The Validity of Treaties in Japan

Gordon Ireland

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation
Gordon Ireland, The Validity of Treaties in Japan, 31 CALIF. L. REV. 405 (1943).

Link to publisher version (DOI)
https://doi.org/10.15779/Z38WJ6J

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
The Validity of Treaties in Japan

Gordon Ireland*

It is established in the United States that treaties are a part of the "supreme law"1 and rank with the Constitution and Acts of Congress. The Constitution, with the twenty-one amendments which have successively been added to it, is the highest of the three, and numerous laws, especially of late years, have been made of no effect when found by the Supreme Court to be in conflict with the Constitution.2 No treaty has ever been expressly declared unconstitutional, and the theory that that might be done rests on the reasoning and assurances of Secretaries of State, court dicta, and text writers only.3 A treaty, with the appropriate legislation for its execution, may change the accepted content of a constitutional power expressly granted; as, for example, the interstate commerce clause, so as to bring lawfully within federal jurisdiction subject matter which, without the treaty, was reserved to the states.4 As between a treaty and a federal law, the United States doctrine, differing from that of Great Britain, where an Act of Parliament (though usually expressly reserving treaty rights) is always supreme,5 is that they are of equal standing; and according to the accepted rule of legislative interpretation, the later in date prevails over the earlier,6 especially if the Act of Congress clearly expresses

---

2 For list of cases, see Bullitt, Supreme Court and Unconstitutional Legislation (1924) 10 A. B. A. J. 419, 425; Notes (1937) 23 A. B. A. J. 334; (1932) 45 Harv. L. Rev. 1092, 1093.
5 In re California Fig Syrup Co.'s Trademark (1886) 40 Ch. D. 620, 627-628.

---

*Professor of Law, Portia Law School, Boston, Massachusetts; Exchange Professor at the University of Santo Domingo (1941).
the purpose to abrogate or modify the prior treaty. This theory of supremacy of the later provision has been expressly applied to the relations of the United States with Japan. The 1854 treaty between them sought to prevent discrimination by Japan against United States citizens by providing (Article VI) that if at any future time Japan should grant other nations privileges and advantages not granted in that treaty to the United States, the same privileges and advantages should be granted likewise to the United States and its citizens without any consultation or delay. The treaty of commerce and navigation between the United States and Japan signed at Washington on November 22, 1894 provided:

Art. I. . . . "The citizens or subjects of each of the two High Contracting Parties shall have full liberty to enter, travel, or reside in any part of the territories of the other Contracting Party, and shall enjoy full and perfect protection for their persons and property."

While that treaty was in force, the act of 1900 for the government of the Territory of Hawaii made all fisheries in the sea waters of the Territory free to all citizens of the United States, without eliciting any known protest from Japan. An Act of 1906 to prohibit aliens from fishing in the waters of Alaska expressly provided (Section 3) that nothing in the act should be construed as affecting any existing treaty or convention between the United States and any foreign power. The federal act of 1906 has been held to override provisions of the 1894 treaty if necessary. The United States and Japan signed at Washington on February 21, 1911, a new treaty of commerce and navigation which provided:

Art. I. "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ

---

8 Ratifications exchanged at Washington, March 21, 1895. 3 Hackworth, Digest of International Law (1942) 755. See No. 10, note 47 infra.
12 Ratifications exchanged at Tokyo, April 4, 1911. 3 Hackworth, op. cit. supra note 8, 759, 767, 773, 774. Cf. Williams, (1943) 37 Am. J. Int. Law 390. See No. 18, note 47 infra.
agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

Under the United States theory, this treaty presumably suspended the two prior laws, so far as they were inconsistent with it. After this treaty, except as to ownership of land, which was not covered by it, and the question of separate school facilities, which was settled diplomatically without judicial determination, Japanese subjects in carrying on trade in the United States could not be discriminated against by state or territorial laws or municipal ordinances. Subsequent federal statutes, however, were of course subject to no such limitation; and discrimination against Japanese as aliens has therefore been allowed in the regulations the Secretary of Commerce was authorized to make to protect the fisheries of Alaska, and in the Alaskan game law. Although internationalists are not in full accord,

---

13 The U. S. Code in effect Dec. 7, 1925, which includes these Acts of 1900 and 1906, expressly does not enact as new law any matter contained in it. Cf. 48 U. S. C. (Alaska) §§199, 207, 222, 222a, 243; (Hawaii) §506.

14 In connection with the "Gentlemen's Agreement" as to immigration of Japanese laborers negotiated in February, 1907, by President Theodore Roosevelt; the acceptance of which by Japan was perhaps in part influenced by the realization that United States courts would probably hold that segregation by state law if affording equal privileges was a constitutional exercise of the general police power and, therefore, it would be argued by the U. S. Department of State, was internationally lawful. See 3 Hackworth, op. cit. supra note 8, at 756.


it seems to be the doctrine of the United States, as of Great Britain,\textsuperscript{20} that treaties of commerce and navigation concerning matters that contemplate future relations between the parties are suspended by the outbreak of war between them.\textsuperscript{21} Such suspension will probably be considered to be permanent, or the equivalent of abrogation, except as to such treaties or portions of treaties as are specifically enumerated in the treaty of peace that terminates the war and are expressly declared to be revived or in effect thereafter. Let us see now how these basic questions appear to be settled in Japanese law and theory.

The Japanese Constitution granted by the Emperor is, as it stands, the highest law of the Empire; but in the historic view of the Emperor as a god on earth and supreme and absolute law-giver, the Constitution may be altered, suspended or entirely withdrawn by his edict at any time. Hence there can be no question of the constitutionality of any imperial decree, and the latest authentic expression of the Emperor's will must always prevail. Even in the days when outward respect was being paid to democratic forms, any legislation by the Diet was of no value until it had been promulgated by the Emperor's order; and it was subject to amendment or abrogation by the same authority at any time. There have been two theories as to the relation, in the absence of definite imperial command, between treaties and statutes.\textsuperscript{22} In the House Tax case before the Permanent Court of Arbitration at The Hague, there was no question of treaties being modified by later national legislation, for the imposts on buildings which were in issue were uniformly local or municipal and not imperial charges.\textsuperscript{23} With the practical submergence of the Diet and the ease with which the current Ministerial Government can at any time produce an imperial decree, it remains of little importance whether in theory treaties are superior or equal to legislative acts: both yield to the Emperor's order.


\textsuperscript{21} Crandall, Treaties, Their Making and Enforcement (2d ed. 1916) 442; 5 Moore, op. cit. supra note 3, 372-386; Moore, Effect of War on Public Debts and on Treaties—the Case of the Spanish Indemnity (1901) 1 Col. L. Rev. 209.


\textsuperscript{23} Scott, The Hague Court Reports (1916) 77-92; Wilson, The Hague Arbitration Cases (1915) 40-63; (1908) 2 Am. J. Int. Law 911-921; (1938) 32 ibid. 114. Case of Japan (in English) 160.
The leading professors of international law at the Imperial University of Tokyo are in agreement that bipartite commercial treaties are ended by war.

"As for treaties of commerce and navigation, and other 'social' treaties, between belligerents, opinions differ among scholars. Some say that this category, differing from 'political' treaties, is compatible with the state of war and therefore should be regarded only as suspended during the war and not ended by the war. However, social no less than political treaties are dependent for their content upon the political position, the level of civilization, and the differences in financial and military powers of the respective countries; and in this respect there is no reason to differentiate social from political treaties. In particular, social treaties often contain within a single instrument numerous items for which homogeneous treatment is impractical. Therefore, both in theory and practice, we have been accustomed to regard social treaties as ended by war. Recently, however, there has appeared a doctrine asserting that those treaties which can be found to be compatible with a state of war should not be regarded as ended because of the war. But this doctrine has received only a limited acceptance among the nations of the world."24

"On this problem (whether treaties between belligerents are to be regarded as suspended or as permanently losing their efficacy) our yardstick should be the intention of the contracting parties at the time of the contract. . . . If the intention is not explicit, we must deduce the intention appropriately according to the nature of the treaties. . . . Treaties affecting economic and commercial relations between the belligerents, are contracted with due consideration for the specific position of each country as to commercial, industrial and economic conditions. Since it is impossible to foretell what consequences the war may have upon such position and conditions, we should infer the intention of contracting parties to favor the interpretation that such treaties lose their efficacy through the commencement of belligerency. . . . The opinion of Oppenheim, for instance, which states that such treaties are to be regarded only as suspended by war or as arbitrarily expirable only upon specific announcement to that effect by either belligerent . . . has certain theoretical merits, but is not favored by the actual practice of to-day."25

The last two bipartite treaties of peace signed by Japan (and both dictated by her as victor) expressed the doctrine that all executory treaties are terminated by war between the parties. In the treaty of

Shimonoseki of April 17, 1895 which ended the 1894-1895 War with China\(^2\) it is recited that,

"Art. VI. All treaties between Japan and China having come to an end in consequence of war...

and the Treaty of Portsmouth of September 5, 1905, which ended the Russo-Japanese War\(^2\) declares,

"Art. XII. The treaty of Commerce and Navigation between Japan and Russia having been annulled by the war...

Thus considering treaties to be terminated by war between the parties, Japan appears further to hold to the much discussed and disputed *rebus sic stantibus* theory,\(^2\) and to maintain\(^2\) that a treaty may be abrogated even without war by change of circumstances.\(^3\) In general, multipartite treaties\(^3\) are not usually considered to be

---


\(^2\) 98 British and Foreign State Papers 735; 33 Martens, *op. cit.* supra note 26 at 3.

\(^2\) "Omnis conventio intelligitur rebus sic stantibus... is only a new expression of the statement that treaties cannot be eternal... A change of circumstances requires revision or abrogation." SCELLE, *Théorie Juridique de la Révision des Traités* (Paris, 1936) 15-16. McNair, La Terminaison et la Dissolution des Traités; Recueil des Cours, 1928. II; 22. 467. de Taube, L'Inviolabilité des Traités; Recueil des Cours, 1930. II; 32. 353.

\(^3\) "It is maintained in Japan that Japan did not break the Nine-Power Treaty... It is held in Japan that under changed conditions that treaty had become obsolete." Grew, *Report from Tokyo* (1942) xx.

---

wholly terminated by war between two or more of their signers;\(^3\) but rather to be suspended only as to the belligerents and unaffected as to the neutral parties with each other.\(^3\) As one of the Allied Powers, Japan signed the treaties of peace after World War I with Germany,\(^3\) Austria,\(^3\) Bulgaria,\(^3\) Hungary\(^7\) and Turkey,\(^8\) which provided that each of the Allied or Associated Powers should notify the respective Central Power which bipartite treaties or conventions the Allied Power wished to revive, only those to be revived and all others to be abrogated. As to multipartite treaties, conventions and agreements, those of an economic and technical nature\(^9\) should enter again into force and be applied thereafter with the respective Central Power. The obligations of a member of the League of Nations are determined by the League Covenant in the peace treaties to which Japan was a party; and the rights and duties of a member who accepts a mandate are described in Article 22 of the Covenant. The obligation of a Mandatory who withdraws from the League\(^6\) has

---

\(^3\) The four signers of the Fur Seal Convention, Great Britain and the United States are at War with Japan, and Russia, down to September 1, 1943, is not. Signed at Washington, July 7, 1911; ratifications exchanged at Washington, Dec. 12, 1911, 37 Stat. 1542; U. S. Treaty Series #564; 3 Treaties of the U. S. 2966; 6 Am. J. Int. Law 342; (1933) 27 ibid. 100; Hyde, *Legal Aspects of the Japanese Pronouncement in Relation to China* (1934) 28 ibid. 431. Cf. Schwarzenberger (1943) 37 ibid. 476, n. 66.

\(^3\) Of the four signers of the Fur Seal Convention, Great Britain and the United States are at War with Japan, and Russia, down to September 1, 1943, is not. Signed at Washington, July 7, 1911; ratifications exchanged at Washington, Dec. 12, 1911, 37 Stat. 1542; U. S. Treaty Series #564; 3 Treaties of the U. S. 2966; 5 Am. J. Int. Law Supp. 267. Denounced by Japan, Oct. 23, 1940; abrogation in effect Oct. 24, 1941. On March 24, 1943, Russia signed with Japan at Kulhyshev a further extension to Dec. 31, 1943, of the convention as to Japanese fishing rights in Siberian waters, at a reported increase in rentals of between 4 and 5 per cent. See Ireland, *The North Pacific Fisheries* (1942) 36 Am. J. Int. Law 400, 406, 422.


\(^3\) Concerning submarine cables, publication of customs tariffs, public hygiene, telegraphic service and the Universal Postal Union, with Turkey; these and many more with the other Central Powers.

\(^6\) Covenant of the League of Nations, Art. 3. "Any Member of the League may,
been much discussed since November 1932, but never legally determined; but that the theoretically correct and lawful procedure would be for such withdrawing nation at once to resign its mandate can hardly be doubted. Professor Sakutaro Tachi, agreeing with the majority of Japanese jurists, declared in 1933, and was substantially supported by Foreign Minister Koki Hirota in statements in the House of Peers in February 1934, that there was little distinction between C Mandates and annexation; that the Mandatory was authorized to exercise its own imperium or sovereignty over the mandated territory; and that the League had neither territorial right in the territories nor sovereignty over the Mandatory and had no power to deprive Mandatories of their mandates. Considering that the Mandatory had originally in fact no recognized or lawful right whatever over the mandated territory except that bestowed by agreement of the Allied Powers and confirmed by the League, this amounts to saying that the power that gave exhausted itself in the giving and had no reserve of power to take away: a curious condition not supported by the usual interpretation of constitutional law in any system. The Council of Ten of the Allied Powers at the Peace Conference in Paris in January 1919, decided upon, the League of Nations Assembly on May 7, 1919, allotted, and the Council of the League on December 17, 1920, confirmed, a C Mandate to Japan over the former German islands in the Pacific north of the Equator.

after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal. Japan gave notice of her withdrawal on March 27, 1933, effective March 26, 1935.

42 CLYDE, JAPAN'S PACIFIC MANDATE (1935); BRITISH YEAR BOOK OF INTERNATIONAL LAW (1935) 104; PAUWELS, THE JAPANESE MANDATE ISLANDS (Batavia, 1936); YANAHARA, PACIFIC ISLANDS UNDER JAPANESE MANDATE (London, 1940); Williams, Japan's Mandate in the Pacific (1933) 27 AM. J. INT. LAW 140, 428, 514, 516; (1939) 33 ibid. 347.


42 Micronesia (discovered by Magellan, Mar. 6, 1521) consists of over 1400 islands, islets and reefs (according to the Japanese report, not varied since 1922), of which 131 are inhabited, extending some 1300 miles from 22° to 0° N. lat. and 2700 miles from 175° to 130° E. long. The principal groups are the Marianas (Ladrones) having 14 main islands, with headquarters on Saipan (71.4 sq. mi.); the Carolines, having 577 main islands, with headquarters for the West Carolines or Palau group, on Koror and including Yap (83.4 sq. mi.) and for the East Carolines or Truk group, on Ponape (144.7 sq. mi.) and Toloas (Summer) (3.4 sq. mi.) and the Marshalls, having 32 main
some of which had been under naval occupation since October 1914; and civil administration by Japan was established in April 1922. Japan had a member on the Permanent Mandates Commission of the League, as set up December 1, 1920, and took part in its sessions and activities until October 1938, when M. Sakenobe, the Japanese member, notified the Commission that he could not take part in the forthcoming session, and Japan told the Council of the League on November 2, 1938, that she had decided to discontinue cooperation with all organs of the League. From 1920 through 1937 Japan made to the Council or to the League itself annual reports upon her mandate, which members of the Mandates Commission in November 1938, characterized as not clear, of little value and practically identical, year after year. The last printed report, for 1937, contained as an Annex certain statistics intended as answers to "Observations" in the Commission's last preceding report to the Council, amounting to requests for further information on matters of public finance, education and land tenure, which, as on previous occasions, the Commission had made in the course of its considerations of the 1936 report in November 1937.\textsuperscript{44} It was a rule of the Commission for each Mandatory to have an accredited representative attend the session of the Commission at which its report was being considered, to answer questions of the members and furnish if possible further desired information. Japan's representative, M. U. Usami, did not attend the October 1938 session, but the Commission decided to consider the 1937 report notwithstanding. Little was accomplished except disclosure of the views of some dissatisfied members of the Commission;\textsuperscript{45} and neither report nor any representative from Japan appeared at the June 1939 session, but toward the close of the December 1939 (and last) session, the Secretary announced that he had had indirect word that the report for 1938 had been dispatched from Tokyo in November 1939.\textsuperscript{46} Japan, out of the League since March 1935, thus maintained her control of the mandated islands, despite

\textsuperscript{44}League of Nations, Permanent Mandates Commission, Minutes, 33rd Session, Nov. 8-19, 1937, pp. 119-138, 177. 1937 VI A 4; C. 551, M. 388.

\textsuperscript{45}League of Nations, Permanent Mandates Commission, Minutes, 35th Session, Oct. 24-Nov. 8, 1938, pp. 15, 171-184, 186, 201, 208. 1938 VI A 2; C. 418, M. 262.

\textsuperscript{46}League of Nations, Permanent Mandates Commission, Minutes, 37th Session, Dec. 12-21, 1939, pp. 11, 118, 129. 1940 VI A 1; C. 7, M. 5.
recurring charges of exploitation, exclusion of foreigners and illegal building of fortifications, especially on Saipan, without action by the League or any member of it, down to the outbreak of war in the Pacific. The question of the mandate has now of course been lost in the appeal to arms, with the strong probability that Micronesia, like Polynesia generally and many other possessed places, will by the treaty of peace be removed permanently from Japanese jurisdiction.

Since March 31, 1854, the United States and Japan appear to have entered into twenty-six bipartite treaties, conventions or agreements,47 of which eleven,48 concerning extradition (two), patents, copyright, trademarks (two), policy in the Far East, mutual interest in China, rights in Yap and former German islands, income tax on shipping profits and smuggling of intoxicating liquors, were at least nominally in force on December 7, 1941. We conclude that by Japan's own doctrine all of these have been abrogated by the war; and when the United Nations dictate the treaty of peace, it may at their will, as after World War I, be specified which if any bipartite and multipartite treaties are to be considered revived or on what subjects new agreements are to be negotiated.

47 United States-Japan Treaties, Conventions and Agreements.

   Superseded by #10.
   Superseded by #3.
   Superseded by #10.
   Indemnities Executed.
6. June 25, 1866 Tariff of duties .................................. 188 1:1012
   Superseded by #10.
7. July 25, 1878 Commercial ........................................ 189 1:1021
   Superseded by #10.
8. May 17, 1880 Shipwreck expenses ................................ 190 1:1024
   Superseded by #10, Art 11.
9. Apr. 29, 1886 Extradition ........................................ 24:1015 191 1:1025
    Superseded by #18.
12. Nov. 10, 1905 Copyright ........................................ 34:2890 450 1:1037
13. May 17, 1906 Supplementary Extradition ......................... 34:2951 454 1:1039
   (To expire Aug. 24, 1913; finally, Aug. 24, 1928)
15. May 19, 1908 Trade Marks in Korea .................................. 35:2041 506 1:1041
16. May 19, 1908 Trade Marks in China .............................. 35:2044 507 1:1043
17. Nov. 30, 1908 Policy in Far East, Notes ....................... 5111/2 1:1045
   Abrogated by U.S., Jan. 26, 1940.
19. Apr. 21, 1913 Foreign Settlements in Chosen .................... 14:664 1:1046
   Abolished, Executed (U.S. Foreign Rel. 1914:435)
23. Feb. 11, 1922 Rights in Yap and other former German Islands in the Pacific .... 664 III:2723
25. Mar. 31, June 5, 1928 Income Tax on Shipping Profits .......... Exec. Amt. #1

48 Nos. 9, 11, 12, 13, 15, 16, 17, 21, 23, 25 and 26.