

# Introduction to the Rule of Law (“法の支配”)

## I . Introduction

The idea of the rule of law is quite widespread among the civilized nations, beyond hedges between the Common Law jurisdictions and Continental Law jurisdictions. It is true that a concept of the rule of law has been developed by and among common law jurisdictions. In the other jurisdictions, however, the similar legal principles have been developed. In non-common law jurisdictions, such as France, Germany, Japan, Taiwan, the doctrine of the rule of law or the similar legal principle has been well recognized in the name of “la suprématie de la règle de droit” or “le principe de la légalité”, “Rechtsstaat”, “法の支配”, and “法治主義” or “法治国”, respectively.<sup>1</sup> They are not necessarily identical to the rule of law in common law tradition, although after World War II the similarity between the rule of law in common law jurisdictions and the counterparts thereto in other jurisdictions have been getting more substantial. At the international level, the idea of the rule of law is also well recognized and the concept thereof has been developed.<sup>2</sup> In all of civilized jurisdictions at both international and domestic levels, the doctrine of the rule of law is deemed as one of the important legal doctrines. However, in spite of the fact that the doctrine of rule of law is widely recognized, the term of the rule of law is commonly known and used by jurists in any civilized jurisdictions and in spite of the fact that various scholars have made efforts to define it, there is no universally accepted definition. Definition of the rule of law has an extremely wide spectrum. Further, beyond understanding in the legal field, the term of the rule of law has been used in various contexts, including political and journalistic contexts, in not well-considered manner. In such contexts, it is abstractly asserted without considering the precise content that the rule of law is the opposite notion of “rule by person” and means abidance by laws. Sometimes, the term is even understood from impression of the language. Further, the counterpart doctrine developed in various non-common law

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<sup>1</sup> Those concepts are not necessarily same as the rule of law. However, they are described as the rule of law when they are translated in English.

<sup>2</sup> For example, the European Convention for the Protection of Human Rights and Fundamental Freedom of 1950. The Universal Declaration of Human Rights of 1948.

jurisdictions have developed based on different legal principles and different understandings of basic and philosophical view of laws from those of common law jurisdictions, and hence they are not completely identical to the notion of rule of law in common law tradition. Nonetheless, such counterpart doctrines are translated into English language as “rule of law”.<sup>3</sup> Such a process of translation seemingly increased difficulty to form universally acceptable definition of the rule of law. Such development process and its diversified background of development of the rule of law might be one of the causes of difficulty in reaching consensus concerning its definition. Moreover, a concept of the rule of law is not a static but a dynamic concept. The rule of law has a nature of a mechanism for implementing or materializing a particular rights or an idea of law. A mechanism has to vary and change depending on circumstances or backgrounds in which such mechanism is planted to, so that it efficiently and meaningfully achieves its purposes in each circumstance. To achieve a particular legal purpose, a different mechanism might be needed in different jurisdiction. The circumstances and backgrounds of each jurisdiction are various not only from jurisdictions to jurisdictions but from an era to an era. Hence, it is not easy to define the rule of law in a universal manner, and the definition cannot but be made by using very general and even ambiguous terms. In this regards, it can be said that it is similar to a concept of “Due Process of Law”. It is not easy to properly and precisely explain or define in several lines of words what “Due Process of Law” is.

Moreover, in some jurisdiction, like Japan, there is another unique factor which increases such difficulty. In Japan, after World War II, constitution of Japan changed from the 「大日本帝国憲法（明治憲法）」, which was based on Weimar Constitutional Law, to 「日本国憲法」, which considerably relies on Constitution of the USA. However, those two constitutional laws have completely different constitutional principles to each other, including an idea of “rule of law”. Hence, some confusion is found in the process of transit from 明治憲法 to 日本国憲法. Before World War II, the understanding of the rule of law in Japan relied on a German notion, “Rechtsstaat” (it was translated into Japanese as “法治国”). Under principle of “Rechtsstaat”, the rule of law was referred to as “法治国/法治主義”. After World War II, however, due to change of constitutional law, the theoretical ground of the rule of law was supposed to change from that of Weimar Constitution to something more similar to the ground accepted in common law

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<sup>3</sup> For example, Rainer Grote, Rule of Law, Rechtsstaat and Etat de droit in Christian Strack, ed., Constitutionalism, Universalism and Democracy --- Comparative Analysis (1999)

jurisdiction. Nevertheless, Japanese commentators who were familiar with the German law tended to talk about the rule of law in the context of “Rechtsstaat”.<sup>4</sup> On the other hand, commentators who were familiar with American law tended to develop the rule of law in the context of common law tradition.<sup>5</sup> As a result, there existed confusion about the concept of the rule of law and such confusion extended to even to terminologies. In fact, even post-World War II, “法治国/法治主義” was still in use together with new terminology under the new constitutional law, namely “法の支配”. In Taiwan, it seems that similar problem is also found. In Taiwan, the rule of law is commonly translated as “法治/法治主義” without any reservation about difference between “Rechtsstaat” and the rule of law in common law tradition and without deliberating a nature of Taiwanese Constitutional Law. Taking it into account both that a considerable number of Taiwanese jurists acquired legal education in common law jurisdictions and that Taiwan basically belongs to continental law system; it seems that there might be confusion similar to that of Japan in Taiwan.

As stated above, consistent efforts by lots of scholars have, so far, not reached universally acceptable definition of the doctrine of the rule of law. In fact, it is difficult to define the doctrine of the rule of law in universally accepted manner. Due to lack of a clear definition, the notion of the rule of law is sometimes misunderstood or misused by protagonists and antagonists of the rule of law for their own agenda or purposes. Recently, there is a tendency that the rule of law is deemed as impractical dogmatic notion, and it is asserted that has been losing its significance in a legal field. It is true that it is difficult to define the doctrine of the rule of law in universal manner. The doctrine of the rule of law, however, still significant legal principle in modern legal system and it is at least possible to share common understanding about the grand design of the rule of law among civilized nations beyond difference of jurisdiction. The grand design denote, in this context, ultimate purposes, objectives, or ends and a framework of the mechanisms for materializing them.

The attempt of this article is firstly to crystallize the grand design of the rule of law, rather than giving specific definition to the rule of law. For this purpose, firstly,

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<sup>4</sup> For example, 高田敏, “ドイツにおける法の支配” 「現代における法の支配」 p. 93、(法律文化社, 1979), “近代における「法の支配」理論と「法治国」理論”, 公法研究 20 号 65 頁

<sup>5</sup> For example, see 佐藤幸治, “日本国憲法と「法の支配」”, (有斐閣, 2002)

an issue unique to process of acquisition by Japan of the rule of law is focused. In this process, development of “Rechtsstaat” in Germany, adoption of “Rechtsstaat” from Germany, and a process of shift from the “法治国/法治主義” to “法の支配” in Japan will be briefly reviewed. I believe that this will be beneficial to Taiwan, which use the terms of “法治/法治国/法治主義” as terminology describing the rule of law for reconsidering and crystallizing the notion of the rule of law in the context of constitutional law and legal system of Taiwan. Secondly, a history of the rule of law and the current understandings of the rule of law is briefly reviewed. The purpose behind of this article is to draw attention of jurists in Taiwan to an issue of the rule of law and trigger them to rethink and discuss about the rule of law in a legal field of Taiwan and among Chinese speaking jurists, and then hopefully ultimately to promote the rule of law in China.

In this decade, laws of Taiwan have developed quite rapidly. However, such development is found mainly in a field of business related laws. Compare with development of business laws in Taiwan, development of public laws in Taiwan is really insufficient. Especially, understandings of basic notion such as the rule of law, due process etc. are still quite immature. Due to commercial or political interests, some jurists in Taiwan makes propaganda comment for Chinese Communist regime that there is the rule of law in China. The other jurists in Taiwan do not or cannot correctly respond to such an absurd comment. Such phenomenon is seemingly reflecting less concern about public law, at least the rule of law, and immaturity concerning this issue in Taiwan. It is necessary to neutralize such a strong propensity toward business related laws in Taiwan.

As widely known, a legal system of China is not tantamount to that of a legally civilized county. Obviously, there is no rule of law in China in accordance with standards of civilized jurisdictions. Although the constitutional law of China by appearance stipulates “fundamental rights”, there is no proper mechanism to implement such rights at all. In fact, there are countless cases of serious violation of fundamental rights in China. The judiciary is structurally influenced by the Chinese Communist Party (CCP), and hence judicial independency is quite poor. No fair trial can be expected in China. Tremendous amount of citizens in China are suffering from such uncivilized legal system. Further, lack of the rule of law adversely affects not only fundamental rights of Chinese people but also interests of foreign business enterprises in China and their investors. As a scale of economic activity in China is becoming more substantial, foreign business enterprises more

frequently need to seek for legal remedy in China. However, lack of the rule of law causes malfunction of legal remedy. Quite obvious infringement of intellectual property rights in China is hardly remedied in a framework of legal system. Due to lack of the rule of law, foreign business entities can have no proper legal remedy and hence have to depend on “extra-judicial protection” by various levels of government officials to protect their business interests, and are finally caught in the mud of corruption.<sup>6</sup> In fact, it is even a threat to international community that a country which is acquiring economic power has uncivilized legal system. In this context, promoting the rule of law in China is common interests of the international community. Recently, it is often discussed among commentators in western countries how the rule of law is prompted and established in China, and various projects have been launched for this purpose. It seems, however, that no conspicuous consequence is found, so far. It is quite natural that westerners, who have quite limited idea about culture, government, legal system, political system and social system in China, will not be in a good position for doing this task. In this regards, jurists in Taiwan might be in better position, or are perhaps only qualified for doing this task. At this moment, it is only Taiwan where the rule of law can be discussed in Chinese language by substantial number of jurists properly educated under normal legal system. Taiwanese jurists are perhaps in best position to understand insufficiency of jurists in China who have acquired totally unusual “legal notions” of public law under legal education by CCP regime. Practically and theoretically, it is, in fact, impossible to establish the rule of law in China as long as dictatorship by the CCP regime exists. However, proper and active discussion about the rule of law in Taiwan should be, at least, helpful and encouragement to jurists in China who wish to acquire a correct notion of the rule of law.

Taiwan is expected to play a key role for this purpose and to make contribution to international community in this regards.

## II. “法治国/法治主義”

Before going to details of the rule of law, a unique issue, which rises in jurisdictions using Chinese characters, should be reviewed.

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<sup>6</sup> See Ethan Gutmann, *Losing The New China: A Story of American Commerce, Desire and Betrayal* (April 2004)

In jurisdictions, such as Japan and Taiwan, the rule of law is normally translated as “法治/法治国/法治主義”. However, “法治/法治国/法治主義”, at least in Japan, is not translation of the rule of law in common law jurisdiction but German tradition of “Rechtsstaat”, which was originated with an idea of a liberal nation of Kant and Fichte. The term of “法治国” was first introduced in Japan as a translation of “Rechtsstaat” in 1870’s to 80’s, and in 1880’s the concept was well accepted in Japanese legal field. During modernization of Japan in 19<sup>th</sup> Century, Japan adopted its legal system from mainly France and Germany.

Due to limited scope of this article, the details of historical background of development of “法治国/法治主義” and its original notion are overviewed to the extent of necessity for the purpose of this article.

As a matter of fact, Japan decided to adopt German constitutional law, Weimar Constitutional Law, and Weimar Constitutional Law contained a notion of “Rechtsstaat”. Upon adoption, “Rechtsstaat” was translated as “法治国/法治主義” and thereafter Japan began to use the terms of “法治国/法治主義” in legal context. It is most likely that Taiwan adopt the terms of “法治/法治主義” through Japan in a process of developing a modern legal system. If so, a notion of “法治/法治主義” in Taiwan has its origin in “Rechtsstaat”, not the rule of law in common law jurisdiction. At least, it is most unlikely that the notion of “法治/法治主義” which has been commonly used in a legal field of Taiwan has the same basis as those of the rule of law in common law jurisdictions. In fact, the constitutional law of Taiwan is one not from common law system but continental law system, perhaps German system.

Then, we take a look of development of the notion in Germany. In Germany, a process of development of “Rechtsstaat” was not simple and the concept drastically changed in its development.

## 1. Development of “Rechtsstaat” in Germany

### (1) Formal Rechtsstaat

In Germany, the term of “Rechtsstaat” began to be in use in the end of 18<sup>th</sup> Century. The process of development of “Rechtsstaat” can be described as a shift from substantive “Rechtsstaat” to formal “Rechtsstaat” and again to substantive “Rechtsstaat”. Originally, “Rechtsstaat” was deemed as a “free nation” (自由主

義国家), which were promoted by Kant and Fichte.<sup>7</sup> In this context, a “自由主義国家” denoted a kind of state which intended to establish a state where a security of individuals and a society as a whole was protected by legal system.<sup>8</sup> “Rechtsstaat” was deemed as a state which had a purpose to be “free nation” (自由主義国家) and had a means for materializing such a purpose.<sup>9</sup> This idea can be categorized as a substantive form of “Rechtsstaat” in a sense that both the purpose and the means are emphasized.

In 19<sup>th</sup> Century, the means for achieving the purpose was more emphasized, and “Rechtsstaat” was gradually understood as a state which had a means to achieve a state purpose, namely to be a “free nation (自由主義国家)”.<sup>10</sup> This tendency got stronger in the latter half of 19<sup>th</sup> Century. The focus shifted from the purpose to a means to achieve the purpose, and finally only a means for achieving purpose of a state, whatever purpose it is, was emphasized. This version of “Rechtsstaat” began to be accepted as prevailing understanding of “Rechtsstaat” in Germany in the end of 19<sup>th</sup> Century.<sup>11</sup> Under this version of “Rechtsstaat”, whether or not a state was “Rechtsstaat” was judged by whether or not such a state had proper and lawful means for achieve whatever state purposes. In accordance with understanding of this “Rechtsstaat”, the focuses are put on legality or lawfulness of means for realizing the objectives of nations, more specifically on whether actions of a government abide by positive laws, such as rules or statutes properly established by legislative body.<sup>12</sup> In fact, under this understanding of “Rechtsstaat”, “Rechtsstaat” was emphasized and developed in a field of administrative law. Otto Meyer was a flag-bearer of administrative law based on this version “Rechtsstaat”, which were most influential to understanding of “Rechtsstaat” and administrative law of Japan in Meiji (明治時代). This understanding was well-established as a main stream of German public law thorough “Deutsches Verwaltungsrecht” of Otto Mayer.<sup>13</sup> This version of “Rechtsstaat” is called as formal “Rechtsstaat”. Under this understanding, requirements of “Rechtsstaat” were deemed to be met if actions

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<sup>7</sup> Karl Theodor Welker, *Die letzten Gruende von Recht, Staat und Strafe*. (1813), Joh, Christoph Freiherrn v. Arentin, *Staatsrecht der konstitutionellen Monarchie* (1824), Robert von Mohl, *Die Polizei=Wissenschaft nach den Gruendsaezen des Rechtsstaates* (1844).

<sup>8</sup> Friedrich Murhard, *Der Zweck des Staates*, 1832, p. 83.

<sup>9</sup> The idea is attributable to Kant and Fichte. As commonly known, Ferdinand Lassalle criticized this idea as “Nachtwächterstaat (Night watch State)”.

<sup>10</sup> Friedrich Julius Stahl, *Die Philosophie des Rechts*, 2. Bd., 2. Abt., 2. Aufl., 1879, p. 33

<sup>11</sup> Otto Baehr, *Der Rechtsstaat*, (1868), Otto Mayer, *Deutsches Verwaltungsrecht* (1895)

<sup>12</sup> *Supra* Friedrich Julius Stahl

<sup>13</sup> Otto Mayer, *Deutsches Verwaltungsrecht*, 1895.

of a government abide by rules or statutes of the nation regardless of lawfulness of its objectives. It is not coincident that a notion of “administration abiding by statutes (「法律による行政」)” was especially emphasized in the context of “Rechtsstaat”, and “Rechtsstaat” is emphasized in a field of administrative law. As long as a legislative body maintains prudence and a sense of reason, actions of a government properly bound and controlled to prevent arbitral use of government power. Once a legislative body loses its sense of reason or a legislative branch loses its independency of executive branch, however, rules and statutes become tools of a government for its own purposes, regardless of their substantive legality or lawfulness. An idea of formal “Rechtsstaat” had a kind of defect that it could not prevent or stop malfunction of legislative body. Although there were sharp counterarguments against such an understanding of “Rechtsstaat” in Germany,<sup>14</sup> formal “Rechtsstaat” were maintained until World War II. This understanding of “Rechtsstaat” was prevailing under the Weimar Constitution.<sup>15</sup>

“法治国/法治主義” which Japan first introduced in Meiji was this version of “Rechtsstaat”, under which a government could legitimize and legalize its own action by making rules and statutes for serving its own purposes, and this understanding of “法治国/法治主義” also prevailed until World War II. It is reasonably presumed that “法治国/法治主義” introduced in Taiwan was also this line of understanding of “法治国/法治主義” .

## (2) Substantive “Rechtsstaat”

After World War II, the fact that “Rechtsstaat” ( “法治国/法治主義” ) acquired a nature of self-serving for a government and the fact that Nazi enjoyed such a nature of “Rechtsstaat” during a period of its ruling were sufficient motives for German to review and to change understanding of the formal “Rechtsstaat”. As a result, instead of the formal “Rechtsstaat”, substantive “Rechtsstaat” was accepted. Substantive “Rechtsstaat” focuses not only on legality or lawfulness of means to accomplish objectives of a nation but also on legality or lawfulness of its objectives themselves. Simply speaking, objectives of a nation are decided by a constitutional law (Bonner Grundgesetz), which stipulates guarantee of fundamental rights, and legitimate means, which can be adopted to realize such objectives, have to promote

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<sup>14</sup> Carl Schmitt, *Verfassungslehre* (1928), Hermann Heller, *Rechtsstaat oder Diktatur?* (1930), Joseph Held, *Der verfassungsmaessige oder constitutionelle Staat*, 1865.

<sup>15</sup> 高田敏、*supra* 「ドイツにおける法の支配」 p. 99

such rights without violating them. This shift of understanding is reflected in the fact that substantive “Rechtsstaat” has broadened its scope of “law” to be abided by to include fundamental rights under the constitutional law in addition to statutes and rules. At this stage, it was understood that the essence of “Rechtsstaat” consisted in guarantee of fundamental rights.<sup>16</sup> This understanding of “Rechtsstaat” covers functions of the rule of law of common law jurisdiction to some extent.

## 2. Development of “法治国” or “法治主義” in Japan

As stated above, Japan first adopted the formal “Rechtsstaat” in 明治時代(1868 – 1912). “法治国” was first found in 1883, and the concept of “法治国” was well established in a legal field of Japan from the end of 19<sup>th</sup> century or the beginning of 20<sup>th</sup> century. In 大正時代 (1912- 1926), instead of “法治国” a term of “法治主義” began to be in use as a principle of administrative law.<sup>17</sup> Before World War II, the understanding of “法治主義” or “法治国” was almost identical to formal “Rechtsstaat” in Germany, and as development in Germany, “法治主義” or “法治国” was reflected as a principle of “administration abiding by statutes” (法律による行政) and was developed in a field of administrative law. Further, also in Japan, during the World War II the formal “Rechtsstaat” became quite useful and convenient tools for totalitarian government in a sense that a government can accomplish its own objectives in “legal” manner.

In Japan, in addition, there was quite unique understanding of “法治国” during a period World War II. In those days, there was understanding that “法治国” required citizens to abide by rule and statutes. It is obviously wrong idea in terms of a contemporary notion of the rule of law.<sup>18</sup> However, such idea spread over not only among laypeople but also in government, which seemingly tried to use this concept as tool for maintaining “public order”. As stated below, the essence of “法治国”, whether substantive or formal, is to require a government to abide by rules and statutes, not citizens.<sup>19</sup> It seems to me that there is the similar

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<sup>16</sup> Christian-Friedrich Menger, *Der Begriff des sozialen Rechtsstaates in Bonner Grundgesetz*, (1953)

<sup>17</sup> 美濃部達吉、*日本国憲法原論* (1952)

<sup>18</sup> In those days, this understanding was strongly criticized. 織田萬「法と人；法治国の思想」(1933)

<sup>19</sup> I personally heard the same understanding of “法治国” among legal field in Taiwan. It seems to me that there is the same misunderstanding of “法治国” in Taiwan.

misunderstanding of “法治国” in Taiwan.

After the World War II, Japan adopted 日本国憲法 (the Constitutional Law of Japan) based on the US Constitution, which expressly protects fundamental rights without granting reservation of statutes and which stipulates that any unconstitutional statutes are void (Section 1 Article 98, the Constitution of Japan). This constitutional principles are directly conflict to formal “Rechtsstaat”, and hence a term of “法の支配” was introduced as translation of the rule of law under 日本国憲法 in stead of “法治主義” or “法治国”.<sup>20</sup> However, a concept of the rule of law of common law tradition was not well known to Japanese legal field at that time, and its understanding was quite immature. Although the definition of the rule of law by A. Dicey<sup>21</sup> had been introduced, there was a strong counterargument that Dicey’s definition of the rule of law was not a stance of 日本国憲法.<sup>22</sup> In those days, Dicey’s definition was seemingly deemed as the only definition of the rule of law known to majority of Japanese commentators of constitutional law, and hence it was concluded without further research that the rule of law had no ground in 日本国憲法.<sup>23</sup> In addition, most of Japanese commentators were more familiar with German notion of “Rechtsstaat”, and a notion of substantive “Rechtsstaat” newly developed in Germany was easier to accept for Japanese commentators in those days. Perhaps because of such coincidental factors, terminology of “法治主義” or “法治国”, which had the identical or quite similar concept of substantive “Rechtsstaat” in Germany, has used as translation of the rule of law in Japan. This situation was maintained until the

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<sup>20</sup> For example, 高柳賢三、英国公法の理論(1948), 伊藤正己英国法における法の支配(1950); 内田力蔵「イギリスにおける法の支配について (二)」法律時報 23 卷 3 号 28 頁.

<sup>21</sup> A. Dicey, *Introduction to the Study of the Law of the Constitution* (London, 10<sup>th</sup> ed. 1960), Dicey characterized the rule of law as follows: “it means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.” “It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by ordinary law court.” “The rule of law, lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individual, as defined and enforced by the courts; that, in short, the principles of private law have with us been by action of the courts and Parliament so extended as to determine the position of the Crown and of its servant; thus the constitution is the result of the ordinary law of the land.” (p202-203)

<sup>22</sup> 柳瀬良幹「法治行政と法の支配——辻教授の所説について——」法律時報 24 卷 9 号 (1952)

<sup>23</sup> In fact, Dicey’s definition of the rule of law was strongly criticized in those days England and currently it is not prevailing understanding of the rule of law.

researches into the constitutional principles of 「日本国憲法」 were substantially progressed. In 1960's, Japanese commentators of constitutional law tried to revive a concept of the rule of law in a meaning of common law tradition by using a term of “法の支配”.<sup>24</sup> As a result, the terminology of “法の支配”, which is distinguished from “Rechtsstaat” in terms of its content, has been well established. However, there is still controversies as to whether 「日本国憲法」 adopted “法の支配” or “法治主義”/“法治国” (substantive “Rechtsstaat”) among commentators.<sup>25</sup> Details of controversies are beyond the scope of this article, and hence I do not go to details. It seems that commentators who promote “法治主義”/“法治国” in Japan deem the rule of law as a doctrine identical or considerably similar to substantive “Rechtsstaat” in Germany. As later mentioned, it can be said that the elements of substantive “Rechtsstaat” in Germany are similar to those of some versions of the rule of law.<sup>26</sup> However, it is not correct that substantive “Rechtsstaat” is the doctrine of the rule of law of common law tradition in and of itself. Although substantive “Rechtsstaat” is similar to the rule of law in terms of its basic idea and its functions, it should not be noted that existing constitution of Germany, administrative law theories, court system, various legal principles, including the ideas and scopes of “行政権”, “司法権”, “立法権”, and even an idea of law are different from those of Anglo-American law jurisdictions. In Taiwan, it seems that “法治主義” or “法治国” is used as translation of the rule of law without reservation of difference between “Rechtsstaat” and the rule of law and without considering the fact that Taiwanese Constitution is influenced by Weimar Constitution, like 明治憲法. To jurisdictions which adopted their legal concept and legal system from foreign jurisdictions, “法治主義” or “法治国” and the rule of law are definitely not self-evident concept.

### III. Grand design of the Rule of Law (“法の支配”)

#### 1. Origins of the notion of the Rule of Law

There are several understandings about origin of the notion of the rule of law. As

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<sup>24</sup> For example, 伊藤正己、「『法の支配』と日本国憲法」(有斐閣 1954)、清宮四郎=佐藤功編「憲法講座(1)」(有斐閣 1963)、佐藤功「日本国憲法概説」(学陽書房, 4<sup>th</sup> ed. 1991)

<sup>25</sup> 佐藤幸治、「日本国憲法と『法の支配』」(有斐閣 2002)、高田敏、「法治主義と法の支配」  
覚道古希「現代違憲審査論」(法律文化社、1996)

<sup>26</sup> 高田敏、「法治主義と法の支配」p. 41

the origin of the notion of the rule of law, an idea of “equal before law” and supremacy of law in ancient Greece, an idea of Germanic custom law and feudal system in Medieval Age in Europe, and/or Magna Carta and its later confirmations in England are mentioned.<sup>27</sup> The historical origin will not give clear answer to a question of a definition and elements of the rule of law in contemporary meaning. However, review of history might be of some use in helping us understand the ground design of the rule of law. In this section, the alleged origins of the rule of law are briefly reviewed.

In Athens in fifth-century BC, a direct democracy by the citizens was at the highest glory, where all male citizens over thirty were eligible to serve on jury, on magistrates, and on legislative body. In terms of the notion of the rule of law, two principles can be referred to as its origin. One is equality before law, and the other is superiority of law.

In those days, Athens had no legal professionals and no politicians who monopolized authority to produce law in a modern meaning. In other words, law was the products of activities of citizens, and hence it can be said that there was very low risk that legislation became a tool for suppressing citizens who are legislators. A concern was that such laws were enforced in equal manner, namely “equality in before law”. The idea of equality before law of ancient Greek was formed in “Isonomia”. “Isonomia” was a notion established by Solon in ancient Greece, which meant equality of law to all the citizens and a certainty to be governed in accordance with known existing rules were well protected. This tradition was adopted by Athena. Under a principle of equality before law, magistrates of Athena were in practice put in such a position that they should always be subject to known existing laws which were created by citizens.<sup>28</sup> This principle created the similar mechanism to judiciary independence and some aspect of due process of law.

Further, the danger of popular democracy, namely demagoguery, was also well recognized. The underlying risks of democracy were for example realized in a form of condemning Socrates to death. To encounter a risk of democracy, a safeguard mechanism was developed. The safeguard was a principle that the law was expected to acquire a status of superiority which is not easily modified by the popular court and legislative assemblies, so that citizens could not abuse their power

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<sup>27</sup> Geoffrey de Q. Walker, “The Rule of Law”, (Melbourne Univ. Press, 1988) p. 93-127.

<sup>28</sup> Sir Paul Vinogradoff, *Outline of Historical Jurisprudence* (1922) p. 113

through legislation.<sup>29</sup> This idea is similar to superiority of law,<sup>30</sup> although Plato preferred the rule by best man to the rule of law.<sup>31</sup> In those days, the total number of free “citizens” was tantamount to just several percent of the whole population. It means that Athenian “democracy” was more similar to “elitisms” or “aristocratism” in a modern notion. It is quite interesting that even in a form of direct democracy; there was already tension between laws for restraining on democratic power and a principle of democracy.

In the context of the rule of law, it can be said that idea of superiority of law and equality before law were to some extent a synonymous of the elements of the rule of law of the modern notion in its function of restriction on arbitral use of power, although the beneficiary of such restriction is not necessarily general public but quite limited Athenian “citizens”. In ancient Athena, the premise of such superiority of law was self-determination, namely “democracy”. On the other hand, there was a concern about demagoguery, which might suppress minorities.

In Medieval Age, especially after Dark Age, Thomas Aquinas was one of main figures who substantially affected a Western view of laws. Aquinas struggled for compatibility of sense of reason and Church doctrine. He asserted that laws should be based on reason and be for the common good, and hence held that unjust laws were not law.<sup>32</sup> Aquinas also emphasized that laws should be subject to divine law and/or the natural law. Further, Aquinas asserted that the secular power (king) should be exempted from application of positive law but should be subject to the divine law and/or the natural law, which secular power had no authority to interpret in any manner. Here, an idea that the secular power (king) had to subject to some limitation in a framework of law, namely divine law and/or natural law, could be found. Aquinas’s idea of the natural law was that the natural law was the actualization of the eternal law by rational creature, namely human beings. He asserted that rational beings could distinguish good from evil by using their reason, *lumen naturale* (“natural light”). The eternal law is decree of reason expressing God’s provisions for the entire creature. A secular power, king, could make and interpret positive laws, but should be subject to divine law and natural law, which could be interpreted by ecclesiastical power, ultimately pope, who in turn had to

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<sup>29</sup> J. W. Jones, *The Law and Legal Theory of the Greeks*, (Oxford Univ. Press 1992) p. 69-70.

<sup>30</sup> For example, Plato, *The Law* (London: Penning 1970) p. 174

<sup>31</sup> J. W. Jones, *The Law and Legal Theory of the Greeks*, p. 7

<sup>32</sup> Thomas Aquinas, *Treatises on Law*, 95. Art. 1 (Wash. DC: Regency Gateway 1987) p. 76

subject to God. In Medieval Age in which people were still in belief in God, and hence the divine law or natural law could be grounds of legitimacy for restraining secular power, although in modern age it has been replaced by theories of democracy and/or fundamental rights. It can be said that such restriction by “laws” on power of authorities, no matter a secular or ecclesiastical it is, is analogous to an idea of the rule of law in a sense that a power is limited by a means of laws although the purpose of such restriction on power did not cover an idea of protecting common citizens and such restriction on power was mainly for restraining power of the other authority to each other. In this era, the premise of superiority of law ultimately relied on a belief in God, not democracy or sense of reason of human being. Hence, there was not struggle between democracy and supremacy of law.

The other alleged origin of the rule of law is Germanic idea of customary law and the feudal system. Germanic tribes had a notion that customary law was the preexisting, objective, legal stipulation, which included a complex of innumerable rights. All well-founded private rights were protected from arbitrary change, as parts of the usual legal structure over which a monarch had authorities.

According to Germanic political ideas, further, a state and Germanic community was, in essence, an organization for the maintenance of law and order.”<sup>33</sup> The underlying concept was fealty, by which both the ruler and the ruled were bound to the law; law imposed reciprocal, albeit unequal, obligations that ran in both directions, including loyalty and allegiance. This notion permeated through the gamut of social relations of the feudal system. A ruler who breached this law forfeited the rights to obedience of his subjects.<sup>34</sup> The monarch was also bound by such reciprocal “contract” in the feudal system. In Medieval Germanic society, there was an idea and a mechanism for restraining power of monarch through custom law and the feudal system. It can be said that the idea is quite similar to the rule of law in modern age, although such an idea did not cover interests of common citizens.

In England, it is deemed that Magna Carta and its later confirmations are the restatements of the notion of government under the law.<sup>35</sup> The allegedly most

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<sup>33</sup> Frits Kern, *Kingship and Law in Medieval Ages*, (1956) p. 70-71

<sup>34</sup> *id.* p. 87-88

<sup>35</sup> Positivists are in a position against a view that modern legal theory is attributable to Magna Carta because Magna Carta is a kind of deal between a king and nobilities and was even obstacle in the way to freedom and democracy. It is true that Magna Carta was forced concession on King John by

important clause for a notion of the rule of law is Clause 39: “No free man shall be taken or imprisoned or disseized or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or law of the land.”<sup>36</sup> It is true that there have been controversies about understanding of Magna Carta in the context of constitutionalism. As a matter of fact, Magna Carta was a simple document just representing a deal between kings and barons. However, Magna Carta has been understood in different manner in different era, and in each era new interpretation has been given together with then newly developed legal theories and principles. Especially, in Stuart era, when absolute monarch and Parliament was sharply conflicted, Magna Carta provided, perhaps beyond its original scope, common lawyers with premise to fight against absolute monarch by using laws and legal practice. In addition to Magna Carta, a notion of independent judiciary brought by Sir Edward Coke in lots of cases related to enclosure and fight of common lawyers against prerogative courts was all fruits of efforts to limit monarch power based on a doctrine of Divine Rights of King. Further, a rise of liberalism in pre-modern period and its development thereafter considerably affects a notion of the rule of law. Together with development of liberalism, it can be observed that common citizens began to come into the picture. Hence, it is important to understand a line of tradition of liberalism, although I do not go into details of liberalism itself. Especially, John Lock, Montesquieu, and John Stewart Mill, among others, have substantially affected a contemporary notion of the rule of law. Lock’s basic understanding of the rule of law was based on contrast with subjection to the will of tyranny,<sup>37</sup> although Lock did not identify the elements of the rule of law. It should be, however, noted that Lock had a view of elitism and attached to properties when he formulate his understanding of “rights” or “liberty”. Hence, his understanding of the rule of law seemingly did not include general public, yet. J.S.Mill raised an objection to laissez-faire liberalism, which was prevailing in those days, and emphasized general voting rights and active legislation to embrace general public in a scope of a social institution under

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barons protecting themselves from financial loss caused by war in France. However, it is also true that the barons represented the interests of all free man, as stated in the document. Further, Magna Carta has been interpreted in the context of history and new meanings or understanding has been given in each point of history, especially in era of Coke. Reading it together with the later confirmations and its history, the comment by positivists is not supported without reservation.

<sup>36</sup> J.C Holt, Magna Carta,(Cambridge Univ. Press 1992) p. 461. Actually, there are two versions of Magna Carta. One is a version of 1215, which was repudiated a month later after conclusion under support of Pope Innocent III. The other was a version of 1225, which was confirmed King Henry III. The Clause 39 was incorporated in the 1225 version as Clause 29.

<sup>37</sup> John Lock, Second Treatise of Government, (Indianapolis: Hackett 1980) p.103

principle of political and judicial equality. It can be said that ideas of J. S. Mill were a theoretical ground for bringing general public into picture of the rule of law. Montesquieu's concept of liberty is so called "classic legal liberty", namely, "Liberty is a right of doing whatever the laws permit."<sup>38</sup> Montesquieu identifies liberty with a life under the rule of law.<sup>39</sup> He believes that a moderate government provides the greatest liberty. To prevent abuse, the government should be subject to a check by the other power. In connection with the rule of law, Montesquieu contributes a notion of judicial independency, which Lock did not claim. Other thinkers, for example, Bentham influenced John Austin in terms of legal positivism, and Austin in turn affected thoughts of A. Dicey in terms of jurisprudence. James Mill advanced Bentham's utilitarianism and further he, as one of the flag-bears of British philosophical radicalism in 18 Century to 19 Century, asserted for a government under the control of a representative of citizens. To support this idea, he also advocated for general education for public. This was in line of Enlightenment philosophy in 1700's. It is difficult to describe liberalism in few lines of phrases. It should be noted that there are several trends of liberalisms, each of which has different agenda. It is, however, fair to say that liberalism brought common citizens into picture of the notion of the rule of law. Importantly, liberalism advanced individualism based on the belief that individuals, as rational and reasonable beings, know best what is best for them

It cannot be concluded which of the above alleged origins of the rule of law is the actual origin of the rule of law. In fact, it is difficult to identify the single origin or root of the rule of law. However, it can be said that the common feature of the alleged origins of the rule of law is an idea of restraining or controlling abuse of power by a means of law and legal system. The source of such power was various from an era to an era; such as a monarch, an ecclesiastical institution, or popular democratic institution, and the purpose of control of power was not same. Further, the forms and nature of laws, which counterbalanced and controlled such power were also various from an era to an era; such as divine law, natural law, positive laws, constitutional law, customary laws and any other norms. In ancient and medieval age, such restraint or control was matters between monarch and

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<sup>38</sup> Baron de Montesquieu, *Spirit of Law*, edited by J. V. Pritchard, vol.1 (London: Bell and Sons 1914) p. 161.

<sup>39</sup> Thomas L. Pangle, *Montesquieu's Philosophy of Liberalism: A Commentary on the Spirit of Laws* (Chicago Univ. Press 1989) p. 109

parliament, king and nobleman, or ecclesiastical power and a secular king, and general public was out of the picture of benefits of such restraint at all. In modern age in which there is no feudalism system, in which the divine law and the natural law lost their authority over state affairs, in which rise of sense of reason and natural science overrode authority of doctrines of Church, and in which further liberalism substantially affects relations between individuals and government, it is fair to say that the essence of the idea of the rule of law is to protect individuals through laws and legal system from an arbitrary use by a government or a state of its power. This is a grand design of the contemporary rule of law, and the elements thereof, whatever they are, should be able to facilitate and implement such a grand design. Hence, the definition of the rule of law should include elements which are in fact able to implement such idea and include mechanisms through which an abuse by government or a state of its power can be effectively prevented and a violation, if any, can be properly remedied.

## 2. Contemporary Understandings of the Rule of law

The rule of law is supposed to be basic and important legal concept in civilized nations, and continuous efforts to define the doctrine of the rule of law has been made. Such effort was extended to the international level.<sup>40</sup> As stated above, however, so far there is no generally accepted definition of the doctrine of the rule of law. The understandings of the doctrine of the rule of law in civilized nations are so various that it appears that unified understanding thereof cannot be found. Hence, it is difficult to precisely answer to a question of what the rule of law is. Under such circumstances, there is an effort to categorize such various understandings of the rule of law into two groups: formal version and substantive version,<sup>41</sup> each of which further has broad spectrum. <sup>42</sup> Hereunder we review

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<sup>40</sup> The International Commission of Jurists in its Rule of Law Project defined the rule of law “The institutions and procedure, not always identical, but broadly similar, which experience and tradition in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be essential to protect the individual from arbitrary governmental and to enable him to enjoy the dignity of man.” Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CDPE, June 5-July 29 1990 “ the rule of law does not mean merely a formal legality which assumes regularity and consistency in the achievement and enforcement of democratic order, but justice based upon the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression;” and “democracy is an inherent element of the rule of law.”

<sup>41</sup> Brian Z. Tamanaha, “On the Rule of Law”, (Cambridge Univ. Press, 2004), Robert S. Summers, “A Formal Theory of the Rule of Law,” 6 Ratio Juris 127 (1993), Paul Craig, “Formal and

this categorization of the rule of law in civilized nations. Although it is quite controversial, such a categorization will be at least helpful for over-viewing entire picture of the contemporary understanding of the doctrine of the rule of law. For convenience for explanation of the entire picture of the contemporary doctrine of the rule of law, I use this framework.

## (1) Formal Versions and Substantive Versions of the Rule of Law

### (i) Formal Versions

Formal versions of the rule of law emphasis legal formality as elements of the rule of law. In this context, legal formality includes legitimate process of legislation, abidance by rules, fair hearing, denial of retroactive effect of law, denial of vagueness of statute and mechanisms for implementing them. The threshold to distinguish “formal versions” from the other version, namely, “substantive versions”, is whether or not judgment on or evaluation of the law itself is sought. Simply speaking, formal versions tend not to judge on legitimacy of contents of law and in principle to accept even “bad law” as long as it is legitimately legislated, although substantive versions tend to judge on lawfulness of contents of law to exclude “bad law” in spite of its legitimacy of legislation process. Further, even among each group of versions, the spectrum is quite broad. An extreme formal version holds that the rule of law means that government actions have to be authorized by legitimate laws, and any statute promulgated, as a matter of form, by a legislative body (or the sovereign) is the legitimate law, regardless of whether such process is based on democratic, tyrannical or monarchic system. In other words, an extreme formal version focuses *only* on legitimacy of legislative process of statutes, and hence it is asserted that a nation is understood as a nation of the rule of law if its government acts in accordance with statues which are “properly” promulgated in that regime, no matter contents such statutes have. In terms of the grand design of the rule of law, however, it is absolutely wrong idea. If a legislative body is substantially control by or not independent of an executive branch, or a legislative body lacks of a sense of reason, a legal system under this version will simply become a tool of government, which is most discouraged by the grand design of the rule of law. In fact, a totalitarian or a dictatorship nation can exist in

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Substantive Conceptions of the Rule of Law,” Public Law 467 (1997).

<sup>42</sup> *id.* Brian Z. Tamanaha, P.91,

compliance with this version of the rule of law. Therefore, this version of the rule of law more tends to be labeled as “rule by law” in order to distinguish from the rule of law. “Some Asian politicians focus on the regular, efficient application of law but do not stress the necessity of government subordination to it. In their view, the law exists not to limit the state but to serve its power.”<sup>43</sup> Such an idea can be facilitated by this extreme formal version of the rule of law. In accordance with the grand design of the rule of law, the rule of law is not that a government abides by law by itself.

The other extreme formal version heavily focuses on democracy as a ground of legitimacy of the formal legality. This version of the rule of law is supported by the idea that the modern legal order can draw its legitimacy from an idea of self-determination or autonomy, and there is no alternative to a ground of legitimacy after the loss of faith in natural law and divinity law.<sup>44</sup> For this purpose, the democracy is deemed as a framework for guaranteeing legitimacy of statutes and governmental act according thereto. However, we should be aware of a risk of deeming autonomy or self-determination as absolute. Democracy does not ensure correctness of its decision. Since majority vote had been adopted for decision making in democracy, minority has been always found, and existence of minority has made an idea of autonomy and self-determination fiction to some extent.

Between the two poles above, there are major supporters of formal version of the rule of law including Lon Fuller, Friedrich A. Hayek and Joseph Raz. As elements of formal version of the rule of law, Fuller referred to generality, clarity, public promulgation, stability over time, consistency between the rules and the actual conducts of enforcers of law, and prohibitions against retroactivity, against contradictions, and against requiring impossible.<sup>45</sup> Hayek defines the rule of law as follows: “Stripped of all technicalities, this (the rule of law) means that government in all its action is bound by rules fixed and announced before-hand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”<sup>46</sup>

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<sup>43</sup> Joseph Raz, “The Rule of Law and Its Virtue,” in *The Authority of Law* (Oxford: Clarendon Press 1979) p.104.

<sup>44</sup> See Juergen Habermas, *Between Fact and Norms: Contributions to a Discourse Theory of Law and Democracy* (the MIT press. 1998).

<sup>45</sup> Lon L. Fuller, *The Morality of Law*, 2<sup>nd</sup> edition (Yale Univ. Press 1969).

<sup>46</sup> Friedrich A. Hayek, *The Road to Serfdom* (1994) p. 80

Raz asserted that all laws should be able to guide the behavior of its subjects.<sup>47</sup> Based on this idea, he listed the followings as elements of the rule of law; all laws should be i) prospective, ii) relatively stable (it should not often change), iii) clear, and iv) public and general. In addition thereto, Raz asserted for the followings as the elements of the rule of law v) the independency of judiciary, vi) open and fair hearings without bias, vii) a court's power of judicial review, and viii) limitation on the discretion of law-enforcement officers. The Raz's definition covers most of the elements asserted by various commentators in common law jurisdictions, and it is safe to say that his understanding is shared by most common lawyers.

Now, we very briefly review how each of Raz's elements works in practice. The first element requires that a relevant substantive law should exist in advance to punish or coerce a person and a government should follow such a law. In criminal context, it has the similar function to a part of “罪刑法定主義”, namely, a person can be punished only if there is a law which in advance clearly stipulates what the elements of the crime are. In non-criminal context, for example, in the context of administrative law, various regulations, such as various business related regulations and other administrative regulations should be based on relevant substantive laws, which currently exist. Further, a government is required to follow relevant laws to enforce such regulations. The second element is rather simple, and hence no further explanation is necessary.

The third element is requiring that a description in a law should be clear. Vague or ambiguous laws will undermine effect of the first element. In the context of constitutional law of civilized nations, hence, a vague provision, which punishes or coerces a person, will be deemed as void. For example, crimes in China, such as “subversion”, “divulgence of national secrets” and other vaguely defined national security offences, which are often used against persons, who have objection to government or the CCP and express such objection, are most likely to violate this element.

The fourth element requires that existing laws should be properly disclosed to general public in advance (public), and a law should not target a particular individual or entity (general). Generality, which also can be called equality before law, is especially important. Under the rule of law, hence, a legislative body may not enact bills of attainder or any law which is applicable only to a particular individual or group.

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<sup>47</sup> Joseph Raz, “The Rule of Law and its Virtue” p. 214

The fifth, sixth, and seventh elements are related to mechanisms for implementation and remedy for a violation. To implement the idea or value of the rule of law, there must be procedure and institution, such judicial review or other procedure, which ensure that a government acts in accordance with laws and an individual can be remedied if any violation is found. A court consisted of an impartial judge is a prerequisite to seeking for meaningful remedy for violation. Impartiality of a court is material not only to the parties to a particular case but also to judicial system for itself. Impartiality is one of the important elements which ensure reliability of judicial system to general public. A biased court would lose people's trust, and any court which lost people's trust would not function in proper manner. Further, independent judiciary is material to legal remedy in a particular case. Without independent judiciary, it is simply illusion to restrict abuse of government power and protect citizens from such abuse in means of law and legal system. Importance of independent judiciary has been emphasized by various commentators.<sup>48</sup> A question of court's power of judicial review is in other words a question of citizens' accessibility to a court. If a scope of court's power of judicial review is unreasonably narrow or the requirements thereof are unreasonably strict, citizens cannot properly seek a court for legal remedy.

The eighth element is directly related to restriction or prevention of arbitrary use of government power and also indirectly related to implementation of legal remedy. A broad discretion of government officials or agency without proper guidelines tends to cause arbitrary use of power. Depending on arbitrary decision of officials or government agency, for example, among people in the same or similar conditions, some applicants for an governmental permit or license are granted or some are not, some people are or are not subject to some particle tax; some people are or are not subject to particular government regulations in arbitrary manner. If there is no just cause for such distinguish, such distinguish is likely to be abuse of government power. In case of abuse of power through discretionary power without guideline, a claimant for remedy has to contest properness of content of such discretion in general. It is, however, quite difficult to prove that such discretion is improper if

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<sup>48</sup> "It is an essential element in the maintenance of that stability and predictability of rules which is the core of constitutionalism" M. J. C. Vile, *Constitutionalism and the Separation of Power*, Oxford 1967 329., "Such independence of the 'judicial department' may indeed be regarded as the very definition of the 'rule of law'; it is certainly an important part of it. If the law and the judiciary come under government control, they merely simulate parliament and parties and lose their function. Either way, the partisan administration of law is in fact the pervasion of law, and the denial of the rule of law." R. Dahrendorf, *A Confusion of Power; Policies and the Rule of Law*, (1977) *Mod. Law Rev.*1, 9.

there is no guideline therefore. Without sufficient guidelines for discretion, a court has to generally make a judgment of whether such discretion is right or wrong, which would be engaged in administrative judgment (行政判断). A court is normally not in a position to generally make a judgment of whether a content of an administrative judgment in a particular case is correct or wrong. As a result, a scope of legal remedy is improperly limited.

The elements stated are intended and expected to function as such. It should be, however, noted that the review above is simply scratching a surface of such elements, which have broad and profound theories and doctrines behind. As a matter of fact, all of the elements above are quite issues in a field of public law, and as to each of element, considerable amount of discussions and controversies have been found.

Under understanding of “formal versions” of the rule of law, it is expected that arbitrary use of government power against citizens can be limited by requiring a government to abide by statutes and various legal formalities.

The alleged most serious defect of formal version is that this version is lacking of a mechanism for preventing a government from using statutes as a tool for abusively exercising its power and suppressing interests of citizens. It is true that democracy does not necessarily guarantee lawfulness of contents of the statutes, as proved in a case of Nazi. However, it should be noted that a definition of the rule of law is normally discussed in the context of civilized nations, which have democracy, well-established fundamental rights, well-developed legal principle and doctrines, and a mature legal system for implementing them, and hence it might be illogical to leap to a conclusion that formal version leads things to a case of Nazi. For example, in a jurisdiction in which fundamental rights are well-established and properly functioning, the risk pointed out by commentators who against formal version will be minor. It is also true that development and maintenance of fundamental rights can be promoted in the other context, not in the context of the rule of law. In legally developed and mature jurisdictions, a formal version of the rule of law might be effective and sufficient in terms of protection of citizens from arbitrary use of government power, together with the other various mechanisms.

#### (ii) Substantive Versions

Substantive versions of the rule of law understand that the elements of the rule of

law include both the legal formalities stated above and individual rights, such as such as rights protecting life, body, property, freedom of speech, freedom of association, freedom of religion etc. Substantive version of the rule of law is a version of the rule of law which incorporates such individual rights into the elements of a formal version of the rule of law. It means that such individual rights are protected as a part of the doctrine of the rule of law. This version is further divided into sub-categories depending on what kind individual rights should be incorporated in it. As substantive version has quite broad spectrum, and it is out of scope of this particle to closely review each type thereof. Hence, it is focused on to describe silhouette thereof.

Substantive versions try to preserve some individual rights within the elements of the rule of law beyond the scope of a legislative power, and concerning some particular rights, such as fundamental rights, even beyond amendment to the constitution. It means that democracy is secondary to individual rights to some extent. Normally, fundamental rights or some other constitutional rights are expected as rights to be incorporated for this purpose. The underlying idea of substantive version of the rule of law is basically liberalism, which in principle promotes individual rights. From the viewpoint of liberalism, there is a couple of reasoning for supporting the idea of emphasizing individual rights above democracy.

Liberty is understood as “self-rule” in political context, which means that citizens govern themselves, which tends to incline to democracy to some extent. However, democracy has inevitable tendency to suppress minorities, although liberty is supposed to be equally enjoyed both by majority and minority as much as possible. In concern with fear of majority oppression and fears of popular democracy, substantive version of the rule of law commits more to individual liberty than democracy.<sup>49</sup> However, as such individual rights are normally stipulated in constitutional law and amendment to such constitutional law is subject to democracy, the risk of majority suppression cannot be completely removed. In fact, it is practically difficult to maintain superiority of individual rights in a framework of democracy. Hence, some commentator asserts that an individual should possess such rights that have been deemed as rights granted by God, rights attached to status of human being, or rights of all the members of a moral community,

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<sup>49</sup> Allen C. Hutchinson and Patrick Monahan, “Democracy and the Rule of Law” in *The Rule of Law: Ideal and Ideology*, p 100

independent of any explicit recognition in constitution or any other statute.<sup>50</sup> In the context of modern legal theory, however, it is difficult to find practical premises of such rights other than in constitutional law. In modern democratic nation, however, a constitutional law is subject to democracy. This reasoning seems not to convincingly tell premise of superiority to democracy.

The other reasoning for supporting substantive version is that only free people can make self-determination for self-governing, and hence freedom of individuals is a precondition of exercising democracy. For genuine self-determination, people must be free, and such freedom is firstly ensured by individual rights, such as rights of freedom of speech, freedom of association, and other freedom. The underlying idea is that “the existence and extent of democratic governance is only justified insofar as it better serves the enhanced liberty of individuals.”<sup>51</sup> However, this theory has to face a difficult question of how full list and scope of individual rights, which are superior to democracy, are decided.

The other strong criticism to this version is that the individual rights to be incorporated in the rule of law are not self-evident in terms of their contents and scope, and hence *someone* must determine what individual rights is and apply the same in a particular case. Judges are normally expected to be engaged in this task. The rule of law is often described by contrasting to “rule by man”. However, an idea of “the rule of law, not man” is considerably undermined by the fact that definition of scope and contents of individual rights and application thereof rely on judges, who are not necessarily free from bias, emotion, passion, prejudice, arbitrariness, political interests. It is concerned that the rule of law ultimately comes to become “rule of judges”. Here, these questions are related to two issues. One is an issue of a judge’s or a judiciary’s authority. In its function of judicial review of legislation, a judge is tantamount to have veto power to legislations which are made by representative of citizens. How such authority can be justified especially in a case that the contents and implication of rights is not self-evident. The other is a question of subjective or arbitrary judgment by a judge, namely a question of impartiality and fairness of a judge. The first question is addressed to judicial review in general and beyond a scope of this article, and hence we do not go to details.

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<sup>50</sup> Ronald Dworkin, “Political Judges and the Rule of Law”, 64 Proceedings of the British Academy 259 (1978)

<sup>51</sup> Hutchinson and Monahan, “Democracy and the Rule of Law” p. 100

Concerning the second question, as a matter of fact, formal version is also not free from such a risk as long as laws are applied by judges. Any legal principle or doctrine, including an idea of the rule of law, no matter formal or substantive it is, is implemented not by the idea or the notion by itself but by a legal institution which includes judges. Hence, to remove bias, emotion, passion, prejudice, arbitrariness, political interests of judges from a judgment, each jurisdiction has developed various legal doctrines and devices. For example, concerning interpretation of law, there is a legal principle that shows a priority of grounds for a judge to rely on for interpretation of law, such as text of statutes, case law, and legislative intents. The *stare decisis*, which has been developed in common law jurisdictions, is an important doctrine to bind a judge to precedents, so that judgments of the similar cases can reach to the similar result. In Continental Law jurisdictions, *de novo* style appeal system has a function to rectify an improper judgment by a problematic judge.

On the top of that, any legal professionals, including judges, are required to acquire professional skills and knowledge as well as professional ethics or responsibilities. Such professional skills and knowledge and professional ethics and responsibilities could decrease a risk of influence by bias, emotion, passion, prejudice, arbitrariness, and political interests. At the time of rising of an idea of Divine Rights of King and declining of authority of Church, it was asserted that king was above the law and responsible only to God. However, the idea of rule of law was not necessarily impaired by such absolutists because of increases of the number of encountering professional lawyers and judges. One of the symbolic events is that Coke issued a decision in 1607, which denied interference of King James I. Relying on judges does not necessarily mean “rule of man” as long as judges maintain professional skill and professional ethics.

In addition to above, some of the substantive version includes democracy in the elements of its definition, despite of the fact that there is a tension between individual rights and democracy. An extreme substantive version extends its scope to a notion of “welfare nation”, which is one of versions of “social democracy”. There are strong objections to such understanding of the rule of law as conjoining formal legality, democracy, individual rights and a notion of a welfare nation. One of the strongest objections is that such a notion of the rule of law is beyond the inherent meaning of the rule of law. Some of those factors, such as “welfare nation”, are sheared by any liberal democratic nation, which can implement such

package of elements without a notion of the rule of law. In other words, no necessity for developing the notion of the rule of law is found. The objections are seemingly reasonable. It is really questionable that substantive version of the rule of law includes a notion of a democracy or “welfare nation”. Incorporation of democracy or a notion of “welfare nation” into the rule of law does not necessarily strengthen function of the rule of law. Moreover, especially, incorporation of a notion of “welfare nation”, which itself has broad spectrum of meaning, makes a definition and a function of the rule of law vague.

## (2) Summary

A substantive version of the rule of law, elements of which includes legal formality, individual rights and democracy, might be more common among western world in general, although it is fair to say that a formal version of rule of law is the dominant understanding among at least legal theorists in common law jurisdictions. The Declaration of the 1990 Conference on Security and Cooperation in Europe, with representatives from dozens of European countries as well as and USA and Canada, states “the rule of law does not mean merely a formal legality which assumes regularities and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression;” and “democracy is an inherent element of the rule of law.”<sup>52</sup> In Japan, it seems that a substantive version of the rule of law is prevailing, although it is still controversial, and there is no consensus of opinion about which individual rights or elements should be included.

Supporters of substantive versions and formal versions have asserted their advantages respectively. It, however, might be not practically meaningful to generally discuss about which version is better, although it might be helpful to understand current trend of understanding of the rule of law. In fact, some elements of formal version are arguably categorized as part of individual rights. If it is case, a formal version also contains individual rights just as substantive version does. To this extent, at least, it might not be practically meaningful to categorize doctrines of the rule of law in a framework of substantive and formal versions. It is perhaps more important to focus on correctly understanding the grand design of

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<sup>52</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSFE, June 5 – July 29 1990, nors 3 and 4.

the rule of law and to figure out elements necessary for materializing the grand design in each jurisdiction. Actual effect and functions of each version of the rule of law will be affected by various factors, such as nature of constitution, function of judiciary, legal practice, a degree of maturity of legal system etc. For example, substantive version might lead things to different results in a jurisdiction whose constitution stipulates “reservation by statutes” concerning fundamental rights and a jurisdiction without such provision in constitutional law. Also, formal version might not have the expected effects in a jurisdiction which has no mature fundamental rights and/or no mechanism for protecting such rights.

As stated above, the grand design of the rule of law is that a government power is restrained for protecting interests of people<sup>53</sup> from its abusive use of government power by a means of law and a legal system. To materialize the grand design, it is necessary to establish various mechanisms, which can be different depending on circumstances of each jurisdiction. The elements of the rule of law stated above presuppose existence of sufficiently mature legal system and institution. In a jurisdiction where laws and legal system is considerably underdeveloped, perhaps additional elements might be required. Further, performance of any legal system and doctrines ultimately rely on players of legal field, such as lawyers, judges, prosecutors and governmental officials. No matter how excellent legal system and doctrines have developed, performance thereof might be quite poor if the quality of players therein is low. It can be said that it might be most essential that such players of a legal field have to realize that the rule of law depends on the will of such players, which is made up by moral, professional ethics, and professional knowledge and skills. Hence, even though all the elements of the rule of law exist, it does not promise expected effects of the rule of law.

### 3. The Rule of Law in Action

#### (1) Jurisdiction with the Rule of Law

Now, we briefly review how the doctrine of the rule of law functions in a framework of a modern nation state (主權国家), which consists of three branches, judicial, executive and legislative branches.

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<sup>53</sup> In the context of contemporary meaning of the rule of law, the term of “citizen(s)” is intended to include not only citizens of the nation in concern but also foreigners residing in that jurisdiction.

#### (i) Legislative power and the Rule of Law

The relation between democratic legislative power and the doctrine of the rule of law is most contentious problem. As stated, there is a kind of tension between the rule of law and democracy. Democracy is a premise of legitimacy of laws which the doctrine of the rule of law primarily relies on. On the other hand, the rule of law is expected to be a safeguard to out-of-control of democracy. Especially, in Great Britain which traditionally deemed Parliament as absolute sovereignty, it might be hard to accept a notion that legislature is limited by law.<sup>54</sup> In jurisdictions such as the USA, Germany, or Japan where constitutional law expressly stipulates that the courts should independently review constitutionality of a statute, namely act of a parliament or congress, however, ambivalent relation between the rule of law and democracy is less questionable, although ultimate collision between the doctrine of the rule of law and democracy might be not avoidable. At this moment, there is, among civilized jurisdictions, seemingly no objection to a view that a legislative power should be, at least, subject to procedural rules in the legislative process, such as a manner of forming of legislative body, a manner of resolution, or any other requirements for act of Parliament to be valid. In addition, in jurisdictions such as USA, Germany, France and Japan, limitation on legislative power extends to substantive matters through a tribunal based on Bill of Rights, although a structure of a system of tribunal, legal doctrines and principles for such a review, and effects of such a review vary from a jurisdiction to a jurisdiction.

Since divine authority and natural law lost their control over secular laws, such control has been entrusted to a notion of “self-rule” or autonomy based on a sense of reason of human being. However, a sense of reason of human being could not prevent emergence of Nazi. As result, it has been realized that there is a risk if democracy is deemed absolute and that it is necessary to control such risk by a means of law and legal system. Doctrines of constitutionalism or the rule of law function for preventive purpose to some extent. So far, however, theoretical premise of ultimate legitimacy and a scope of limiting democratic legislative power are still in controversy. Such problems sometimes appear as a question of limitation of amendment to the constitutional rights, a question of *Verfassungsgebende Gewalt* (憲法制定權力), a question of a limitation on

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<sup>54</sup> A. Dicey, *supra*, p. 39, 40.

democratic power, a question of ultimate premises of fundamental rights, a scope of judicial review etc. So far, there is no absolute answer thereto.

## (ii) Executive Power and the Rule of Law

The control of executive power by the doctrine of the rule of law is less controversial. Before discussing a mechanism for controlling the executive power under the doctrine of the rule of law, it must be emphasized as a presupposition of the control of executive power by the doctrine of the rule of law that the executive branch and any of officers thereof are not vested full legislative power or power to control the legislative branch. In civilized jurisdictions of the rule of law, separation of power is well-established, although the manner and form thereof are various.<sup>55</sup> Without separation of power between the executive branch and the legislative branch, in other words independency of the judiciary, the control of executive power by the doctrine of the rule of law is most likely illusion.

In accordance to the doctrine of the rule of law, government (executive branch) should be put under laws. It means that government officials are required to follow existing legitimate statutes which stipulate clear enough to guild acts of such officials. It is followed that discretion of governmental officials is required to be guided by concrete guidelines, because too broad discretion of officials tend to make a notion of “a government under laws” dead letters. Such guidelines provide not only government officials with proper direction concerning their behavior but also judiciary with standard for judicial review. In practice, the doctrine of the rule of law often raises issues in administrative laws (including procedural law),<sup>56</sup> criminal procedure and criminal law. Issues are, among others, whether or not the relevant provisions of the substantive laws and procedural rules are clear enough, whether or not an administrative order or other rules made by administrative body has proper statutory ground and is issued within a scope of such a statute, whether or not government officials abide by existing substantive laws and procedural rules, whether or not discretion of government officials is reasonably controlled by reasonably clear guidelines and enforce their power within such proper scope, and

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<sup>55</sup> For example, machinery for implementing such separation of power is quite deferent between the USA adopting Congress and Presidency and UK adopting Parliament and Cabinet system.

<sup>56</sup> There are controversies about the scope of administrative laws. However, in thin as context, the scope of administrative laws are understood in accordance with “控除” theory.

so forth.

### (iii) Judicial Power and the Rule of Law

If judges are free to reach any judgment which they designer, then it is just “rule by judges”. Once, it was asserted by supporters of “Free Law” in Germany that judges were not bound by established rules, but were free to reach any conclusion which they regarded as in accordance with public interests. And there is bad memory that this doctrine was used by Nazi regime. On the other hand, judges and the judiciary must maintain independency from other branches and any other pressure from outside and inside. In such ambivalent circumstances, the rule of law has developed its relevant elements.

Under the rule of law, it is commonly asserted that judges should be subject to proper statutes, laws, rules, legal doctrines and/or some institutional limitation. Judges must follow substantive laws properly promulgated by legitimate legislative body, and also must follow constitutional law. In case of conflict constitutional law and statutes, judges are, if possible, required to interpret such law in question in constitutionally acceptable manner or make it void as unconstitutional.

Concerning interpretation of law, judges must follow firstly wordings of provisions of law, secondary precedents and thirdly legislative intent of the relevant law. Up on application of precedents, further, judges must follow *Stare Decisis* or any other principle and theories for interpreting and applying case law.<sup>57</sup> In addition, judges should be subject to norms, which require them to be fair, impartial and unprejudiced, and various legal doctrines to materialize such norms, such as due process, have developed. Also, a bureaucrat system might be able to bind judges with hoops of internal rules and procedure in terms of organization and internal administration matters, although it, off course, should be strongly discouraged to intervene in a particular case on a particular judge’s hand. Moreover, appeal system, especially, *de novo* type appeal system by a superior court has a function to retrieve unity of judgments which come to broad spectrum under similar factual background.

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<sup>57</sup> In Taiwan, development of case law is quite immature. In fact, there is not theory or principle for applying 「判例」 in Taiwan. Many jurists in Taiwan have wrong idea that Continental law system does not have case law. In modern era, at least, majority of laws of continental law jurisdictions rely on case law, although development or contents of a theory or principle for applying case law are various.

The judiciary is, in its nature and in terms of its organizational structure, quite different from a jurisdiction to a jurisdiction. In common law jurisdictions, there is, with some exceptions, no special court, such as constitutional court, administrative court, tax court, a labour court etc.<sup>58</sup> At least, there is no administrative court which specially handle only administrative law matters, such as *Conseil d'Etat* in France *verwaltungsgerichts* in Germany, and constitutional court which handle only constitutional issues, such as *Conseil constitutionnel* in France, *Verfassungsgericht* in Germany. Although a machinery is different, both different legal systems have a mechanism for reviewing government act and constitutionality of legislation. The judiciary is a part of important instrumentalities for implementing the doctrine of rule of law.

## (2) Jurisdiction without the Rule of Law

Some legally underdeveloped countries in East Asia claim that they have the rule of law on a basis of a simple fact that some individual rights are stipulated in a constitutional law or a fact that a government technically abides by statutes. As stated above, it is, however, absolutely wrong at least in accordance with a notion of the rule of law prevailed in civilized jurisdictions.

As reviewed above, “rule by law” is not deemed as the rule of law among civilized jurisdictions. In terms of the grand design of the rule of law, “rule by law” is simply distortion of the concept of the rule of law. Typical example of “rule by law” is the Third Reich, namely, Nazi Germany. Under Nazi regime,<sup>59</sup> purge of Jewish, including the Holocaust, was conducted technically in accordance with statutes which were legally promulgated by legislative body. For example, parliament of Germany (*Richtstag*) legitimately establish *Gesetz zur Behebung der Not vom Volk u. Reich* (“*Ermächtigungsgesetz*” 「*授權法*」), which gave a government (executive branch) a power to make and change law, including power to change constitutional law. Based on *Ermächtigungsgesetz*, Nazi regime made *Zweites Gesetz zur Überleitung der Rechtspflege auf das Reich* (「*第2 司法権移譲法*」), and *Drittes Gesetz zur Überleitung der Rechtspflege auf das Reich* (「*第3 司法権移譲法*」), the judiciary power was put under control of Nazi regime.

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<sup>58</sup> Japan is normally categorized as a continental law jurisdiction. However, there is no special court.

<sup>59</sup> Nazi is a disparaging name. The official name of Nazi is *Nationalsozialistische Deutsche Arbeiterpartei* (国家社会主義ドイツ労働党), and *NSDAP* or *NS* is a formal abbreviation. It is quite interesting that Nazi professed socialism at least its name of party.

Further, in accordance to Gesetz gegen die Neubildung von Parteien (「新政党禁止法」) , political party other than Nazi was illegalized. In accordance with Nürnberger Gesetze (Reichsbürgergesetz and Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre (「血の保護法」) and Reichsbürgergesetz (「公民法」) and other laws, Jews were totally discriminated, including purge of Jews from positions of public servants,<sup>60</sup> and prohibiting from practicing law or engaging some profession , such as mass media. It here should be emphasized that all these government acts by Nazi regime were conducted totally in accordance with legitimate statutes, which are legally promulgated by parliament. It satisfied requirements of “rule by law”.

China often claims that it has the rule of law based on a fact that some individual rights are stipulated in a constitutional law and other statutes. However, such a fact does not ensure existence of the rule of law. Actually, China does not reach even the level of “rule by law”. In China, serious violations of fundamental rights such as cases of persecution against Falun Gong, Christians of “family church”, promoters of democracy and Tibetans keep occurring in China<sup>61</sup> in spite of Article 36 of the Constitutional Law of People’s Republic of China (“PRC Constitutional Law”) stipulates that “citizens enjoy freedom of religious belief” (Paragraph 1) and “no state organ, public organization, or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion” (Paragraph 2). Across China, expropriation of land without just compensation is common practice of Chinese governments, even though expropriation of land from citizens supposed to be subject to just compensation (Paragraph 3 Article 13 of PRC Constitutional Law). In fact, many victims, who have been deprive of land without just compensation, keep coming to a city of Beijing for petition seeking for compensation. Under Article 35 of PRC Constitutional Law, citizens are supposed to enjoy freedom of speech, of the press, of assembly, of association, of procession, and of demonstration, and further Article 41 stipulates that “citizens of the People’s Republic of China have the right to criticize and make suggestions to any state

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<sup>60</sup> During the purge a lot of distinguished legal scholars were ousted from their positions.

<sup>61</sup> Amnesty international, Report 2005-China, Human Rights Watch, Human Rights Overview-China, United Nations Report on China’s persecution of Falun Gong (2004), Special Rapporteur on Religious Intolerance, Addendum, E/CN.4/1995/91/Add.1 (excerpt) [p.83] Economic and Social Council E/CN.4/1995/91/Add.1 23 December 1994,

organ or functionary; citizens have the right to make to relevant state organs complaints and charges against, or exposures of, any state organ or functionary for violation of the law or dereliction of duty; but fabrication or distortion of facts for the purpose of libel or frame-up is prohibited” (paragraph 1). In fact, however, any speech, assembly, association, procession and demonstration which express different view or opinion from that of government or the Communist Party, is strictly prohibited with criminal sanction. Persons, who have different view from that of government or the Community Party and express such a view in public, have been convicted of “subversion”, “divulgence of state secrets” and other vaguely defined national security offences.<sup>62</sup> In fact, China is always listed as one of the worst 10 countries in press freedom index (2002, 2003, 2004, 2005) issued by Reporters without Borders. Article 37 PRC Constitutional Law stipulates that “the personal freedom of citizens of the People's Republic of China is inviolable” (Paragraph 1), no citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ and unlawful deprivation or restriction of citizens' personal freedom by detention or other means is prohibited; and unlawful search of the person of citizens is prohibited” (paragraph 2). In China, constitutional rights are simply “rights in book” only, and notwithstanding fundamental rights stipulated in PRC Constitutional Law, constant violations of such fundamental rights have occurred in China in considerably large scale. If anybody tries to exercise such constitutional rights, such person and even an attorney representing such person will be sanctioned.<sup>63</sup>

In addition, the judiciary is subordinate ultimately to Political and Judicial Committee in terms of its organizational structure under the CCP regime. Major members of Central Political and Judicial Committee are also members of Standing Committee of Political Bureau, which in fact holds authority and power of the CCP regime. Budget of a court system of each level is subject to each local government in the same level. In terms of a structure of a state, independency of the judiciary is not secured. Further, some judges are retired soldiers, who have no professional legal knowledge and skill.<sup>64</sup> In accordance with a notion of the rule of law among

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<sup>62</sup> Thirty-two journalists are unlawfully detained or imprisoned in China. Press Freedom Barometer 2007, Reporters without Borders.

<sup>63</sup> Beijing-base Human rights lawyer, Mr. Gao Zhisheng, has been sentenced to imprisonment with three years probation period, simply because he complained to government and state leaders of persecution against Falun Gong.

<sup>64</sup> Even some prosecutors do not have legal background. For example, 最高人民檢察院檢察

civilized jurisdictions, this kind of jurisdiction is lacking of major elements of the doctrine of the rule of law.

### (3) Summary

A lack of the rule of law is definitely a disaster to people of that jurisdiction. People in such a jurisdiction are not able to enjoy fundamental rights. Their life, freedom, and properties are arbitrarily deprived of by a government. People simply have to bear and accept such abusive use of power by a government. China is one of such jurisdictions. Especially, the weak in a society, such as people in low-income bracket, are often victimized. Further, disaster does not stay within China but extends to various rights of foreigners. Economical globalization extends such negative impact to economic interests of foreigners. Many foreign business enterprises in China have been annoyed by changeable government policies, such as tax policy, zoning policy, industry policy, financial policy, unreasonable requests by government officials, quite vague wordings of regulations, and other arbitrary governmental acts in China. Many foreign enterprises are in fact harmed by arbitrary governmental acts. Further, lack of the rule of law causes a malfunction of judicial remedy, and malfunction of judicial remedies hinders exercise of rights which are supposed to be given under laws or constitutional law. In fact, due to poor judicial remedies in China, people and foreign enterprise can not properly exercise their rights in proper and timely manner. Especially, malfunction of legal remedy adversely affects interests of foreign business enterprises. As result, disputes tend to be resolved in an “informal extra-judicial” manner, which is a kind of interests-orientated manner of dispute resolution. It cannot be expected that fairness and equality, which dispute resolution is normally expected to seek for, is promoted by such a dispute resolution mechanism. Sound law enforcement is not expected in a jurisdiction which does not have proper legal remedy. Without sound law enforcement and proper legal remedy, any rights, including property right, would not be secured, and without property rights, fairness on markets would not be maintained.

## **IV. Conclusion**

The concept of rule of law in modern era emerged out of and developed in experience and presumption that power would be depraved and abused. In this modern age, unfortunately, such presupposition seemingly is still correct. A government, after all, tends to abuse its power. Further, emergence of a nation state in modern era has made such power of government tremendously greater and stronger, and made consequence of abuses much more tragic and cruel.

Once, human being's behavior was ultimately disciplined by divine laws and/or natural law based on a belief in the Divine. In modern era, however, divine laws and natural law have been replaced by positive laws (実定法), which are ultimately based on a notion of "self-rule" or autonomy based on a sense of reason of human being. Such replacement has been called Enlightenment. It can be said that in modern era, ultimate premise of morals and ethics of individuals have shifted from the Divine to a notion of human beings, such as reasonableness, intelligence, common-sense, or prudence. As result, moral and ethics are understood relatively, not absolutely. It means that standards to distinguish good from bad, right from wrong, righteousness from evils have become relative. Such relativity of morals and ethics might cover actual deterioration of morals and ethics in a society. On the other hand, any legal institution, legal system, legal doctrines and other legal devices are, after all, operated and enforced by person, and hence their performance relies on the players, namely, lawyers, judges, prosecutors and law enforcement officials, ultimately on their morals and ethics. Of course, positive laws are able to regulate such players' conducts and might mitigate a negative impact by such deterioration of morals and ethics to some extent. However, once morals and ethics get deteriorated, any legal institution, legal system, legal doctrines or other legal devices do not function in originally expected manner and then additional or new legal devices and regulations are required to maintain the originally expected functions. It was a history at least in legal field.

The elements of the rule of law stated above are also not out of this circulation and have to be increased or changed if morals and ethics of such players further deteriorate. Again, it might be of the essence that the rule of law ultimately depends on the will of such players, which is made up by moral, professional ethics, and professional knowledge and skills. We might have to seriously consider a way to improve moral and ethics, in addition to thinking legal devices.

It is not easy to promote the rule of law in a jurisdiction of a dictatorship which is totally incompatible with the doctrine of the rule of law. China is one of such

jurisdictions. As stated, the rule of law cannot be established in China as long as the CCP regime exists. There is, in fact, no rule of law in China. Nonetheless, some people in China keep seeking for legal remedy even though it is in vain. And some local lawyers try to help such people at a cost of their career, freedom and even life. Under such hopeless circumstances, there are quite limited things to do for promoting the rule of law in such a jurisdiction. Education might be one of them. Active and correct discussion about the rule of law among jurists in Taiwan will provide an opportunity to learn a correct notion of the rule of law to such righteous jurists and young law students in China, who unfortunately could not have a chance to acquire correct legal notions and doctrines of public law under the CCP regime. Such lawyers and law students, in turn, might be able to explain more clearly to international community how distorted a legal system under the CCP regime is. Also, such active and correct discussion will prevent any jurists in China and Taiwan from making such propaganda statement that there is the rule of law in China.

International community has noticed various negative impacts on commercial activities of foreign enterprises arising out of underdeveloped legal system under the CCP regime. Hence, international community has considered importance of promoting the rule of law in China, and various programs for this purpose have proceeded by various countries and international organization. However, no conspicuous fruit has seen yet. In this regards, Taiwan as a country of civilized legal system might make some contribution to international community.

Yoshida, Akira