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A suggestion for an impeccable logical integrity;
Legal Errors contained in some emotional
assertions emphasizing the meaning of
SCAPIN677

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A suggestion for an impeccable logical integrity of the legal corollary in maintaining the Korean sovereign title to the Dokdo Island (Ⅱ)

—Legal Errors contained in some Emotional Assertions emphasizing the meaning of SCAPIN677—

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Until the late days of the last century, in a political decision, like negotiation, mediation or conciliation, the assessments of the legal claim, the logical integrity of the legal corollary may not have been the only decisive factor to conclude the settlement. Usually, other considerations like military, economic strength of the particular contending parties or factual influence of the political power exercised by the bloc of states in which a certain party is belonged, have practically rolled as the more decisive factors.

However, the international societies in 21st century in which we are living now, have already become too transparent and fair to debase the sense of justice by compromising with the considerations like, military or economic strength of a contending party, factual influence of the political power exercised by the bloc of states in which a certain party is belonged.

No matter it be in a political decision or in a judicial decision, the assessments of the legal claim have eventually become the only decisive factor to conclude the settlement. In the case of a political decision, particularly, an international sovereign dispute no longer is a question of which party can show 'the better case'.

So, even when the case is not brought to a judicial tribunal, a contended party is required to give (or show) the most impeccable logical integrity of the legal corollary to prove the sovereign title to the disputed territory, good against all in the international society.

The dispute claiming the sovereign title to the Dok-do Island between Korea and Japan could not be any exemption. The question has become the game only party who can show and prove the best and perfect legal theory, good against all in the international society, shall win. Consequently, any emotional assertions which lack the legal logics or relevant evidences are no longer permissible or excused, no matter how they might be innocent and patriotic.

Non-the-less, Korea has committed a few fatal legal mistakes in the proceedings of refuting the Japanese aggressive and persistent allegations asserting the sovereign title to the Dok-do Island.

Making things even worse, a few experts in Korea seem to be indulged in emotional assertions which obviously lack legal logics and without any relevant evidences.

The fatal legal mistakes Korea has committed in the proceedings of refuting the Japanese aggressive and persistent allegations asserting the sovereign title to the Dok-do Island are as follows;

(1) In the troubled provision, Article 2 of the 1965 Treaty on Basic Relations between Korea-Japan, Korea has accepted the ambiguous term, 'already" which has eventually paved a legal way of allegation for Japan that the 1910 Japan-Korea Annexation Treaty was validly made and entered into force as far as in a view of the inter-temporal law.

In spite of the prevailing comprehension among the international law experts, particularly in the western countries that the 1910 Japan-Korea Annexation Treaty was validly made and entered into force, actually the invalidity of the treaty could be legally proved with just a simple review of a few historical facts.

Emperor Kojong had been deprived off his throne by the Japan, because he sent the secret envoy to the 1907 Hague Peace Conference to declare the invalidity of the 1905 Protectorate Agreement. On August 27th 1907, the Japan had made the Korean Prince by force, to receive the throne to be a new Emperor. The faked coronation had been proceed, employing two eunuchs, one acting as Emperor Kojong abdicating the throne, the other acting as Emperor Sunjong receiving the abdicated imperial throne, in place of the two stubbornly boycotting real actors.

Reviewing from the view of the rule of customary public international law of the throne factorial at that time, the Emperor's crown and his sovereign power cannot, without his consent, be transferred to another; he cannot forfeit it. So, the Emperor Sunjong nominated and crowned by the brutal force of Japanese Empire was nothing but a puppet Emperor, and should be naturally denied as a valid crown of the Korean Empire.

Consequently, the 1910 Japan-Korea Annexation Treaty concluded between Japanese Emperor and the Emperor Sunjong, was nothing but a fake pactum agreed only by the Japanese Empire, by herself. So even without scrutinizing those detailed faults of the treaty in view of the law of treaty, such as lack of the Korean Emperor's signature on the instrument of ratification, or some procedural defects in issuing the full powers, this annexation treaty cannot be deemed as has ever been concluded and existent as an international legal agreement.

As a matter of a fact, article 2 of 1951 San Francisco Peace Treaty prescribes as;

(a) Japan recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.

Japan insists that article 2 (a) indicated that the islands Japan should renounce are Quelpart(Cheju-do), Port Hamilton(Kermun-do) and Dagelet (Ullung-do) only, it did not include Liancourt Rocks(Dok-do). The name of Liancourt Rocks was

intentionally omitted. So, the Rock is remained as Japanese territory.

In such Japanese allegations a few important legal theories seem to be backing up the corollary and logic.

First of all, the most important logic is this; as far as the 1910 Japan-Korea Annexation Treaty was made and done legitimately and effectively, every part of Korean territory should be separated from the Japanese territory concretely and manifestly. No matter whether it was intentional omitting or not, Liancourt Rocks was not indicated as the island Japan should renounce, in the peace treaty. So, Japan does not have any obligation to give up that island and return it to Korea.

So, strictly speaking in view of the law of the treaty, unless this 1965 Treaty on Basic Relations between Korea and Japan be duly abrogated or revised, the legal corollary asserting the Korean sovereign title to the Dok-do Island should have a formidable obstacle to be deemed as impeccable or undisputable.

(2) Another formidable obstacle to Korean legal corollary asserting sovereign title to the Dok-do is the 1998 Korea-Japan Fishery Pact.

This 1998 Fisheries Agreement between Korea and Japan, with a prominent legal construction that Korea and Japan mutually acquiesces each other's assertion of sovereign title to Dok-do Island, enhances substantially the Japanese legal stance in asserting their sovereign title to Dok-do Island, as it is.

So, this 1998 Fisheries Agreement, which has "legally" nothing to do with any fishery matters between Korea and Japan, should be immediately renounced.

(3) Among the many patriotic legal allegations, the emotional assertion emphasizing the meaning of SCAPIN 677 seems to be the most problematic issue which ought to be reviewed and analyzed, right away.

The legal errors inevitably contained in these emotional assertions emphasizing the meaning of SCAPIN 677 seem only to encourage the Japanese aggressive allegations asserting the sovereign title to Dok-do.

On January 29, 1946 the Supreme Command for Allied Powers (SCAP) GHQ issued a memorandum, SCAPIN No. 677 entitled "Governmental and Administrative Separation of Certain Outlying Areas from Japan" and sent it to the Imperial Japanese Government. GHQ used the expression "definition of Japan" and clearly defined the limits of the Japanese territory and the scope of Japanese exercise of its political and administrative sovereignty.

In the directive, SCAPIN No. 677 classified the areas to be excluded from the government and administrative jurisdiction of Japan into (a), (b) and (c). Ullung-do, Dok-do and Cheju-do were included in (a) as the areas to be restored to Korea when it had become independent in the future.

By SCAPIN No. 677, Dok-do was completely excluded from the Japanese territory and the exercise of its sovereignty, and reverted to the caretaker U.S. Military Government in Korea on January 29, 1946, and finally to the Republic of Korea

proclaimed on August 15, 1948.

To repute Japanese allegations that Liancourt Rocks was not indicated as the island Japan should renounce in the 1951 Peace Treaty, was not separated from Japan, SCAPIN No. 677 obviously provides a fairly nice ground of the legal theory for Korea. But some Korean experts seem to be too excited in invoking this aptly relevant legal ground.

They defined the SCAPIN No. 677 as the essential and concrete legal actions to establish the territory of newly proclaiming state, Korea. They even named the SCAPIN No. 677 as 'a special international law' which is 'legally and permanently' prescribing the scope of Korean territory, authorized by paragraph 8 of the Potsdam Declaration and the Japanese Unconditional Surrender Terms.

The Japanese allegations like, "The name of Liancourt Rocks was intentionally omitted. So, the Rock is Japanese territory." could not sustain as any legal assertions because they are not based on the true and precise historical facts or sound legal theory. But by the same token, the emotional assertion emphasizing the meaning of SCAPIN 677 should be reviewed and analyzed to be ironed out as an impeccable legal theory by curing every possible legal errors and defects, immediately.

(3-1) In an accurate view of legal analysis, the SCAPIN No. 677 is not necessarily 'the essential and concrete legal actions' to establish the territory of newly proclaiming state, Korea.

As far as the 1910 Annexation Agreement between Korea and Japan is null and void ab initio (as has already mentioned above), the Japanese colonial rule over the Korean Empire didn't have any legal titles or justifications. The Japanese control over the Korean peninsula was nothing but a 'belligerent occupation' in the precise terms of the international law.

Even though it is a stark fact that the Japanese war lords occupied and controlled Korean peninsula for more than 35 years until the end of WW II, Korea has never legally been annexed by Japan. It was only occupied by the Japanese war lords. So, as soon as Japan was defeated in the Pacific War, and announced unconditional surrender, this Japanese military occupation upon Korean peninsula was ended. The subjection to Japan was ended, just that manner. So, the free and independent state which shall proclaim in Korean peninsula upon the end of military occupation by the Allied Forces, does not need any 'essential and concrete legal actions' to separate its territory from Japan.

(3-2) By issuing the memorandum SCAPIN No. 677, the occupying commander, Gen. Mac Arthur separated Dok-do, Ullung-do, Kermun-do (Port Hamilton) and Cheju-do from Japanese territory on January 29, 1946.

As a matter of a fact, even way before this action, SCAPIN No. 677 of January 29, 1946, the occupying commander, Gen. Mac Arthur imposed military exigencies restricting and precluding any Japanese fishing activities outside the boundaries

SCAP designated (later, it came to be known as the 'Mac Arthur Line') which is obviously separating Liancourt Rocks (Dok-do Island) from the authorized area.

The reason why this action has any decisive meanings, is not because the SCAPIN No. 677 is 'a special international law' which is 'legally and permanently' prescribing the scope of Korean territory, authorized by paragraph 8 of the Potsdam Declaration and the Japanese Unconditional Surrender Terms.

Infallibly, the Japanese government invoked paragraph 6 of the SCAPIN No. 677:

"6. Nothing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in article 8 of the Potsdam Declaration."

This occupying commander's directive is only an action to execute the occupation policy. So this could not be any rule or "special international law" authorized by paragraph 8 of the Potsdam Declaration and the Japanese Unconditional Surrender Terms.

The Japanese also invoked paragraph 5 of the SCAPIN No. 677:

5. The definition of Japan contained in this directive shall also apply to all future directives, memoranda and orders from this Headquarters unless otherwise stated therein.

This occupying commander's directive could not be any 'permanent action'. It could be changed. SCAPIN 677 was changed (revised) twice before April 28, 1952 when the Peace Treaties with Japan became operative: SCAPIN 841 issued on March 22, 1946 returned Izu and Nanpo Islands to Japan; the revised SCAPIN 677 dated December 5, 1951 returned the islands between 30°~29° N latitude and Kagoshima Ten Village Islands to Japanese sovereignty.

These were "specific" revisions to SCAPIN 677 in accordance with paragraph 5 of the directive. However, no such directives, memoranda and/or orders were ever issued to change the separation of Dok-do.

The reason why SCAPIN No. 677 has any decisive meanings, is because this occupying commander's action has a very important logical function as a normative fact (not as any form of rules), particularly for the teleological view in interpreting the 1951 San Francisco Peace Treaty.

By 1951, it had been over six years since the war had actually ended on September 2nd, 1945. As aptly clarified by Ambassador John Foster Dulles, the then chief U.S. delegate to the 1951 Peace Conference; " the territorial provisions in the Chapter II which, so far as Japan is concerned, were actually carried into effect 6 years ago." Thus the territorial provisions in the 1951 San Francisco Peace Treaty merely conformed what had already become an accomplished fact. The separation of Dok-do by SCAPIN No. 677 -so far as it has not been changed specifically- should be acknowledged and respected as the accomplished facts which were actually carried

into effect by the Peace Treaty.

As far as they are to deny the contention of Japan, and as far as they are innocent and patriotic, could any refuting assertions be welcomed and tolerable, even with somewhat feeble or unreasonable legal theories, and even without any logical consistencies? Such notion is dangerous and harmful.

Now, it is the time for us Koreans to be more serious in dealing with this dispute of sovereign title to Dok-do with Japan.