Briefing Memo

The Significance of the "Rule of Law" in the International Community

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1. Introduction

One of the pillars of Japan's "Free and Open Indo-Pacific" vision is the promotion and establishment of the "rule of law." In addition, the Ministry of Foreign Affairs of Japan states that Japan has been making significant and constructive contributions towards the "establishment of the rule of law in the international community." Statements issued by international organizations also frequently enshrine the need for "the rule of law at international level" and the establishment of "an international order based on the rule of law." As Prof. Kenji Yotsumoto (Kobe University) notes, the frequent repetition of the "rule of law" in the context of the international community and international relations is an indication that "it has become a key task in the current international community to aim to establish the rule of law on a global scale" (Brian Z. Tamanaha [trans. Kenji Yotsumoto], *On the Rule of Law*, p. v). The rule of law is, however, a core principle of common law/Anglo-American law on limiting power by law to eliminate the arbitrary exercise (control) of state power, with a view to protecting the rights and freedoms of individuals. At the same time, the rule of law is a principle of public law in domestic governance (constitution) governing the relationship between rulers and the ruled.

The principle of the "rule of law," as it applies to the international community, must therefore fit the international community. Nevertheless, no official documents can be found that make this clear. This situation may be described as follows, as Brian Z. Tamanaha states, "The rule of law thus stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means" (Tamanaha, *On the Rule of Law*, p. 4 [trans. p. 5]). Although having a clear grasp of the original significance of the "rule of law" is, first and foremost, necessary in discussing the "rule of law" in the international community, it is questionable as to whether there is adequate understanding of this significance. Accordingly, this article first proposes the principle characteristics of the "rule of law" by comparing it with a similar principle, "Rechtsstaat." Furthermore, this article provides a concise explanation of the significance of the "rule of law" in the international community by presenting aspects of the original principle of the "rule of law" which should be revised in order to make it suitable for its purpose of governing the international community.

2. Principle Characteristics of the "Rule of Law": Compared with the Principle of "Rechtsstaat"

As already stated, the "rule of law" is a principle aimed at eliminating arbitrary control of state power (rule of man) and limiting power by law to protect the rights and freedoms of individuals. The principle emerged in medieval England and has developed as the bedrock of common law/Anglo-American law. Specifically, the "rule of law" entails the following concepts: (1) the law (especially laws such as the constitution) limits and binds all state powers, such as judicial power, administrative power, and legislative power; (2) respect for individual human rights, i.e., inviolability of human rights by power; (3) guarantee of due process; and (4) respect for the role of the court.

A principle similar to the principle of the "rule of law" is "Rechtsstaat." It is the notion of restricting the exercise of power by legal act. Rechtsstaat was utilized as a governance principle of the constitutional monarchy during the Reich and has evolved as one of the principles of civil law. During the Meiji period, Japan enacted a constitution and other instruments modeled on German law and adopted the principle of "Rechtsstaat." The "principle of administration according to act," a

theoretical consequence of the "Rechtsstaat" discourse, continued to serve as the foundation for administrative practices and doctrines, even after the enactment of the Constitution of Japan following World War II. Like the "rule of law," the principle of "Rechtsstaat" seeks to utilize the law to protect the freedoms and rights of individuals from arbitrary exercise of power. Unlike the "rule of law," however, "Rechtsstaat" originally and fundamentally envisioned utilizing the law to limit administrative and judicial powers. This difference stems from the notion of the principle of "Rechtsstaat," which is to utilize act (Gesetz), i.e., legal norms enacted by a parliament made up of members selected by the people, in order to limit the exercise of power by the government and court under the control of the monarch, and protect the freedoms and rights of the people. (Recht [law] in Rechtsstaat is a legal concept that is broader than act, encapsulating not only acts but also lower-level legal norms including regulations [Regierungsverordnung], ordinances for implementing laws, and other instruments.) Moreover, most (constitutional) monarchies today adopt the principle of sovereignty of the people rather than sovereignty of the monarch. Thus, both the government and court are identified as state bodies under the control of the people, not power-exercising agencies for the monarch, and act has become a means for the people to democratically control the exercise of power by the government and court. On the other hand, even under the principle of sovereignty of the people, the freedoms and rights of the people could be restricted by the exercise of certain public powers, such as police power. For this reason, the adoption of the principle of sovereignty of the people does not translate into the immediate elimination of violation of people's rights and its threat from arbitrary exercise of power by the government and court. Therefore, the principle of "Rechtsstaat," which restricts the exercise of power by the government and court by act to protect the freedoms and rights of people, may be valid also in political systems based on the principle of sovereignty of the people.

As such, both the principles of the "rule of law" and "Rechtsstaat" seek to protect individual freedoms and rights from arbitrary exercise of power by "law." "Law" in the principle of "Rechtsstaat" basically envisions act. In this sense, it is closely associated with legal positivism which recognizes only positive law (law created by human acts such as enactment and customs) as law. In contrast, "law" in the "rule of law" does not refer only to statutes, such as act, and positive law, such as customary law, and also includes "law" with universal validity manifesting justice, i.e., legal principles of the nature of natural law. It envisions a broader legal concept than "Recht (law)" envisioned in the principle of "Rechtsstaat." For this reason, the "rule of law" is closely associated with the natural law theory, which recognizes universally correct principles, whose components are based on human reason, as law. This is one of the principle characteristics of the "rule of law."

Under the conventional principle of "Rechtsstaat," the content of an act is not questioned if procedures for establishing an act are taken, namely, if the act is made by parliament. Thus, even if a law was a bad law that unjustly violates the rights and freedoms of individuals, it could still be theoretically enacted as an act. This has been evident in incidents, such as the persecution of the Jewish people under Nazi rule. Accordingly, following WWII, the principle of "Rechtsstaat" was revised to the principle of material "Rechtsstaat," which incorporated the principle that the content of an act must be correctly reasonable. Hence, the principle of "(material) Rechtsstaat" today includes that an act has correctly reasonable content. In this regard, there appears to be no longer any distinction with the principle of the "rule of law." However, as stated above, the original "rule of law" includes natural law elements. The fact that the "rule of law" excluded, in principle, bad law that would unduly violate individual freedoms and rights is a characteristic of the "rule of law," as is the fact that "law" in the "rule of law" is not limited to statutes, such as laws.

Both the principles of the "rule of law" and "Rechtsstaat" seek to utilize law to protect individual freedoms and rights from arbitrary exercise of power. The principle of "Rechtsstaat," on the one hand, attaches importance to the role of parliament as a lawmaking body; court, as a power-exercising agency that could violate individual freedoms and rights similar to administrative agencies, is construed as being bound by parliament-enacted laws. The principle of the "rule of law," on the other hand, attaches importance to the role of not only the parliament but also the court. This is because greater importance is attached to the concept of separation of powers compared to the principle of "Rechtsstaat." Furthermore,

since it assumes that "law" in the "rule of law" is not limited to statutes, such as laws, the principle of the "rule of law" requires the discovery and establishment of "law" with universal validity manifesting justice other than the enactment of law by a legislative body, such as parliament, and this role is fulfilled by the court. (This is evident in common law/Anglo-American law countries from the granting of a legal nature to precedents of judgments as "case law.") The fact that the court fulfills the role of law discoverer (or discoverer of natural law principles) and maker is also a principle characteristic of the "rule of law."

3. The "Rule of Law" as a Principle Governing the International Community

The "rule of law" is originally a principle of public law (constitution) to protect the freedoms and rights of individuals by regulating arbitrary exercise of power by law, and assumes a vertical relationship between rulers and the ruled. In the international community, there is no centralized power. And the relationship between states, equivalent to the members of society, is an equal and horizontal relationship based on the principle of sovereign equality. Therefore, the legal principles for governing this relationship, in other words, the principles of international law, are also principles like private law that seek to address interest clashes among equals by law (principle governing a horizontal relationship), rather than principles like public law that seek to regulate power mechanisms by law (principle governing a vertical relationship). Thus, legal principles for governing a vertical relationship like the "rule of law" does not fit with governing the international community based on a horizontal relationship, and it can be considered that the principle of the "rule of law" is not suited for the international community. On the other hand, while states, which are members of the international community, have a reciprocal relationship on equal terms and on an equal footing under (international) law based on the principle of national (sovereign equality), disparities exist among states, including in their scope of territory, population, natural resources, geographical environment, economic power, technological capabilities, and military capabilities. There are steadfast differences between so-called major powers and small nations. As long as the differences exist and if the parties are entrusted with complete freedom, it can be foreseen that the assertions and acts of major powers would be prone to arbitrariness. In addition, depending on the situation, small nations, which rely on moral concepts such as protection of the weak and the principle of formal equality, may repeatedly claim for excessive and undue rights and postpone negotiations uselessly. Accordingly, the need to prevent arbitrariness is also found in the international community based on a horizontal relationship. However, the aspects that require removal of arbitrariness, together with the interests that should be protected from arbitrariness, are likely different between domestic and international levels. As for exclusion of arbitrariness, it is to be removed from the exercise of power at the domestic level, whereas it is to be removed from the assertions and acts of states in the international community. Furthermore, the interests to be protected by removing arbitrariness at the domestic level are the freedoms and rights of individuals, while in the international community, they are the rights and interests of states, which are members of the international community. Thus, the principle of the "rule of law" in the international community based on a horizontal relationship is the same as the original principle of the "rule of law" in regard to removing arbitrariness by law. However, the aspects that require removal of arbitrariness and the interests that are to be protected by removing arbitrariness must be revised from the original principle. It can be logically concluded that there needs to be a shift from the principle of regulating power by law, to the principle of securing fairness by law.

Additionally, "law" in the principle of the "rule of law" is construed to include not only statutes and positive law, but also principles like natural law that have universal relevance manifesting justice. This concept does not contradict or conflict with the horizontal relationship of the international community. Hence, there is no doctrinal contradiction to interpret that the "law" in the original "rule of law" and the "law" in the "rule of law" in the international community are the same type of "law." It can be concluded theoretically that, even if there are loopholes in a treaty, it would not be permissible under the principle of the "rule of law" for a party to a convention to take an action of disloyalty based on the loophole.

At the same time, the court has the role of "law" maker in the original principle of the "rule of law." As regards "law" that governs the relationship among states, which are members of the international community, granting lawmaking status to non-state bodies would mean overturning the principle of international law, i.e., supremacy of national sovereignty, which is also an assumption of the principle of national sovereign equality. From a doctrinal perspective, it would therefore be difficult to accept this as part of the "rule of law" in the international community. In fact, Article 59 of the Statute of the International Court of Justice stipulates, "The decision of the Court has no binding force except between the parties and in respect of that particular case." Its purpose is to deny precedential binding force of judgment (*stare decisis*), fearing that an International Court of Justice judgment would have the effect of creating or changing international law. Accordingly, even if there were a move to establish the "rule of law" in the international community, it would not involve granting "law" maker status to the court, as in the "rule of law" at the domestic level. Even if a decision of an international court is not deemed binding as a "law" or precedent, respecting this decision voluntarily by each of the states does not contradict the principle of supremacy of national sovereignty, and this would be desirable for the international community as well. Therefore, it is interpreted that the "rule of law" transported from the domestic level to the international level could involve the recommendation that states respect the decision of international courts and other international dispute resolution bodies.

4. Conclusion

As Prof. Yotsumoto notes, "'Rule of law' is a prime example of a term so concise that it makes you think you understand it." As already discussed, the "rule of law" in fact has profound meanings related to questions such as what is "law," who can make "law," what is protected by "law," and what roles courts fulfill with respect to the application of "law." Furthermore, applying a domestic governance principle like the "rule of law" to the international community, which has an entirely different set of assumptions and conditions than domestic politics, requires doctrinal revisions to some extent as noted in this article. In this light, the significance of the "rule of law" in the international community is not a simple one. In order to understand existing concepts and strategies, including the establishment of the "rule of law" in the international community, and develop new concepts and strategies, it is essential to understand the fundamental principle characteristics of the "rule of law" of the type described in this article, as well as the doctrinal revisions necessary for applying the "rule of law" in the international community. Moreover, it is critical to have an accurate grasp of the significance of the "rule of law" in the international community. Even in aiming to establish the "rule of law" in the international community, it is vital that an accurate significance of the "rule of law" is shared among the whole international community and to ensure there are no differences in views or objectives among its advocates.

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