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Isao Sato

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TREATIES AND THE CONSTITUTION

ISAO SATO*

INTRODUCTION

Problems of the validity of treaties in a constitutional order concern aspects of both international and constitutional law. The chief concern of this article, however, is the effect of the Japanese Supreme Court's power of judicial review upon the validity of treaties in domestic law. The relationship of treaties and the Constitution long has been a favorite theme of Japanese international law scholars. Under the new Constitution it has become an urgent and unavoidable issue for constitutional law scholars as well; the present constitution, unlike the Meiji Constitution, has provisions, (Articles 81 and 98), which bear directly upon the problem.

Much of the recent discussion of the problem has been stimulated by the so-called "Sunakawa Case,"¹ involving the United States-Japanese Mutual Security Treaty. This treaty has been the subject of heated political dispute between the parties of the government and the Socialist opposition, and in the *Sunakawa* case, the defendants asserted its unconstitutionality under Article 9.² The Tokyo District Court held the treaty unconstitutional,³ but its decision was reversed on appeal to the Supreme Court.

The *Sunakawa* case is a leading case on the review of treaties; it also illustrates that at the present time, with a short twenty year history, the constitutional issues presented by treaty review are not separable from the political overtones of the controversies in which they have thus far arisen. This caveat is particularly in order when evaluating the schools of thought embodied in academic commentaries on the problem.

The main purpose of the following treatment is to offer fresh, practical approaches to this problem rather than to review theoretical and

* Professor of Law, Sophia University, Tokyo.

¹ *Japan v. Sakata*, 13 Saikōsaibansho keiji hanreishū [hereinafter cited Keishū] 3225 (Sup. Ct. G.B., Dec. 16, 1959).

² Article 9 provides:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes

2. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

³ The decision appears in 13 Keishū 3305 (Tokyo Dist. Ct., March 30, 1959).

academic ones. The matter shall be treated by discussing: (1) the situation which existed under the Meiji Constitution; (2) the situation under the present constitution; (3) underlying theoretical and interpretative issues; and (4) the *Sunakawa* decision. A detailed study of the political question doctrine, one of the important points in the *Sunakawa* decision, appears in Chief Justice Yokota's article in this symposium.⁴

I. THE SITUATION UNDER THE MEIJI CONSTITUTION

The 1889 Meiji Constitution mentioned treaties only in Article 13: "The Emperor declares war, makes peace, and concludes treaties." Thus no provision directly considered the validity of treaties in domestic law. However, in the opinion of the government, treaties had domestic validity upon promulgation by the Emperor. The official opinion of the Japanese government on the domestic validity of treaties was represented in its answer to an inquiry from the Government of Holland in 1906:⁵

Even if the treaty contains matters of the same nature as law, it can be concluded in Japan without the consent of the Diet. And it is the interpretation of the Japanese government that such treaties have legal force as a part of domestic law by their promulgation. It is not necessary to insert them into the law of the land through legislation, and the provisions of laws and ordinances contradictory to the treaties are to be regarded as changed automatically

However, when the signatory powers *promise* in the treaty that they *have to* supplement their domestic systems of law, it becomes naturally the responsibility of each power to enact legislation, in accordance with such a provision, to accomplish the purpose of that particular treaty

The basic thesis of this official opinion is stated in its first paragraph. Article 13 of the Meiji Constitution provided for the conclusion of treaties as a prerogative of the Emperor and did not require the

⁴ See pp. 1036-45 *supra*.

⁵ Quoted in Y. TAKANO, *KEMPŌ TO JŌYAKU* (Constitution and treaty) 128 (1960). The inquiry was as follows:

"In what way and form shall the treaties have legal force or validity?" "Shall the provisions of a treaty which is appropriately concluded and is, when necessary, approved by the Diet, have legal force or validity for the courts, governmental officials and peoples at once after the exchange or the deposition of the instrument of ratification? Shall any prior law be necessary for the admission of the provisions of treaties into the domestic order of law, according to the academic theory that the ratification of signatory powers means only the promise to make the provisions of treaty fit for each one's own legal system?"

participation of the Diet; at the same time Articles 8 and 9 gave the Emperor power to issue Imperial Ordinances independently, without the concurrence of the Diet. Therefore it was consistent with the domestic legal system for a treaty, concluded by the Emperor's prerogative power without the participation of the Diet, to have domestic legal force.⁶

A further question raised under the Meiji Constitution was whether it was possible for a treaty to be unconstitutional. The usual theory was that it was not possible, since the power to conclude treaties was delegated to the Emperor by the Constitution itself. This of course was consistent with the Meiji Constitution's principle of "rule by law," which did not provide for judicial review of legislation's constitutionality.

Such discussion of constitutionality as did occur took place in the Privy Council. Occasionally there was heated debate in the Council over constitutionality. An outstanding example was the so-called "No-War" Treaty (General Treaty for the Renunciation of War) of 1927.⁷ Article 1 of this treaty provided:

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

A strong opinion was voiced in the Privy Council insisting that the words "in the names of their respective peoples," contradicted Article 13 of the Meiji Constitution and invaded the Emperor's prerogatives. The same opinion was voiced in the Diet by those opposing the Government. Though this opinion was not officially advanced to the Emperor by the Privy Council, the government was forced into a difficult situation by the objection.

As a result, the government issued a Declaration on June 27, 1929, stating that it was the Japanese government's understanding that the words "in the names of their respective peoples" would not be applicable to Japan due to the provision in the Imperial Constitution. The Emperor ratified and promulgated the treaty with the above declaration included.⁸

⁶ See S. Hayashi, *Jōyaku no kokumaijōjō no kōryōku ni tsuite* (On the domestic validity of treaties), *HōGAKU KYŌSHITSU* (No. 7) 34, 35 (1963). Mr. Hayashi was, when he wrote this article, the Director of the Cabinet Legislation Bureau.

⁷ Kellogg Briand Pact (signed 27 Aug. 1927).

⁸ It seems doubtful that such an interpretation of the words "in the names of their respective peoples" is proper. At that time, the discussions took place in the academic field. The precise details are omitted here. However, in my opinion, the

II. THE NEW SITUATION UNDER THE 1946 CONSTITUTION

The 1946 Constitution of Japan produced a new situation. Aside from the declaration of peace and international cooperation in the Preamble, and the renunciation of war in Article 9, many provisions relating to treaties are found in the constitution.⁹ But the problem of judicial review of treaties revolves around Articles 81 and 98. These provide:

Art. 81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act.

Art. 98. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

2. The treaties concluded by Japan and the established laws of nations shall be faithfully observed.

The obvious questions raised by these provisions are: (1) Why does Article 81 not include treaties as objects of judicial review? (2) What does Article 98, paragraph 2 mean? Before attempting to detail the interpretation of these two articles it is important to detail the process of their formation and to outline their practical operation.¹⁰

A. Article 81

Article 73 of the MacArthur Draft, which was the origin of present Article 81, provided;¹¹

words "in the means of the respective peoples" should probably be regarded as rhetorical, expressing the will of each signatory power; thus the word "people" has no relation to the distinction between monarch and people. Consequently it has no relation to the issue of who has the power to declare war and to conclude treaties in the domestic constitutional structure of each party to this treaty. As the above example suggests, constitutionality of treaties under the Meiji Constitution depended solely upon the judgment and self-restraint of the political organs such as the Privy Council, and was not properly a matter for judicial determination.

⁹ For example the ratification and promulgation of treaties are powers of the Emperor (Art. 7(1)); conclusion of treaties is the function of the Cabinet, with the prior or subsequent approval of the Diet (Arts. 61, 73(3)).

¹⁰ These aspects are also treated in *Kempō Chōsakai hōkokusho fuzoku bunsho* No. 2 (Report of the Commission on the Constitution, Attached Document No. 2) *KEMPŌ CHŌSAKAI, KEMPŌ SEITEI NO KEIKA NI KANSURU SHŌ-IKAI HŌKOKUSHŌ* (Commission on the Constitution, Report of the committee relating to the history of the adoption of the Constitution) (1964); *Kempō chōsakai hōkokusho fuzoku bunsho* No. 5 (Report of the Commission on the Constitution, Attached Document No. 5) *KEMPŌ CHŌSAKI, KEMPŌ UNYŌ NO JISSAI NI TSUITE NO HŌKOKUSHO* (Commission on the Constitution, Report of the third committee relating to the actual application of the Constitution) (1964).

¹¹ Quoted in *Kempō Chōsakai hōkokusho fuzoku bunsho* No. 2, *supra* note 10, at 723.

The Supreme Court is the court of last resort. Where the determination of the constitutionality of any law, order, regulation or official act is in question, the judgment of the Supreme Court in all cases arising under or involving Chapter III of this Constitution is final; in all other cases where determination of the constitutionality of any law, ordinance, regulation or official act is in question, the judgment of the Court is subject to review by the Diet.

A judgment of the Supreme Court which is subject to review may be set aside only by the concurring vote of two-thirds of all of the representatives of the Diet. The Diet shall establish rules of procedure for reviewing decisions of the Supreme Court.

The idea of review of the Supreme Court's judgment by the Diet was unique, and was omitted from the draft of March 6, 1946.

In the Diet, discussions concerning the validity of treaties in domestic law and the relation between the Constitution and treaties centered around this Article and Article 98. Representing the government, Mr. Tokujirō Kanamori, Minister of State, stated the official interpretation that the validity of treaties in domestic law was not changed by the provisions of the new Constitution. Kanamori explained that the new Constitution was not intended to regulate conflict between the Constitution and treaties in international law, because the validity of treaties in international law should not be determined by only one signatory power. Rather, their validity should be determined by the treaties' actual operation. But since the state must establish its own domestic system of law, and since no treaty contrary to the Constitution can be executed when it impinges upon domestic law, treaties do occupy a lower status than the Constitution.

The government has continued to maintain that the Constitution occupies a higher status than treaties in domestic law, emphasizing that the procedure for concluding treaties is easier than the procedure for amending the Constitution.¹² With respect to "the established laws of nations" the government has indicated its view that in so far as Japan is subject to the fundamental principles of international society, it intends to follow them; the government maintains there could never be contradiction between the Constitution and such principles.

The government also has continuously maintained that the purpose of Article 81 is to guarantee the superiority of the Constitution over all the nation's laws, including treaties. Even though the word "treaties" does not appear in Article 81, treaties are to be subject to judicial

¹² See Article 96.

review. An analogy may be drawn to the regulations of local governmental bodies, which many court decisions have held to be subject to judicial review, even though such regulations are not explicitly included as an object of review under Article 81, and presumably must be subsumed under the generic heading "official act."

B. Article 98

Article 98 of the MacArthur Draft provided:¹³

This Constitution and the laws and treaties made in pursuance hereof shall be the supreme law of the nation, and no public law or ordinance and no imperial rescript or other governmental act, or part thereof, contrary to the provisions hereof shall have legal force or validity.

This provision remained as it was, except for a small change in the wording, in the draft constitutions of March 6 and April 17, 1946. The most important point to be noted is that not only "the Constitution" but also "the laws and treaties made in pursuance hereof" were made the supreme law. Clearly the writers of the MacArthur Draft relied on article 6 paragraph 2 of the United States Constitution. However, the United States article also was intended to establish the supremacy of federal law, and to that extent has no applicability to Japan's centralized political system. The House of Representatives therefore omitted the words "and the laws and treaties made in pursuance hereof" and added instead the present second paragraph providing for the faithful observation of "the treaties and established laws of nations."

There are two further reasons why the House adopted the latter formulation. First, the Constitution was inadequate without a provision concerning the relationship between the Constitution and treaties. Second, according to Mr. Hitoshi Ashida's report to the plenary session,¹⁴ it was necessary for Japan to make clear in the new Constitution a strong determination to respect international law in the future. At the time of its adoption, the government, particularly the Ministry of Foreign Affairs, understood that to be the intention of the amendment.

During proceedings of the Commission on the Constitution, Mr. Kumao Nishimura,¹⁵ representing the authority of the Ministry of

¹³ Quoted in *Kempō chōsakai hōkokusho fuzoku bunsho* No. 2, *supra* note 10, at 719.

¹⁴ *Kempō chōsakai hōkokusho fuzoku bunsho* No. 5, *supra* note 10, at 284.

¹⁵ Mr. Nishimura formerly was the Director of the Bureau of Treaties, Ministry of Foreign Affairs.

Foreign Affairs, testified that one purpose of Article 98(2) was to recognize the domestic validity of treaties and international laws; another purpose was to emphasize Japan's high degree of respect for international law. Article 98 must be interpreted with respect to this political background.¹⁶

The legislative history and the official government interpretation of Articles 81 and 98 has been traced above. The Court's view was made clear in the well-known *Sunakawa* decision.¹⁷ It was there held that a treaty featuring extreme political considerations and bearing upon the very existence of the country as a sovereign power, is outside the scope of judicial review, unless it is patently unconstitutional.¹⁸ Presumably then the Supreme Court believed treaties to be subject to the Constitution; except for treaties of a highly political nature, treaties are subject to judicial review as well. The present view of the Supreme Court thus coincides with the view consistently put forth by the government.

III. THEORETICAL ISSUES

A. The Validity of Treaties in Domestic and International Law

As international rules, treaties find their validity in international law. The problem of such validity is outside the scope of a constitution. When a treaty is subjected to constitutional review by a domestic court, the effect of the judgment is upon the validity of the treaty in domestic law. It is not doubted that review of the validity of treaties in international law is not a proper function for a domestic court.

Generally, the validity of treaties in international law is terminated only when the signatory states so agree. If a court does decide that the domestic application of a certain treaty is unconstitutional, the government is under an obligation to do its best to cure the defect. This inconsistent treatment of treaties in domestic and international law is an undesirable outgrowth of the present state of development of international society, but must be recognized.¹⁹

¹⁶ *Kempō chōsaki hōkokusho fuzoku bunsho* No. 5, *supra* note 10, at 184.

¹⁷ *Japan v. Sakata*, 13 Keishū 3225 (Sup. Ct., G. B., Dec. 16, 1959).

¹⁸ *Id.* at 3234-35.

¹⁹ M. ITO, *KEMPŌ NO KENKYŪ* (Studies on the Constitution) 226 (1965). Kurota, *Jōyaku no ikenshinsaken no genkai* (Limits of the constitutional review of treaties), *JURISUTO* (Special issue on *Sunakawa* case) 57 (Jan. 1960).

B. The Admission of Treaties into the Domestic Legal Order

Upon ratification by the parties, treaties are valid in international law, but they are not necessarily valid and enforceable in domestic law. For under the present regime of international law, the constitution of each state determines the legal status of treaties in domestic law. The constitution of each state also determines what, if any, additional legislation is necessary after conclusion or promulgation to give treaties validity in domestic law.

A complete comparative constitutional survey of this issue will not be attempted here.²⁰ But a typical example of a constitutional system which does not give treaties automatic validity in domestic law is that of England. There the Crown concludes treaties without the consent of Parliament and treaties do not of themselves have validity in domestic law. Where the treaties relate to the rights and duties of the people or place financial burdens upon the state, they are enforced in the country only after Parliament has enacted enabling legislation. Such legislation is usually passed after the signing and before the ratification of treaties.

Under a constitutional system such as England's, the question of the domestic validity of a treaty in the face of a conflict with the constitution or another law is never raised. The courts can deal only with the laws established to execute the treaties; they do not deal directly with the treaties. This is so even if the treaties are self-executing, as will be explained below.²¹

In many other constitutional systems, treaties themselves are given validity in domestic law, that is, they become enforceable as domestic law upon their promulgation. It is not a matter of concern whether a specific provision in the constitution so provides. There may be instances in which domestic legislation is enacted to enforce treaties, but these are supplementary, not necessary, measures for the enforcement of treaties.

Japan adopted the latter system under both the Meiji and the present constitutions. Indeed, there is a trend toward such constitutional systems. Most of these systems require the participation of parliament in the conclusion of treaties. However, such participation bears no necessary relationship to the treaties' self-executing nature. For example, under the Meiji Constitution the participation of the Imperial

²⁰ On the precise issues see Y. TAKANO, *supra* note 5, at 118 *et seq.*

²¹ See text pp. 1071-73 *infra*.

Diet was not permitted, but treaties were given validity in domestic law upon promulgation by the Emperor.²² On the other hand, the Constitution of Spain requires legislation to enforce treaties internally, in spite of the fact that the approval of Parliament is necessary to conclude treaties.

The Japanese Constitution's provision on promulgation of treaties does not expressly provide that promulgation shall give the treaties validity in domestic law. However, Article 98, paragraph 2, provides for the faithful observance of treaties. It may be assumed that the treaties have validity in domestic law upon promulgation.

C. *The So-Called "Constitutional Supremacy" and "Treaty Supremacy" Theories*

The opposing theories of "Constitutional Supremacy" and "Treaty Supremacy" dominate discussion in Japanese academic circles today. Many treatises on the Constitution explain and compare these two theories and endeavor to determine which is correct. The majority and minority opinions of the Supreme Court in the *Sunakawa* decision mirror this debate in the academic field. But in the writer's opinion, a careful interpretation of the Constitution will indicate that the rationale of the Treaty Supremacy theory is faulty.

Proponents of the Treaty Supremacy theory rely principally on Article 98, paragraph 2. They assert that even unconstitutional treaties should be faithfully observed and enforced as domestic law. As the proponents of the Constitutional Supremacy theory point out, however, the relative status of constitution and treaties cannot be inferred from Article 98, paragraph 2. Rather that article is only a recognition that Japan will not neglect its treaty obligations under international law and that treaties will be given validity in domestic law.

Proponents of the Treaty Supremacy theory also look to Article 81, which does not specifically include treaties as objects of judicial review. They argue that the Article is meant to *exclude* treaties as objects of judicial review, and that this in turn indicates that treaties occupy a higher status than the Constitution. But that is a non sequitur, for the question of judicial review is separable from the question of the supremacy of treaties or constitution. Thus if treaties are to be excluded from judicial review, this might equally well indicate that determination of their constitutionality should be left to the political

²² See text pp. 1058-59 *supra*.

branches of government. Article 99, which requires all Ministers of State and members of the Diet to respect and uphold the Constitution, would lend further support to the latter interpretation.

Having no solid foundation for their theory in the provisions of the Constitution, proponents of the Treaty Supremacy theory have turned to the principle of international cooperation allegedly implicit in the Constitution. Thus they argue that, even recognizing the Constitution to be the fundamental expression of national sovereignty, it is faithful to its principle of international cooperation to give treaties, as the law of international society, higher status than the Constitution. Although this reason seems to be a positive one, it has been criticized on two grounds. First, if that had been the intention, the rigid special procedure required for amendment of the Constitution would have been unreasonable; amendment is more difficult than treaty ratification. Second, such a rationale undercuts the principle of national sovereignty, a cornerstone of the Constitution, without any explicit constitutional authority for doing so.

The discussions of the two schools of thought in Japan have produced an abstract, pedantic theory. But what the problem of judicial review of treaties demands is a mature theory for interpreting positive law.

IV. THE SUNAKAWA DECISION

The *Sunakawa* decision is the only Supreme Court decision dealing directly with Article 9 of the Constitution, which is beyond question the most important and controversial article in the present constitution. Consequently, the case is one of the most important to arise under the new Constitution.²³

The so-called *Sunakawa* decision was the catalyst for extensive academic discussion of the relationship between the Constitution and the validity of treaties. Furthermore it was important because it distinguished between self-executing and non-self-executing treaties, a distinction which has not always been clearly maintained.

The Sunakawa incident occurred on July 8, 1957, at Tachikawa Air Base in the village of Sunakawa. A group of demonstrators protesting the extension of a runway at the air base trespassed on the base, knock-

²³ The complete translation into English of the Reason (Majority opinion), supplementary opinions, and other opinions is contained in J. MAKI, COURT AND CONSTITUTION IN JAPAN, SELECTED SUPREME COURT DECISIONS, 1948-60, 298 (1964). On my general comment and criticism on this decision, see 2 I. SATŌ, KEMPŌ KAISHAKU NO SHOMONDAI (Issues on constitutional interpretation) 95 (1962).

ing down a boundary fence. Seven of these Japanese were charged under a law prohibiting entry without good reason into an area or installation utilized by the United States Armed Forces.²⁴ The question whether the United States-Japanese Mutual Security Treaty itself was unconstitutional became the basic issue. The Supreme Court reversed a Tokyo District Court decision which had ruled that the defendants were not guilty. The Tokyo District Court reasoned that by sanctioning the retention of United States Armed Forces in Japan the Japanese government was maintaining a war potential, forbidden by Article 9, paragraph 2. Holding the government's action sanctioning retention of the United States forces to be unconstitutional, the court stated that the implementing law under which the defendants were charged was in contravention of Article 31 of the Constitution, which provides that no person shall suffer a criminal penalty "except according to procedure established by law." This opinion is the so-called "Date Decision."²⁵

The Supreme Court reversed the lower court decision. But rather than accepting the arguments on appeal of either party,²⁶ it held that

²⁴ The charge was under article 2 of *Nipponkoku to amerika-gasshūkoku to no anzen hoshō jōyaku daisan-jō ni motozuku gyōseikyōtei ni tomonau keiji-tokubetsu-hō* (Special criminal act accompanying the Administrative Agreement based on article 3 of the Japan-United States Security Treaty) (Law No. 138, 1952). The title of the statute was changed in 1960 by Law No. 102, as a result of the amendment to the Treaty, but the substance still remains the same.

²⁵ Regarding my general comment and criticism on this decision, see I. SATŌ, *supra* note 23, at 78.

The Date Decision purported to avoid direct consideration of the constitutionality of the Security Treaty itself by judging directly only the unconstitutionality of the action of the Japanese Government.

However, as the Supreme Court decision later said, a judgment about whether the action of the Japanese Government in retaining the United States Armed Forces is unconstitutional has as its underlying premise the answer to a prior question; whether the content of the said treaty is in contravention of the constitutional provisions. Thus while the Date Decision did not formally purport to judge the Security Treaty unconstitutional, such was its practical effect. K. Yokota, *Jōyaku no Ikenshinsaken—Sunakawa hanketsu o chūshin to shite* (Judicial power of constitutional review of treaties—centering around the Sunakawa decision) 73 *KOKKA GAKKAI ZASSHI* (No. 7) 1, 4 (1960).

²⁶ On appeal to the Supreme Court, the prosecutor argued that since the word "treaties" is clearly omitted from Article 81, and because Article 98, paragraph 2, provides for the faithful observation of treaties, treaties shall be outside the scope of judicial review. The brief continued:

This does not mean that the Constitution permits the conclusion of the unconstitutional treaties.... [T]he Constitution leaves the determination of the constitutionality of treaties to the Cabinet and the Diet, the highest political organs of the state, in consideration of the nature of treaties and the character and function of the court.... Since treaties are outside the scope of judicial review, it is beyond question that the action of the Government which, as prescribed in the original judgment, sanctions the retention of the United States Armed Forces, is outside the scope of judicial review.

13 *Keishū* at 3303.

treaties which have a highly political nature, not treaties in general, fall outside the scope of judicial review.²⁷

The Security Treaty in the present case must be regarded as having a highly political nature which, as was pointed out above, possesses an extremely important relation to the basis of the existence of our country as a sovereign nation. There are not a few points in which a legal decision as to the unconstitutionality of its content is simply the other side of the coin of the political or discretionary decision of the cabinet, which concluded the treaty, or the National Diet, which gave its consent to it. Consequently, the legal decision as to unconstitutionality has a character which, as a matter of principle, is not adapted to review by a judicial court, which has as its mission a purely judicial function. It accordingly falls outside the power of judicial review by the court, unless unconstitutionality or invalidity is patent. It is proper to interpret the matter as one that must be entrusted primarily to the decision of the cabinet, which possesses a power to conclude treaties, and of the National Diet, which has the power to approve them; and it ultimately must be left to the political review of the sovereign people. Thus, this matter is not concerned either with the unconstitutionality of the Security Treaty or with the actions of the government that are based on the treaty or with whether the case is one in which [the treaty] has become a basic premise, as in the present case.

Defendant's lawyer answered the Constitution must be given higher status than treaties, giving six underlying reasons:

(1) An interpretation permitting the conclusion of unconstitutional treaties gives the treaties higher status than the Constitution, and is contradictory to article 99, which establishes the obligation of the Cabinet to respect and uphold the Constitution.

(2) If treaties were given higher status than the Constitution, the Constitution, which is particularly difficult to amend in its own wording, could be amended in practice by the easy procedure of concluding treaties. [Without a special, clear provision, such as article 54 of the Constitution of the Fifth Republic of France], it is not possible to realize through the conclusion of treaties the same results intended to be realized through amendment of the Constitution.

(3) Article 98, paragraph 2, does not refer to the question of the superiority or the inferiority of the validity of treaties and the Constitution. Its purpose is only to recognize the validity of treaties in domestic law.

(4) The premise of the opinion insisting on the higher status of treaties is the respect for the principle of international coordination embodied in the Constitution. However, the Japan-United States Security Treaty is precisely contradictory to this principle because substantially it is a treaty of military alliance.

(5) Any interpretation holding the view that the Constitution has higher status than treaties and, at the same time, insisting that treaties are beyond judicial review, either on the grounds that the word "treaties" is omitted from article 81 or on the grounds of the theory of Political Question, is logically self-contradictory.

(6) In domestic law, treaties have the same validity as municipal laws. The power of judicial review therefore can also be exercised on treaties. Though the word "treaties" is omitted from article 81, a treaty is an "official act."

13 Keishū.

²⁷ *Id.* at 3234-35.

The decision then considered whether the Security Treaty was "patently unconstitutional or invalid" and judged that "such retention of the United States Armed Forces must certainly be in accord with the intent of Article 9, of Article 98, paragraph 2, and of the Preamble of the Constitution."²⁸

To a final contention that the Administrative Agreement,²⁹ which the special criminal act,³⁰ implements, was unconstitutional because the consent of the Diet had not been obtained,³¹ the Court replied that the agreement was within the scope of article 3 of the ratified treaty.³² The Court also pointed out the fact that the House of Representatives had rejected a resolution that the government obtain the Diet's consent to the Administrative Agreement.³³

Although the Court agreed unanimously upon the proper *judgment*, it should be noted that no fewer than ten justices differed in varying degrees over the issues raised by the case. Disputes over the nature of the power of constitutional review of treaties and other "acts of government" and of "political questions" are of special significance. Three justices presented minority opinions.³⁴ They insisted that all treaties, including treaties having a highly political nature, should be subject to judicial review. Thus reaching the merits, they judged the treaty constitutional.

The minority opinions first disposed of the contention that the treaty's validity presented a political question, and was therefore not reviewable. Justice Kotani wrote as follows:³⁵

It goes without saying that not only among treaties but among laws as well many are of great importance to the existence of our country and consequently have a high political content. Would the Majority Opinion say that in the case of these, as well as treaties, the exercise of the right of constitutional review is limited only to cases of patent unconstitutionality? If not, then it is clear that the logic is inconsistent. [Ac-

²⁸ *Id.* at 3235-36.

²⁹ *Nipponkoku to amerika-gasshūkoku to no aida no anzen hoshō jyōyaku daisanjō ni motozuku gyōseikyōtei* (Administrative Agreement based on article 3 of the Japan-United States Security Treaty), which came into effect on April 28, 1952 (signed on February 28, 1952). This agreement was replaced by Treaty No. 7, June 23, 1960, which preserves the same basic contents.

³⁰ See note 24 *supra*.

³¹ JAPANESE CONST. arts. 61, 73(3).

³² 13 Keishū at 3236.

³³ *Id.*

³⁴ These opinions were by Justices Katsushige Kotani, Ken'ichi Okuno, and Kiyoshi Takahashi. They appear in 13 Keishū at 3268-86.

³⁵ *Id.* at 3275-77.

ording to the majority opinion] the right of constitutional review is in the position of being completely unable to touch on important national affairs. (What is termed "patent unconstitutionality and invalidity" in the majority opinion is something which, by and large, does not exist. It exists only in name.) I believe that [the majority's view] threatens the very foundations of our system of the separation of powers Again, the phrase "patent unconstitutionality and invalidity" has been taken to mean "unconstitutional and invalid as can immediately be understood by anyone." But can there ever be a defect that is unconstitutional and invalid as can be immediately understood by anyone in a treaty that has been concluded through the pooling of intellects over a long period and has been approved by the wisdom of many? In short, the majority opinion can be considered as nothing more than a self-consoling excuse regarding the right of constitutional review. Accordingly, the final position of the majority opinion is the same as saying that the right of constitutional review does not extend to treaties.

The minority opinions then supported their own position by comparing the procedure for amending the Constitution with the procedure for concluding treaties.³⁶ Finally, since treaties as well as laws are given domestic validity, the minority justices argued that treaties should be subsumed under the term "the laws" in Article 81. For example, Justices Okuno and Takahashi, in their joint opinion, wrote as follows:³⁷

In essence, treaties are contracts in international law between nation and nation, but at the same time there are cases in which treaties in themselves possess validity in domestic law, and cases in which they are implemented through the separate enactment of domestic law. We interpret the situation as follows: in cases in which treaties in themselves possess binding force over the people as domestic law, their validity as domestic law, as a matter of principle, stands in a position beneath the Constitution, the supreme law; these cases, like domestic law, become the object of so-called constitutional review by the courts under article 81. It is the same when treaties are judged as premises in suits. . . . On the other hand, there are those who hold that because the word "treaty" does not appear in the above article 81, the courts have no power of constitutional review over treaties. Even granting that the courts adjudge a treaty unconstitutional, that only denies the validity of the treaty as domestic law and does not deny its validity in international law, wherein it would still be valid; . . . the courts do not review or judge the validity of treaties under international law. [That is the reason] that the word "treaty" was not inserted in article 81; that article is not to be understood as having the intent of denying to the courts the right of judicial review of the validity of treaties in domestic law. . . . In

³⁶ *Id.* at 3273, 3281.

³⁷ *Id.* at 3280-81.

this sense, the proper interpretation is that treaties are included in the "laws" of article 81. In the same way the proper interpretation is that treaties are included as domestic law in the "laws" of article 76, paragraph 3, and article 98, paragraph 1, of the Constitution.

V. CONCLUSION: A NEED FOR MEANINGFUL DISTINCTIONS

The viewpoint expressed above fails to make necessary distinctions.³⁸ The first distinction is that the Court has the power of constitutional review over treaties only in so far as they are effective as domestic law rather than as international law. The second distinction is between self-executing and non-self-executing treaties. Non-self-executing treaties cannot originally be applied by the Court, and are not originally subject to judicial review. This distinction between self-executing and non-self-executing treaties is central to any proper interpretation of Article 81.³⁹

Self-executing treaties are those whose contents are enforceable as internal law without further legislation.⁴⁰ This concept was established by court decisions under article 6, paragraph 2, of the United States Constitution. As Chief Justice Marshall wrote in *Foster v. Neilson*:⁴¹

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.

Marshall distinguished "a treaty provision that operates of itself" from "a stipulation that a particular act shall be performed, in which case the legislature must execute the contract, before it can become a rule for the court." Such a "stipulation" renders a treaty non-self-executing. The treaty then has no validity in domestic law and is not applied by the court. Only the laws enforcing such a treaty are subject to constitutional review.

The above analysis could be applied to Article 81 of the Constitution of Japan, even though Article 81 does not directly deal with the

³⁸ See S. Kurota, *supra* note 19, at 58.

³⁹ See *id.*; M. Itō *supra* note 19; K. Hashimoto *Jōyaku to iken rippō shinsaken* (Treaties and the judicial power of constitutional review), *KIKAN HÖRITSUGAKU* (Jurisprudence quarterly) (No. 28) (1960); T. Fujita, *Jōyaku no gōkensei* (The constitutionality of treaties), 4 *Jōchi hōgaku* (Sophia Journal of law) (No. 2) (1960).

⁴⁰ Although the minority opinions in the *Sunakawa* case adopt this interpretation, only Justice Kotani delineates between self-executing and non-self-executing treaties with sufficient clarity. 13 *Keishū* at 3270. There is another interpretation which tries to affirm the judicial review on treaties by involving the treaties in "the regulations" in Article 81. But it is unnecessary to adopt this interpretation.

⁴¹ 2 Pet. 253 (1929).

judicial review of treaties. Self-executing treaties are similar to other domestic laws, and in this regard they are naturally included in "the laws." And with regard to non-self-executing treaties, only the laws established for enforcing them, not the treaties themselves, become objects of judicial review.

But where the constitutionality of laws executing a non-self-executing treaty is to be judged, a question arises as to whether the court can exercise the power of judicial review on the treaty itself as a necessary premise of the judgment. Views are divided on this point, which was central to the Date Decision in the *Sunakawa* case. For example, Professor Kurota denies the courts' ability to reach the question, since such a treaty has of itself no validity in domestic law.⁴² So also does Professor Miyazawa:⁴³

The court is not authorized to exercise the power of judicial review on treaties in the way which, through the exercise of the power on laws and ordinances, makes the result the same as judicial review of treaties themselves.

But against these views, Professor Itō affirms the judgment of the Court on the treaty as a basic premise as follows:⁴⁴

[S]ince treaties are of a highly political character, the court must be very careful in judging their unconstitutionality. However, even so, the judgment of the constitutionality of a treaty, when logically necessary as a basic premise [of a decision upon the laws executing it] should not be precluded in the name of a "Political Question."

According to this view Professor Itō supports the Date Decision in the *Sunakawa* case:⁴⁵

The Date Decision did not directly judge the Security Treaty itself unconstitutional. It considered the constitutional validity of the Security Treaty as a basic premise, which as a practical matter made clear the unconstitutionality of the Special Criminal Law, a domestic law for enforcing the Security Treaty.

A final point is in order. As has been widely said, the Court ought to be extremely cautious in judging a treaty unconstitutional. It has been frequently noted that there is not a single example in the history of the United States of the Supreme Court declaring a self-executing

⁴² S. Kurota, *supra* note 19, at 59.

⁴³ T. MIYAZAWA, *NIHONKOKU KEMPŌ* (The Constitution of Japan) 672 (1955).

⁴⁴ M. Itō, *supra* note 19 at 235-36.

⁴⁵ *Id.* And *see* 2 I. SATŌ, *supra* note 23, at 90.

treaty unconstitutional. The court usually avoids the judgment of unconstitutionality either by invoking the "political question" doctrine or by construing the treaty so as to save its constitutionality.⁴⁶ An equally circumspect approach by the Japanese Supreme Court may eventually do the most to strengthen a tradition of judicial review.

⁴⁶ However, the United States Supreme Court did recently hold part of an executive agreement unconstitutional. *Reid v. Covert*, 354 U.S. 1 (1957).

On this decision see K. TAKAYANAGI, *TENNŌ, KEMPŌ DAI KYŪ-JŌ* (Emperor, Article 9 of the Constitution) 184 (1963). Professor Takayanagi, who died recently and who was a pioneer in Japan in the study of the system of judicial review of the United States, gave comment on the Supreme Court decision in the *Sunakawa* case as follows:

The prosecutor adopts the interpretation that the court has no power of constitutional review of treaties. This interpretation is supported by influential constitutional scholars in Japan. I am skeptical on such interpretation. Apart from the *Sunakawa* Case and in a view of long perspective, I think such interpretation which makes the scope of judicial power too narrow would be dangerous.

Id. at 185.

