried to demonstrate that there have been a great achievements in politics between Korea and Japan by concluding a series of treaties including the Basic Relations Treaty in 1965, without having accuracy in legal concepts. Only few issues, but the most and critical issues which may govern all related issues, were considered. I started with an impression that the 1965 treaties are the ones which, in many ways, may be characterized as “agreements without agreement”, or “settlement without settlement.” Some months ago, Professor Onuma Yasuaki properly emphasized that this year is not only the 40th anniversary of the end of World War II, but also the same anniversary for the achievement³ of decolonization. The latter consists the core value of the purpose of the war. In this sense, I can say that the Korea-Japan treaties excluded the heart of the problems which we had to solve. I propose new approaches to interpretations of the existing provisions. It is the law, I believe, that provides stable guidelines in a changing international society.

(19) This opinion was expressed by one high ranking official of the Japanese Ministry of Foreign Affairs before the Congressional hearings.