Discussions Concerning the Legality of the 1910 "Annexation" of Korea by Japan*

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Abstract

The legality of Japan's "annexation" of Korea under international law is an issue which forms the starting point and foundation of the bilateral relations between Korea and Japan. Therefore, it has been the object of acute confrontation between the two states. The so-called Japanese legal responsibility for its colonial rule over Korea is directly affected by the answer to the issue. Theoretically speaking, this legality should be judged solely on the basis of the validity of the 1910 Annexation Treaty between Korea and Japan. However, discussions concerning this issue also cover the validity of a series of other treaties concluded in the process of Japanese plundering of the sovereignty of Korea from 1904 to 1910. The argument for the invalidity of these treaties relating to the "annexation" of Korea is grounded on two major points: firstly, the 1905 Treaty and the 1910 Annexation Treaty were concluded in coercion; and secondly, several of these treaties have formal and procedural defects. Examining the two points, this paper concludes that the treaties relating to the "annexation" of Korea borrowed the mere appearance of treaties and therefore cannot be deemed to be valid.

Keywords: annexation of Korea, treaty, Eulsa Treaty, Annexation Treaty of Korea, coercion, ratification, entrustment of full power, principle of intertemporal law

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Introduction

From 1910 to 1945, Korea was "annexed"[1] by Japan, falling under Japanese rule. The issue of how to comprehend and evaluate this historical fact forms the starting point and foundation of the two states' bilateral relations. This is because the answers to the questions whether Korea was a victim of Japanese rule, and, if so, what was the nature of the victimization and how Japan should owe its responsibility for that depend all upon such comprehension and evaluation.

As this issue lies at the root of Korea-Japan relations, it was inevitably raised during the negotiations for the normalization of diplomatic relations between the two states in the early 1960s. As the so-called "Kubota remark"[2] showed, the Japanese government once seemed to take the position that Japanese rule of Korea was not only legal under the international law of the time but also morally and politically justifiable one.[3] Now, Japan consistently admits that its rule over Korea was a morally unjustifiable act. However, from the days of the Korea-Japan normalization talks to the present, Japan's

1. From the standpoint that Japan's "annexation" of Korea was invalid under international law, the "annexation" was not a *de jure* state but a *de facto* one. In consideration of this, the word annexation is put in quotation marks throughout this paper.
2. In the second meeting of the Wealth Reclaim Committee of Korea-Japan Talks held on 15 October 1953, Japanese Representative Kubota Kanichiro made a statement with the purport that Japan's rule of Korea was beneficial to Koreans. For details on the Kubota statement and the breakdown of the Third Korea-Japan Talks, see Pak (2005).
3. Japan has apologized for its colonial rule of Korea on many occasions. To cite some representative ones, Prime Minister Hosokawa gave remarks of apology in Gyeongju on 6 November 1993; Prime Minister Murayama apologized for the colonial rule in general in his statement on 15 August 1995; Prime Minister Obuchi included an apology in the Korea-Japan Joint Declaration of 8 October 1998; and most recently, on 10 August 2010, Prime Minister Kan made a statement of the same purport. Kan's statement can be found on http://www.kantei.go.jp/jp/kan/statement/201008/10danwa.html (visited on 4 October 2010).

position that the "annexation" was legal under the international law of the time remains unchanged.[4] On the other hand, the Korean government has consistently maintained its position that Japanese domination was not only morally unjustifiable one but also illegal and devoid of any ground in international law. The two sides failed to bridge the differences in their positions during the diplomatic normalization process. It is a well-known fact that Article 2 of the Treaty on Basic Relations between the Republic of Korea and Japan (1965) adopted an intentionally vague expression to evade resolving the differences, stating that the treaties signed by Korea and Japan on August 22, 1910 and prior to that "were already null and void."[5]

Not only on the governmental level, but also between the scholars of Korea and Japan, there are acute discrepancies regarding the legality of the "annexation" of Korea. After the release of Lee Tae-Jin's paper in *Sekai* (The World), a leading Japanese monthly journal, in 1998, arguing that the annexation of Korea "had not been established," controversies over the legality of Japan's colonial rule of Korea began to develop briskly;[6] since then, the two opposing views remain as far apart as ever, unable to find common ground.

On this occasion of the 100th anniversary of the so-called "annexation" of Korea by Japan, this paper attempts to review the various perspectives and their logical foundations developed in Korea and Japan on the legality of the "annexation" and reconsider the validity and persuasiveness of those arguments.

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4. Even the Murayama Administration, which came most close to Korea's stance among the Japanese administrations concerning the problems of the past history between the two states, held the view that, apart from the political and moral sense, Japan's rule of Korea was legally valid. On this point, see Park (2003, 372).
5. For a detailed examination of the process of formulating the wordings of Article 2 of the Treaty on Basic Relations between the Republic of Korea and Japan, see Chang (2008).
6. Regarding how discourses of Korean and Japanese scholars have developed with regard to this, see Sasagawa and Lee (2008, 11-14)

Treaties in Question and Issues

Treaties under Examination

Japan "annexed" Korea by concluding a treaty with Korea on August 22, 1910. Hence, the question of the legality of Japan's "annexation" of Korea can be traced to the validity of the 1910 Annexation Treaty. Yet discussions about the legality of Japan's colonial[7] domination of Korea are not confined to the 1910 Annexation Treaty alone but also include discussions about a number of other treaties that contributed to Japan's "annexation" of Korea. This is because the 1910 Annexation Treaty is viewed as the result of a series of political processes developed with the agenda of "annexation,"[8] and several other treaties concluded in this process are related to the 1910 Annexation Treaty. Their validity is problematic. Five treaties are often questioned in discussions about the legality of the "annexation." The following table summarizes the important contents of the five treaties and the reasons argued for their invalidity:[9]

Among the five treaties, the most problematic ones are the 1905 Korea-Japan Negotiation Treaty and the 1910 Annexation Treaty. It is needless to say that of the two, the 1910 Annexation Treaty is most directly related to the controversy over the legality of Japan's "annexation" of Korea.[10]

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7. Calling the Japanese rule of Korea "colonial" rule or "colonial" domination implicates the legality of the rule. Therefore, those who view it as illegal describe the period of Japanese rule of Korea as a "forced occupation," instead of a "colonial" period. Fully recognizing this, I use in this paper the term "colonial" in a neutral sense with regard to the issue of its legality.
8. Paik Choong-Hyun calls it a "creeping annexation" extended over 15 years from the end of the Russo-Japanese War in 1895 (Paik 2003, 213).
9. This table is slightly modified version of the one in my aforementioned paper (Park 2003, 375).
10. A considerable amount of confusion and mismatch exists as to the titles of the five treaties. For an example, the 1905 Treaty has the title of "Korea-Japan Negotiation Treaty." However, according to Lee Tae-Jin's research, it did not have any title when it was concluded and was given a title by Japan later. Its Japanese appellation is the "Second Japan-Korea Agreement." It is also commonly dubbed the

Date of concusion	Important contents	Causes argued for invalidity	
		Coercion	Formal and procedural defects
February 23, 1904	– Expedited Japan's agenda in emergency situations – Permitted expropriation of locations necessary for military strategy at any time (Article 4)	– Conclusion of the treaty was forced by the stationing of five Japanese battalions of Temporary Corps to Korea on the peninsula, creating a state of military occupation.	– The treaty was concluded by unilateral Japanese intentions without negotiation with Korean representatives. – The original text of the treaty was drafted after the signing date.
August 22, 1904	– Korea was required to employ a financial advisor of Japanese nationality and diplomatic advisor of foreign nationality recommended by the Japanese government and obligatorily consult with them.		– A Korean version of the original treaty text does not exist. – The treaty was concluded by unilateral Japanese intentions without negotiation with Korean representatives. – Texts of the treaty were added and promulgated after the signing date according to the direction from the Japanese government. – Draft was signed as a memorandum and later altered to an agreement. – The memorandum lacked the delegation of authority to the representative of the government.
November 17, 1905	– Authorized Japanese Ministry of Foreign Affairs to supervise and direct Korea's external relations (Article 1)	– Treaty was signed under the circumstances in which Japanese troops surrounded the residence of the Korean Emperor; some of them entered the meeting room and intimidated Korean officials, and heavily armed Japanese forces were present in major locations throughout Seoul.	– Title of the treaty is absent. – A matter of extreme importance such as the power to handle foreign relations was transferred in the form of an agreement that lacked the regular formality of a treaty. – Document evidencing the delegation of signing authority to the representative of the government does not exist.

Date of concusion	Important contents	Causes argued for invalidity	
		Coercion	Formal and procedural defects
			– Instrument of ratification does not exist. – The Korean Foreign Minister was forced to sign and seal. – The treaty was not ratified.
July 24, 1907	– Required Korea to follow directions of the Japanese Resident-General for administrative reform (Article 1) – The Japanese Resident-General had the power to approve Korean legislation and other important administrative measures. (Article 2) – Korea was not allowed to employ foreign advisors without consent of the Japanese Resident-General. (Article 6)	– A mixed brigade was dispatched to assist Japanese troops stationed in Korea.	– The treaty was not ratified. – The full powers issued by the Korean Emperor and the instrument of ratification do not exist. – The Korean Emperor's signature and seal are lacking.
August 22, 1910	– Conceded all rights of sovereignty over the entirety of Korea permanently and completely to Japan (Article 1)		– The royal edict proclaiming the annexation has the royal seal instead of the state seal and was not signed by Emperor Sunjong. – Treaty was signed by the Japanese Resident-General acting as a representative of the Japanese government even though this post was created by the 1905 Treaty and put under the auspices of the Korean Emperor.

Legal Issues

As we can see from the table above, different reasons for invalidity are being argued for each of the five treaties. However, they can be can be categorized into two different kinds of reasoning: one is related to formal and procedural defects, while the other deals with the problem of coercion.

Before we enter into the legal issues raised by these reasons, it is necessary to make some remarks concerning the principle of intertemporal law, as it is one of the legal grounds in addressing them. The principle of intertemporal law is a general principle of law that "a juridical fact must be assessed in the light of the law contemporary with it and not of the law in force at the time when a relevant dispute arises or fails to be settled."[11] It goes without saying that this principle should be applied to the treaties concluded between 1904 and 1910 relating to the "annexation" of Korea in assessing their validity. In other words, the validity of these treaties must be judged not by applying current law of treaties but by applying the law of the time which regulated the causes of invalidation of a treaty. Therefore, to discuss the validity of those treaties relating to the "annexation" of Korea, we must start from ascertaining the causes of treaty invalidation under the rules of positive international law that existed in and around 1910. At that time, the law of treaties that regulated the causes of invalidity of a treaty existed only as customary international law; the conventional law of treaties such as the 1969 Vienna Convention on the Law of Treaties did not exist at that time. However, recognizing the contents of customary international law is not an easy thing to do as it is so-called "unwritten" law. It is for this reason that the concrete rules of customary international law regarding the causes of invalidity at that time became one of the points of contro-

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"Second Japan-Korea Agreement." but those who regard it as invalid or not concluded at all call it Eulsa Neukyak ("Neukyak" means "coerced agreement") for it cannot be called as a "treaty." Regarding the titles of the five treaties, see Park (2003, 374).

11. United Nations, Reports of International Arbitral Awards, Vol. II, p. 845.

versy regarding the validity of the treaties related to the "annexation" of Korea.

Meanwhile, all scholars involved in the debate acknowledge that in 1910, a treaty concluded by the coercion of state representatives was invalid under the customary international law of the time. Therefore, whether the Korean representatives were coerced in the process of the conclusion of the treaties relating to the "annexation" of Korea is a major issue for the validity of those treaties, especially the 1905 Treaty. At the same time, scholars agree that for a treaty to be recognized as valid, it must be concluded by a state organ endowed with treaty conclusion authority in accordance with specific formalities and procedures. However, concerning the treaties relating to the "annexation" of Korea, following formal and procedural defects are argued as the reasons for their invalidity: the procedure of appointment of the representatives was problematic; the texts of the treaties were drafted or added after the date of conclusion; in some cases, there were no full powers for the representatives and sometimes signature or the seal itself was absent; and they were not ratified or the instruments of ratification were missing. Whether these reasons can be considered as the causes of invalidity of the treaties relating to the "annexation" of Korea is another point of controversy over their validity.

Another issue raised recently is the corruption of state representatives. According to a fact which began to attract recent attention, before or after the conclusion of the 1905 treaty, Japan gave a large sum of money to Emperor Gojong, who had the power to conclude treaties, as well as the Emperor's attendant and several ministers who supported the conclusion of the treaty. The money was paid for the Emperor and Justice Minister Yi Ha-yeong before the conclusion of the treaty and the other ministers and the attendant were paid afterward. There is no record of Prime Minister Han Gyu-seol, who opposed the conclusion of the treaty, being paid money (S. Lee 2007, 186-187). Lee Sang Chan, who discovered and published these facts, noted that although it is questionable whether these payments were conciliatory actions taken in order to conclude the treaty or not, it is indisputable that Japan offered bribes to the Emperor and government officials

beforehand and bribed the officials and a person close to the Emperor after the conclusion of the treaty. He asks how these facts should be evaluated under international law (S. Lee 2007, 187).

Coercion

Facts

As mentioned above, coercion is mainly referred to as a cause of invalidity for the 1905 treaty.[12]

The facts surrounding the conclusion of the 1905 treaty are as follows. First of all, Ito Hirobumi, a special envoy of the Japanese Emperor sent to Korea to handle the conclusion of the treaty, told Emperor Gojong that "Japan is determined to have it done. If you do not agree to enter into the treaty, your country's status will suffer more serious trouble, even worse than when you do it. You should be prepared for detrimental consequences." He also remarked that the Emperor should "remember that delaying its conclusion will only cause more damage and no benefit to Korea."[13] While the king and his officials held the meeting where the signing of the treaty was finally decided, Commander Hasegawa stayed in the palace with his 50 military policemen (MPs). It is said that what Commander Hasegawa said to his chief of MPs made everyone, especially the prime minister and the foreign affairs minister to whom the comment was directed, shudder with fear. It is also known that when Prime Minister Han Gyu-seol held fast to his opposition to the treaty, Ito Hirobumi said to the person sitting near him, "Kill him if he contin-

12. Needless to say, coercion in the process of concluding the treaties relating to the "annexation" of Korea is not limited to the case of the 1905 Treaty. For detailed accounts on the facts of coercion, see T. Lee (2003, 32-52).
13. Sakamoto, a representative scholar holding the view that the "annexation" of Korea by Japan was legal, notes that the remarks by Ito Hirobumi can be seen as intimidation (Sakamoto 1995, 325).

ues to act like a child."[14] According to the report of *Daehan maeil sinbo* (Korean Daily News), when the officials opposed holding the meeting with the Emperor that would decide the conclusion of the treaty, the Japanese troops entered the palace, approached Suokheon (Royal Office), where the Emperor was, and surrounded it in rows and rows, armed with guns and knives.[15]

From a position that regards these facts to be acts of coercion in the conclusion of a treaty, what matters is whether this coercion was directed to the state of Korea or to the representative appointed for the conclusion of the treaty. This is because it is generally accepted that under the international law of the time, coercion is divided into that of a state and that of a representative of a state, and only the latter invalidates a treaty.

The Position Arguing the Validity of the Treaties

As is well known, the representative Japanese scholar of international law who tried to demonstrate the validity of the 1905 Treaty on the basis of intertemporal legal differentiation between coercion of a state and coercion of a representative of a state is Sakamoto Shigeki. Even before his famous 1998 dispute with Lee Tae-Jin through *Sekai*, where he attempted to prove that the 1905 Treaty was valid in terms of the fact of coercion, he already published a detailed article on this problem. Firstly, regarding the problem of intertemporal law, based on a

14. Among the many materials describing these facts, here T. Lee (2003, 40-46) was referred. The source of Ito's remarks is Nisiyotsutsuji (1930, 47-48). For a critical view on the value of the historical records of this book, see Unno (1999a, 48). Kim (2001, 160, note 17) also points out this problem.

15. *Daehan maeil sinbo* (Korean Daily News), General News column, edition of November 23, 1905. The report said that it was cited from *Hwangseong simmun* (Capital Gazette), but I could not find it in *Hwangseong sinmun*. Kang Seong-eun wrote that this report was released in the edition of November 26 and it said that General Hasegawa "drew his knife and threatened Prime Minister Han Gyu-seol with it, but he did not make accommodation" (Kang 2008, 176). However, the date 26 seems to be mistake and there is no report of such content in the November 23 edition of *Daehan maeil sinbo*.

review of the writings of Western scholars of the time such as L. Oppenheim, W. E. Hall, J. C. Bluntschli, and P. Fiore, he concluded that the customary rules of international law which distinguished coercion of a state from coercion of a representative of a state and recognized only the latter as a cause of treaty invalidation were solid positive law at that time (Sakamoto 1995, 341-342). He is of the opinion that the differentiation between coercion of a state and that of a representative of a state is difficult to be applied to a "specific and concrete situation" because the criteria to differentiate the latter from the former is not so clear when the former is carried out in the manner of coercion of an official organ such as a head of a state or a minister. What is important in his opinion is that he thinks that the coercion of an individual holding the status of an official organ may be equated to the coercion of a state itself. While he did not draw a clear conclusion about the validity of the 1905 Treaty under the international law of the time, it can be understood that Sakamoto does not think that the 1905 Treaty can be considered invalid.

The Position Arguing the Invalidity of the Treaties

Against the Japanese scholars' position, represented by Sakamoto, which supports the validity of the 1905 Treaty, the following refutations have been made.

Paik Choong-Hyun is not different from Sakamoto in that he recognizes that under the traditional international law between coercion of a state and that of a representative of a state only the latter was a cause of invalidation of a treaty (Paik 1996, 76-77). However, Paik argued that Japanese coercion in the process of concluding the 1905 Treaty was used for both the state itself and the representative of the state, thus its invalidating effect could not be eliminated (Paik 2003, 233). He pointed out that under the international law of the time, the coercion of a state itself did not invalidate a treaty because use of force was a legally recognized means of coercion in those days and, therefore, a consent acquired by coercion of a state could not be thought to be invalid (Paik 2003, 231). He concluded that only a

peace treaty was such a kind of treaty and other treaties concluded by means of coercion of a States itself were not recognized as valid among the majority of the international law scholars at that time (Paik 2003, 235). Based on this logic, he said that no legal factors could justify the legal validity of the 1910 Annexation Treaty, as it did not fall under the category of a peace treaty and was not concluded on the basis of mutual free consent of wills (Paik 2003, 235). It is needless to say that this logic can be valid for the 1905 Treaty as well.

Lee Keun-Gwan refuted Sakamoto's argument through an extensive review of the opinions of the scholars of international law in around 1905 on this matter. Beginning with the problem of whether coercion of a state as a juridical person was possible, he made a detailed follow of historical changes in theories of *Coercion in International Law* and demonstrated that, prior to 1918, scholars of international law distinguished between the coercion of a state *per se* and coercion of an organ of a state (K. Lee 2003, 259-272). Furthermore, he examined in detail the confusion that occurred during the drafting of the Convention on the Law of Treaties in the United Nations International Law Commission (K. Lee 2003, 272-281). It seems to be his conclusion that Sakamoto's argument that a treaty concluded by coercion of an organ of a state as a means of coercion of a state itself could not be said to be invalid cannot be supported, as coercion of a representative of a state prior to 1918 included both the coercion of an individual and that of a representative of a state as an organ of a state and both cases of coercion were causes of treaty invalidity from the perspective of intertemporal law.

Sasagawa Norikatsu made the most thorough refutation of Sakamoto's argument. First, he criticized Sakamoto's position in the debate triggered by the release of Lee Tae-Jin's article in *Sekai*. Defining his method as trying to "achieve an inherent understanding and verification on the basis of various texts of international law and history of theories (which Sakamoto deemed important)" (Sasagawa 1999, 245-246), he reached the following conclusions after an extensive review of the first (1905), fourth (1927), eighth (1955), and ninth (1996) editions of Oppenheim's *International Law*, Hall's *A*

Treatise on International Law (1890), and Grosch's *Der Zwang im Voölkerrecht, mit besonderer Berücksichtigung des voölkerrechtlichen Vertragsrecht* (Coercion in International Law, with Special Reference to International Law of Treaties) (1912): 1) at around the time when the first edition of Oppenheim's book was published,[16] the conception that a powerful state coerces an "official organ such as head of a state or a minister of a weak state" as a means to "force its will on it" did not exist (Sasagawa 1999, 237-243); and 2) two types of coercion, coercion of a state and coercion of a representative of a state, were different in their justification under the customary international law of the time—"for the former, it was important for the state using or threatening to use force to prove 'redemption of wrongful act' or 'securing of rights,' while for the latter it was important to prove the existence of individual violence or coercion (menace)."

Sasagawa also demonstrated the following facts through comprehensive and thorough follow-up research of the history of theories on the topic of coercion in treaty conclusion: scholars of international law take different positions regarding the effect of coercion of a treaty according to their respective endorsements of the two core theoretical perspectives of international laws, positivism and normativism; according to the normativistic view, coercion of a state is the only occasion that a treaty may be valid despite evidence of coercion, and coercion of a representative of a state makes a treaty invalid at all times (Sasagawa 2008a, 494-502). Analyzing the writings of Japanese scholars of international law who examined Hitler's coercion of a treaty, he found that some saw that coercion of a state and coercion of a representative of a state existed in mixture, while others understood that the two exist side by side (Sasagawa 2008b, 560-578). On the basis of these findings, he refuted Sakamoto's argument, which equated coercion of an organ of a state with that of a state itself. In particular, he noted that Sakamoto "appreciates and reinterprets the characteristics of traditional international law from the perspective of current international law" (Sasagawa 2008b, 578), which I believe to

16. The years immediately preceding and following 1905.

be an incisive critique.

Sasagawa mentioned a Japanese scholar's rejection of a French scholar's assertion against the validity of the 1905 Treaty expressed right after its conclusion. It is well known that Francis Rey, a French scholar of international law, published a paper shortly after the conclusion of the 1905 Treaty claiming that the treaty was not valid because it was concluded by means of "mental and physical violence, which is a shameful act for a civilized state to commit" (Rey 1906).[17] Ariga Nagao, a Japanese scholar of international law, rejected Rey's argument by saying that, based on the distinction between coercion from a situation and coercion of a physical body, the treaty was not invalid because no coercion such as "threat of detention or killing" was exerted in the process of making Korea a Japanese protectorate and "the situation compelled a rushed conclusion of the treaty" (Ariga 1906, 208). Sasagawa evaluated Ariga's view on the degree of coercion to be a very narrow and limited interpretation, and claimed that this was an uncommonly narrow interpretation in the era of traditional international law (Sasagawa 2008a, 505-506).

Negation of Coercion

While both positions arguing the validity or invalidity of the 1905 Treaty admit the existence of coercion as illustrated above, some Japanese historians have recently claimed that no coercion whatsoever was present in the process of the conclusion of the Treaty. Examining the "Five Ministers' Memorial to the Throne" submitted on December 16, 1905, and later shown in *Gojong hwangje sillok* (Veritable Records of Emperor Gojong), *Ilseongnok* (Records of Daily Reflections), and *Seungjeongwon ilgi* (Daily Records of the Royal Secretariat), Harada and Unno, Japanese historians and leading advocates of

17. This paper is listed in Choi and Nam (1995). Another French scholar Rousseau regards that the 1905 Treaty was concluded with the use of direct menaces to the Emperor of Korea and officials, and under the occupation by the Japanese troops of the palaces in Seoul (Rousseau 1970, 148).

the validity of the 1905 Treaty, maintained in their papers (Harada 2004; Unno 2005) that Emperor Gojong led the negotiation of the 1905 Treaty and approved its conclusion. According to them, the Emperor's position of the invalidation of the 1905 Treaty in his replies to the memorials to the Throne, which were submitted by officials and Confucian scholars and insisted on the invalidation of the Treaty, gradually toned down and did not reject the Five Ministers' Memorial to the Throne.[18] If these claims are valid ones, there is no legal problem for the 1905 Treaty under international law, at least in respect to the issue of coercion, and advocates of the invalidity of the Treaty would lose an important logical ground supporting their claims.[19]

Lee refuted the argument that Emperor Gojong ordered negotiations for the conclusion of the 1905 Treaty by thoroughly reviewing historical documents on the basis of which such an argument was made. According to Lee, the documents presented as evidence for the argument are full of facts that were distorted to fit the assumption that the Emperor ordered the negotiations and the Treaty was concluded lawfully without any coercion. This kind of distortion was possible, as Japan was in control of the managerial posts handling the royal records in the process of stripping the Korean monarch of his sovereign rights (T. Lee 2005, 137). He continued that the truth about the scene can be found not in the documents referred to by the argument about the role played by the Emperor, but in the Emperor's personal letter dated on June 22, 1906 to nine countries with which Korea had diplomatic relations and in his petition submitted to the Hague Peace Conference on June 27, 1907. In his personal letter, Emperor Gojong wrote that the 1905 Treaty was legally invalid and that he had never ordered his government to sign it. In his petition, he recorded that he had never imagined that Ito Hirobumi would submit a proposal to make Korea a protectorate of Japan, and that he had expressed his will to reject the proposal (T. Lee 2005, 134-137).

18. See Kang Seong-eun's notes in his afore-cited paper (Kang 2008, 156).
19. Lee Tae-Jin says that "if those claims are true, the position advocating its invalidity is to lose its ground" (T. Lee 2005, 109).

Concerning the attempt to explain the contradictions between the Emperor's role implicated in the argument and his efforts to invalidate the Treaty as a crafty political scheme, Lee called for caution, as such a claim might make Emperor Gojong an "irresponsible politician" (T. Lee 2005, 113).

Defects in Formality and Procedure

Scholars offer diverse opinions on the view that the treaties relating to the "annexation" of Korea are invalid because of formal and procedural defects. At the center of this discussion are Lee Tae-Jin, an advocate of the treaties' legal invalidity, and Unno Fukuju, a proponent of their validity. In a recent article, I reviewed these two historians' debate about the treaties' legal validity when viewed from the perspective of intertemporal law (Park 2009). Here, let me explain the two opposing arguments regarding the validity or invalidity of the treaties on the basis of their formal and procedural defects by reiterating with some modification to my previous review of these two scholars' views.

The View Supporting the Invalidity of the Treaties

The debate on the validity of the treaties relating to the "annexation" in light of coercion has proceeded in the fashion of criticizing Sakamoto's view supporting their validity. In contrast, the debate over their validity in light of formal and procedural defects has taken a different course. In this discourse, Lee Tae-Jin argues for the invalidity or nonconclusion of the treaties on the basis of such defects, and Unno refutes it. And then, Lee refutes it further.

Lee Tae-Jin presented the following arguments regarding the legal invalidity of treaties based on formal and procedural defects. First of all, an official treaty[20] should meet three requirements: 1) a

20. Under international law, a "treaty" may be defined as "an explicit agreement governed by international law and concluded by subjects of international law with the

letter from the head of a state appointing a plenipotentiary representative; 2) the text of a treaty signed by the representatives of the contracting parties; and 3) the instrument of ratification of a head of a state (T. Lee 1998a, 308; 2001, 45).

In the case of the Treaty of August 22, 1904, it was initially prepared as a memorandum and later the title of agreement was given to it. This was done to camouflage a memorandum—a document lacking officiality—into an official diplomatic arrangement, an action committed afterward with the objective of hiding its defects (T. Lee 1998a, 307; 2001, 42). What became the 1905 Treaty was also prepared not as a formal treaty but as an agreement (a summary arrangement), which was not a proper form for matters of grave importance such as the transfer of power to handle diplomacy. Lacking full power and the instrument of ratification of the Emperor, the 1905 Treaty did not satisfy the requirements of a bilateral arrangement that dealt with grave state affairs such as the transfer of diplomatic powers (T. Lee 1998a, 308; 2001, 44-45). The 1905 Treaty was originally untitled. This was because the form of the treaty was undecided at the time of its conclusion; its title was given only afterward (T. Lee 1998a, 308-309; 2001, 45-49). Japan used the word "convention" instead of the word "agreement" in the process of informing the U.S. and British governments of the conclusion of the treaty because convention was thought to be a higher-level document than an agreement. However, even the word "convention" was scarcely used for an agreement regulating critical political matters such as transfer of diplomatic powers (T. Lee 1998a, 309-310; 2001, 49-50).

The so-called New Agreement between Korea and Japan, concluded in 1907, was to hand over Korean sovereignty in internal affairs to Japan. For it to be valid, it should have taken the form and procedure of a formal treaty (T. Lee 1998b, 186; 2001, 54).

In concluding the 1910 "Annexation" Treaty, Japan tried to satisfy the requirements for a formal treaty. However, its royal edict,

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capacity to conclude a treaty." In Lee's papers, a treaty in this sense is referred to as an "arrangement."

which was equivalent to the instrument of ratification, had a formal defect as it was unsigned. There was no signature because the Emperor of Korea did not agree to the "annexation." If this interpretation of the lack of signature in the royal edict is not wrong, the "annexation" of Korea cannot be considered as ever having been concluded (T. Lee 1998b, 187-189; 2001, 55-62).

Lee Tae-Jin's reasoning and argument can be summarized as follows: the treaties relating to the "annexation" of Korea, especially treaties of great importance such as the 1905 Treaty and the 1910 "Annexation" Treaty, could be valid only when they were concluded as formal treaties and they never should have been concluded in the form of summary treaties to be legally effective. A formal treaty is a treaty concluded by a negotiating representative endowed with full powers and ratified in due course. The treaties relating to the "annexation" of Korea were not ratified, nor for the conclusion of which, full powers issued. Therefore, they were not concluded *ab initio*. The title of a treaty is a crucial factor in determining whether it is a formal treaty or not. A treaty titled "agreement" or "convention" instead of "treaty" is not a formal treaty. Therefore, a state cannot effectively promise a matter of enormous importance such as transfer of sovereignty by an agreement which carries other title than "treaty." Besides, the officiality of a treaty is judged by its title; for example, a memorandum is less official than an agreement.

Lee Tae-Jin reviewed diplomatic agreements of various states introduced between 1902 and 1911 in "Public Documents" and "Treaties Column" in *Kokusaiho zasshi* (Journal of International Law), the official journal of the Japanese Society of International Law to research whether they included ratification clauses or clauses relevant with credentials. According to his findings, Japan was a contracting party to all but two of twenty agreements and arrangements, which were not formal treaties, concluded during the period. He interprets this as an indication that "Japan started to commit or promote actions of breaking international practices in order to take over Korea" (T. Lee 1999, 253-256; 2001, 112). Noting the fact that Japan consistently demanded letters authorizing plenipotentiary power of the representatives and the

instrument of ratification signed by the Korean king for treaties between the two states up to 1880, he argued that the agreements which did not satisfy the same formalities should be regarded as "not concluded" *ab initio* (T. Lee 1999, 261; 2001, 116-118). He continued to say that state practices up to 1911 demanded both full powers and the instrument of ratification in concluding a treaty relating to national sovereignty, and there was no exception even for a state organ in charge of foreign relations (T. Lee 1999, 259; 2001, 114-115).

The View Supporting the Validity of the Treaties

Unno rejects Lee's arguments point by point. His refutations are as diverse as Lee's arguments, but here I shall introduce only the key points.

According to Unno, the forms of treaty conclusion arranged by the Japanese Ministry of Foreign Affairs were: 1) exchange of ratification, 2) Japanese Emperor's approval, and 3) conclusion by the power of government without Emperor's approval. As the 1905 Treaty was concluded in the form of the Emperor's approval, it was a matter of course that there were no full powers given to the representative (Unno 1999b, 265). He also noted that according to the report compiled by the Treaty Bureau of the Japanese Ministry of Foreign Affairs, there was a practice to leave the original text of a treaty to be signed untitled, and the 1905 Treaty was not the sole example of such cases (Unno 1999b, 266). In addition, the 1907 "Japan-Russia Entente" was concluded without full powers or an instrument of ratification, though it regulated a matter of great importance. This was the same with the "Japan-France Entente" concluded on June 10, 1907 (Unno 1999b, 262-263). Of fifty-three bilateral treaties concluded between Korea and Japan prior to the "annexation" of Korea, all but three took the form of intergovernmental agreement. Therefore, a form of a treaty that included a ratification clause and for which full powers were issued could not be said to have been a custom between Korea and Japan, he argued (Unno 1999b, 263).

Unno's argument can be summarized as follows: the form of

treaty conclusion is decided by the agreement of the contracting States and the effect of a treaty is not influenced by its form; there are treaties concluded by representative without full powers and treaties can be concluded and enter into force without ratification; as treaties establishing protectorates have the title of "convention" instead of "treaty," it may be said that a treaty regulating very important political affairs can be concluded under the title of "convention." As a conclusion, according to him, the argument that the treaties concluded between Korea and Japan were not valid or not even concluded as there were no full powers for the representatives or instruments of ratification cannot be supported.

Lee retorts against Unno, saying that there is no such case of a decision to make a state a protectorate being concluded in a form other than a formal treaty (T. Lee 2000a, 252; 2001, 189-190). "The practice of leaving the title blank in the original text of a treaty to be signed" was an arbitrary act of the Japanese Ministry of Foreign Affairs and not an international practice (T. Lee 2000a, 254; 2001, 193). "It is difficult to find an example of pre-approved treaty in the history of international treaties, and the act of pre-approval itself is an evidence that there was coercion in the procedure of treaty conclusion" (T. Lee 2000b, 278-279; 2001, 205). The 1907 Japan-France Entente and the 1907 Japan-Russia Entente were exceptional cases that were concluded by Japan's insistency and by which Japan intended to gain confirmation of its protectorate over Korea. Therefore, it cannot serve as international precedents of intergovernmental agreement (T. Lee 2000a, 251; 2001, 187).

Corruption

As mentioned above, a historian has raised the issue of how the validity of the 1905 Treaty can be affected by the fact that Japan provided substantial amount of money which might be regarded as bribes to the Korean negotiation representatives. As a scholar of international law, Paik Choong-Hyun raised the same question.

Paik premised that the free consent of the state parties to a treaty is essential for it to be valid, and regarded corruption as a factor of invalidation of a treaty (Paik 2003, 235). He cited Article 50 of the 1969 Vienna Convention on the Law of Treaties as a provision denoting corruption of a representative of a state as a ground for invalidating a treaty, and further stated that the Report of the UN International Law Commission on this provision also acknowledged that corruption leads to denial of the consent by a state (Paik 2003, 235-236). After laying out these facts, he introduced a foreign scholar's view that money delivered to the Korean royalty influenced the conclusion of the 1910 "Annexation" Treaty (Duus 1995, 182). He estimated that, even if the money might not have been directly associated with the conclusion of the treaty, this situation gave us a "glimpse of the careful intention of Japan to induce corruption of Korean representatives who had the authority to express their will on behalf of the state" (Paik 2003, 236).

From the perspective of intertemporal law, corruption does not seem to have been thought to be a cause for invalidation of a treaty around the year 1910. It would be needless to say that, like error, corruption may be regarded as a factor that undermines the ability of a state to give true consent. However, there is no mention of corruption as a cause of legal invalidation in Oppenheim's international law textbook (Oppenheim 1905, 525-526), which is often cited in the discussions on the validity of the treaties relating to the "annexation" of Korea and is commonly called "the most influential English textbook of international law." This is the same in the writings of other representative scholars of international law of the time. The review of the discussions concerning the drafting of the Article 50 (Corruption of a representative of a state) of the 1969 Vienna Convention on the Law of Treaties also tells us that this provision was understood not as a codification of customary international law but as a progressive development of international law in the UN International Law Commission.[21]

21. For a detailed review of this problem, see Park (2010).

In this respect, it is doubtful that corruption could be invoked as ground for the invalidation of a treaty in and around the year 1910.

As mentioned previously, even those scholars who pointed out the fact of Japanese affording of money, which could be interpreted as a sign of corruption, take a restraining attitude towards the causal relationship between corruption and the conclusion of the treaties. They do not seem to claim conclusively that the treaties were invalidated by corruption. They only seem to comment that not only coercion, but also corruption existed a factor undermining the freedom of consent in relation with the 1910 "Annexation" Treaty. In conclusion, it may be said that no one definitively claims the invalidity of the treaties on the ground of corruption.

Evaluation of Discussions

So far, I have reviewed the debates on the legal validity of the treaties relating to the "annexation" of Korea from the perspectives of coercion, formal and procedural defects, and corruption. Since I have evaluated the argument of the invalidity of the 1910 Treaty based on the corruption just above, let me here evaluate the other two arguments concerning the validity of the treaties relating to the "annexation" of Korea.

In the discussion surrounding coercion, Sakamoto claimed that coercion of a representative of a state was subsumed within coercion of the state itself, and that even if Emperor Gojong and his ministers were coerced in the conclusion of the 1905 Treaty, that was coercion of the state, not that of the Korean representatives; therefore, it did not constitute a reason for its invalidation under the international law of the time. As to this argument of Sakamoto, Lee Keun-Gwan demonstrated that, even under the international law of those days, coercion of a state organ was recognized as coercion of an individual and distinguished from the coercion of a state itself. Paik Choong-Hyun rejected Sakamoto's claim on the mixed presence of coercion of an individual and coercion of a state by arguing that the two forms of

coercion existed side by side. Based on an extensive intertemporal legal research, Sasagawa showed also that the state of the international law on coercion at the time was not necessarily consistent with the conclusion reached by Sakamoto. It is not known how Sakamoto counters these persuasive arguments. Given this, one might say that the position claiming the invalidity of the Korean "annexation" treaties for reasons of coercion remains not finally refuted for now. The attempt to negate the fact of coercion itself by arguing that Emperor Gojong himself ordered the negotiation of the conclusion of the 1905 Treaty may be understood as a reflection that in light of international law, it is very difficult to deny the invalidity of the treaty caused by coercion any longer.

As for the controversy between Lee and Unno over the formal and procedural defects of the treaties, I would like to make the following evaluations in due consideration of the international law of the 1910s. Firstly, it is difficult to judge whether the "annexation" treaties were concluded at all or valid/invalid taking their titles as the criterion of the judgment.

Secondly, it was accepted at the time when the treaties were concluded that officials in certain positions were able to conclude a treaty without full powers. Even in that case, however, it was also recognized that, for a treaty to be valid, a negotiating representative should not conclude a treaty *ultra vires*. Additionally, a state representative for the conclusion of a treaty was always required of full powers unless he or she was the Foreign Minister or a head of diplomatic mission. Therefore, it would be reasonable to say, in light of the international law of the time, that a treaty concluded by an official not endowed with the capacity to conclude a treaty and did not have full powers was invalid. In this sense, the argument that a certain treaty relating to the "annexation" of Korea was invalid for the lack of full powers in its conclusion has substantial persuasiveness, even when it is considered separately from the claim that treaties dealing with a matter of great importance could not be concluded in the form of a summary agreement.

Third, a treaty must be ratified in principle; a treaty's entering

into force without ratification was an exception; and a special agreement of contracting states was necessary for a treaty to be promptly implemented.

Fourth, according to the treaty conclusion practices of the time, all treaties were in principle to be concluded as a "formal treaty," as termed by Lee. Although it is unclear whether the requirements of a "formal treaty" enumerated by Lee were recognized as those of "formal treaty" under the international law of those days, it appears that a treaty of the time in principle required full powers in its conclusion and ratification as a condition of its entering into force, regardless of whether it was a "formal treaty" or a "summary arrangement." As it may be said that the treaties concluded around 1910 all required ratification in principle, regardless of the importance of the matter under their regulation, it would be pertinent to argue that the treaties relating to the "annexation" of Korea, which regulated such an important matter as a transfer of state sovereignty, cannot be considered valid if they were not properly ratified.

In conclusion, although Lee's logic seems to be not well-organized or elaborately constructed in the context of the discourse of international law, his core argument is that a treaty of such an enormous importance as to transfer state sovereignty is invalid if it is concluded without full powers and ratification and borrows the mere appearance of a treaty. This claim should be deemed both logically persuasive and proper in light of the international law of the time.

Japanese scholars arguing the validity of the treaties relating to the "annexation" try to interpret and apply the international law of the period immediately preceding and following 1910 in a narrow, limited, and technical manner, taking the positivistic point of view of the law. However, such method does not seem to render it easy to prove their validity. Even from the perspective of legal positivism, it seems to be more persuasive to argue for their invalidity. Further, if we go beyond the legality discourse which admits "*dura lex, sed lex*" (a bad law is still a law) and take the legitimacy of international law and its ideal to be a law serving the justice in international society into consideration, it would be almost impossible to argue for the

validity of the treaties relating to the "annexation" of Korea or the legality of the "annexation" of Korea.

Concluding Remarks

Although Sakamoto and Unno claim that the "annexation" of Korea by Japan was legal, they do not say that it was just. Some may wonder why they argue the legality of a matter on which they made moral judgment that it is unjust. Their argument of legality of the "annexation" may be the result of their commitment to scholarly precision and conscience: even though they think the "annexation" to be unjust, at least as scholars they cannot help saying that it was "legal." That is fully understandable. However, if their assertion is a reflection of a thought that Japanese responsibility for the damage and suffering inflicted on Korea and its nationals by Japan may be reduced by calling the "annexation" "legal," it is hard to agree with them. Moreover, if it is admitted that Japan committed a morally unacceptable act, one cannot help asking whether Japan has done enough to make reparations for the injuries and damage caused by the act.

Many people do not believe that true historical liquidation has been achieved between Korea and Japan even after a century from the "annexation." What I would like to emphasize again at this point is that Japan should reflect on whether it has done enough to take responsibility for what it did, be it legal or moral responsibility. That is what to be done by Japan for its relations with Korea, and at the same time for itself. Korea also has its share of things to do. Korea must be vigilant not to inflict the suffering and injustice it endured onto any other country. Korea should not loose the perspective of maintaining friendly relations with Japan and working together for a mutually prosperous future, though it should continue to bring to light and keep record of the dark aspects of its historical relations with Japan and assert any necessary claims against Japan for its past wrongdoings.

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