Rule of Law and Law Reform in Korea

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I. Law and Society in Transition

As a theater of historical experimentation, Korean society merits special attention. Economic and social transformations that unfolded over two centuries or more in Western societies and over more than a century in Japan have exploded in a far shorter time in Korea. Various features of Korean society are radically heterogeneous in origin: some echo feudal structures of the pre-modern Chosun Dynasty, which lasted through the 1890s. Others stem from institutions of Japanese colonial rule(1905-1945), from the American military occupation of 1945-1948, from the corrupt autocracy of Syngman Rhee(1948-1960) or from the "developmental dictatorships" that ruled Korea by military decree from 1961 until only a few years ago. In the quasi-pluralistic Korean society of today, a commerce-centered network of relations interacts with oligarchical structures deeply rooted in recent as well as remote history. Confronted with unprecedented challenges, internal and external, Korea presently is in a period of transition, groping its way toward democratization while trying to maintain momentum for sustained economic development.

As for law and society in Korea, some remarkable changes have been witnessed since 1987. Despite pervasive shortcomings in the legal system and continued improper manipulation of legal institutions, pressure for reform has been sustained more than ever before, and change is ongoing. Especially noteworthy have been the legislative initiatives taken since the February 1993 inauguration of the "Civilian Government" of President Kim Young-Sam, longtime leader of opposition to the military dictatorships of Park Chung-Hee

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and Chun Doo-Hwan. The legitimacy of the legal order continues to be questioned, and scepticism about the administration of justice persists among citizens who see themselves as deprived or underprivileged. Inevitably, however, the legal system is compelled to adapt to changes in civil society. If the process of democratic reform can find expression in improved legal institutions, the many historical impediments to a functioning Rule of Law in Korea may in time be overcome.

The following discussion of recent developments in Korea tries to furnish an accurate assessment of Korean legal reality in the light of the Rule of Law as legitimising principle, to describe and evaluate recent changes in legal institutions, in particular various reforms carried out as part of the so-called "Politics of Reform" pressed by the administration of President Kim Young-Sam, and lastly to consider alternatives for legal reforms which may further the realization of an authentic Rule of Law in Korea.

II. Rule of Law and Legal Reality in Korea

1. Rule of Law

To begin with the Rechtsstaatsprinzip, or in Anglo-American terms, the doctrine of the Rule of Law, it functions as a legitimising principle of the legal order, and so may be adopted as a meaningful criterion for evaluation of legal reality in Korea. Here, the expression "Rule of Law" will be used as a broad notion equivalent to the German Rechtsstaatsprinzip. This use of terminology can be justified based on the ideological similarities in historical formation, although, to be sure, there are wide variations from country to country in interpretation of these principles as well as in their institutional embodiments.
In fact, the Rule of Law ideal emerged in various combinations of legal principles and institutions corresponding to a spectrum of unique historical contexts. Expressions such as "Rule of Law", "Due Process of Law", "Règne des lois", "État de droit", or "Rechtsstaat", signify not merely a range of terminological nuances, but characteristics distinctive to each of the sociohistorical milieux which contributed to the worldwide currency of these legal principles.

These diverse ideals are highly heterogeneous, but comparative legal studies have provided common denominators for varying legal theories. One constant encapsulated in them is an aspiration for individual freedom and political liberty through repudiation of absolute power: this underlies the idea of

Herrschaft des Rechts, which sees a central function of law as constraining, organizing, limiting and judicially controlling the state power. The political ideal of 'government in accordance with law' has through a long historical development been integrated into the legal cultures of Europe and North America. Among the shared contents in its diverse manifestations are an injunction against governmental arbitrariness, meaning that state coercion should be exercised only according to rules announced in advance, or, in other words, that commands should be issued and coercion be applied only on the basis of announced rules.

Another indispensable element of the Rule of Law is independence of the judiciary, for the autonomy of courts is critical to the autonomy of law, an essential prerequisite for the Rule of Law. Through their law-finding activities the judiciary purports to secure a "government of laws, not men". These aspects of Western constitutionalism, regardless of variations in particular countries, contibute to a Rule of Law paradigm widely accredited in modern societies.

The Rule of Law notion can be differentiated according to level of abstraction as follows: First, the concepts of a "Rule of Law" or a Rechtsstaat can be understood as generated in particular national-historical milieux. Second, we can propound a common ideal of the European family of legal systems, in which the Rechtsstaatsprinzip and the Rule of Law manifest themselves as "essentially contested concepts" with familial resemblances. This general idea of a Rule of Law has become a key part of the Western tradition of political culture, deeply rooted in its organic growth. Its fullest achievement is associated with the maturation of capitalism into laissez-faire competition under conditions of political stability. Finally, the Rule of Law in its broadest extension is an ideal propagated as a universal organizing principle for constitutional orders since World War II, especially across the Third World in the period of decolonization.

It is at this highest level of abstraction that the Rule of Law is seen as "marking the transition from the rule of person to that of an impersonal and neutral order, which protects the citizen against discretionary and arbitrary power, ensures equality with others, guarantees procedural fairness, impartial administration of the law through independent courts, a democratic process of law-making, and rules which both define and enforce the limits on the powers of state institutions as well as set out the scope of legitimate state intervention in the affairs of its citizens."

The possibility of considering the Rule of Law as a superior concept (Oberbegriff) to the specific principles of public or constitutional law developed in certain concrete legal-cultural environments consists in the replacement of the

rule of a (subjective) person by the rule of (objective) law, on one hand, and in their functional similarities as legitimising ideologies for the legal order, on the other hand. Abstracted from specific historical circumstances, the Rule of Law thus acquires an ideological universality. A Rule of Law in which validity of the legal order is secured by the autonomy and supremacy of the law in relation to the state and its functionaries thus has been regarded as an essential organizational principle of liberal democratic regimes, giving expression to fundamental ideals of the objectivity, universality and neutrality of law.

It is now necessary to consider the value of this Rule of Law concept before proceeding to evaluate Korean legal realities in the light of the principle; for any attempt to use it as a criterion would be misguided if the principle itself lacks justification. What matters here is the question of its legitimacy as a concept capable of legitimising the legal system as a whole. Legitimacy quiets doubts and promotes acceptance not only of specific legal rules, but of the political system that has enacted them. Is the Rule of Law, as eulogized by some, an unqualified human good?

The appeal of a global criterion of legitimacy has come under attack from various directions. It has been argued that developments in "post-liberal" society(Roberto M. Unger's term) have undermined the twin pillars of generality and autonomy. The welfarism and social purposive orientation of modern capitalist states with related discretionary powers, particularistic rules and specialized state agencies have destroyed the generality of rules and the possibility of their impartial and mechanical application. Can the Rule of Law ideal survive these challenges?

The answer is complex. To be sure, one should not lose sight of the fact that the Rule of Law with its connotations of legal equality and individual liberty functions as an ideological construct to conceal real inequalities in socioeconomic relations. Nor can it be denied, as E.P. Thompson emphasized, that the Rule of Law can be used as an appeal for "the imposing of effective inhibitions upon power and the defense of the citizen from power's all-intrusive claims." We need not go so far, however, as to ascribe an intrinsic value to it, thereby sliding into a wholesale acceptance of the Rule of Law ideology.

The argument, however, that the Rule of Law can be brought into play to curb authoritarian impulses of the powerful is one that must be taken seriously. Thus, Wright contends that basics of due process such as habeas corpus, trial by jury, and a right to confront accusers are worthy components of any socialist legality. Hunt has urged a more modest, but nevertherless positive, role for the Rule of Law. Even a socialism needs a version of it, for it provides a means of

distinguishing between decision procedures themselves and the substantive results of those procedures, thus enabling a viable separation of law from politics.

To sum up: If the Rule of Law has been criticized as an ideological feature of liberal legality which conceals the real structures of oppression and inequality, such has been true first of all in the Third World, where the Rule of Law commonly has been less than effective in limiting political oppression of opposition groups, even where it met the demands of foreign capitalists for a predictable economic environment.

An overemphasis on legality may expose the state to a loss of legitimacy -- for two somewhat contradictory reasons. The first is that legality as understood in the West, typified by formalism, professionalism, and a narrow focus on issues abstracted from their social context, is alienating and esoteric, non-participatory and undemocratic, superficial and expensive. The second reason is that legality by design constrains the leadership; but to win credibility the government must be supreme and be seen to have full authority -- judicial review and formalized administrative processes may derogate from such authority.

In the Third World, a welfare state(Sozialwohlfahrtstaat) not grounded in a Rule of Law may tend to evolve into a "police state"(Polizeistaat). A Rule of Law is nothing if not a restraint on arbitrary exercises of power. A social order which has made serious attempts to eliminate social inequality, as Weitzer argues, may discover that equality before the law furthers the more general amelioration of inequality. In much of the developing world the Rule of Law remains an unrealized ideal and far less effective in legitimising existing legal orders than is true in Western societies. Evaluation of a developing country's legal reality will be particularly meaningful when the Rule of Law is unevenly institutionalized. Such an approach hardly entails simple adoption of a universalistic Western standard, for the Rule of Law concept must be adapted to historical reality when used to generate criteria for evaluation of shifts from authoritarian to more democratic institutional arrangements.

2. Legal Reality in Korea

To grasp key characteristics of legal reality in Korean society today, to be sure, some historical background is required. It is a commonly held that at least three historical factors have contributed to the shaping of modern legal reality in Korea. First, the legal traditions of pre-modern society of Korea supplied the

basic foundations. Second, the experience of Japanese colonial rule, during which alien legal institutions were imposed, had a distorting impact on legal consciousness in Korea. Third, the importation of Western jurisprudence during the post-1945 nation-building process had had far reaching consequences. The foregoing certainly constitute critical factors that have left shadows and scars in Korean legal culture to this day.

Legal reality in contemporary Korea can be characterized by chronic discrepancies between legal norm and reality, a phenomenon attributable to the historical factors just sketched which left behind a "hybrid" legal culture. Such circumstances as memories of harsh experience under Japanese colonial law, a displacement of civil law by hypertrophied criminal law, reliance upon traditional duty-oriented attitudes of functionaries to implement repression, and routinized political manipulation of law have all contributed to the cumulative distortion of the legal environment in contemporary Korea.

It has proven very difficult for the enlightened, rational values of Western jurisprudence, exemplified in the Rule-of-Law principle, to take root in the sediment of Korea's modern history. Certain features of Western legal positivism, for instance, the ideals of formality, particularism and isonomy, unfortunately have had a seriously corrosive effect upon affirmative values carried forward from Korea's own legal tradition. There thus has been a widening in the gap between legal norm, expressed in modern legal forms imported from the West, and a reality that displays many syntheses of residues of traditional legal culture and of militaristic colonial law.

Legal practice in Korea long has been anchored in a social control perspective from which the coercive aspect of law and order has been given priority over protection of individual rights. Economic underdevelopment and recurring political instability were aggravating factors as well -- authoritarian military regimes found themselves lacking in legitimacy. Constantly challenged by opposition movements, such regimes had little choice but to propagate an ideology of developmentalism. Legitimation crises in Korea became so routinized that the legitimacy criterion of the presence or absence of a Rule of Law, taken for granted in the West, was undermined in the face of an opportunistic welfarism as well as frequent resort to "emergency" measures administered by special agencies. Hence arose two distinct syndromes to be observed in Korea: widespread popular disaffection with law, paradoxically coupled with heavy state reliance upon instrumental uses of law.

(1) Discredit of Law

A distinctive feature of legal reality in Korea is widespread discredit of law

among the population. This is partly a reflection of legitimacy deficits in the substantive legal order itself, but more broadly it has been due to unhappy life experiences of the addressees of legal norms. Expectations of justice have long tended to be betrayed in the actual output of legally-validated institutions, especially in the determinations of functionaries accustomed to arbitrary exercise of official powers. Of significance here is less the attitude of disrespect for the legal system than the dysfunction or practical irrelevance of law itself. In other words, as a means of dispute resolution law simply fails, being evaded or simply ignored not only by parties in dispute but by law enforcement authorities themselves. In other cases the law multiplies problems instead of solving them, or it actually aggravates conflict situations. The so-called "NIMBY"(Not In My Back Yard) syndrome affords a useful example for analysis. In recent years 'NIMBY' movements have been witnessed with growing frequency in Korea as environmental degradation, a by-product of rapid industrialization, has proceeded at an alarming pace. Faced with environmental hazards, and with a diminishing likelihood of the sorts of reprisals against civic action experienced under prior authoritarian regimes, local communities often engage in protest demonstrations or direct civil disobedience rather than attempt to invoke judicial processes.

The 'NIMBY' label came to be used by the government as a term of disapprobation, stigmatizing demonstrations against polluters or against siting decisions for infrastructure as a form of 'collective egoism'. Such ethical censure, obligingly highlighted in the media, often has been applied without any attention to the justifiability of underlying concerns of the local community.
Such an approach to environmental disputes, with propaganda at the government level effectively polarizing the situation by seeking to ostracize protestors as immoral, often has impeded the rational resolution of such controversies. In such instances law fails to play its expected role because the people concerned instinctively distrust litigation as a means of dispute resolution, feeling that defective law is itself the source of the conflict. Moreover, many citizens remain deeply skeptical about the objectivity and impartiality of available tribunals.

Construction of an effluent facility, a large incinerator or other potentially hazardous installations appears to the local community as nothing but an infringement of their environmental rights, which are to be sacrificed in the name of the public interest. Especially when the community affected has been allowed no meaningful input into the planning process for the project, a better civil acceptance cannot be expected.

Protests against such infrastructure projects are concerned less with the legality of a certain administrative act such as the issuance of the construction permit, than with breakdowns in interest representation or inadequacies in the system of redress the law is supposed to guarantee. Proliferation of 'NIMBY' controversies thus is symptomatic of failures in the legal order, despite attempts to dismiss them as mere 'collective egoism'.

Another example is the expropriation of land for housing redevelopment projects. On average, only ten percent of the prior inhabitants of a redevelopment zone are accommodated with new housing in the "gentrified" zone, while in most cases the redevelopment has triggered a local surge in real estate speculation. Given this pattern, tenants frequently stage demonstrations against redevelopment projects. The protests do not focus on any legal defect in the eminent domain or eviction processes. Rather, they register discontent over the lack of any adequate legal recognition of the prejudicial impact involuntary displacement has on tenants' subsistence.

Mass protest against a legally valid act of expropriation in fact represents resistance to the real intended consequences of legal norms and dissent against the resolution of conflicting interests prescribed in valid laws. The state itself, as an indirect beneficiary of the expropriation along with the redevelopers, is seen as in conflict with tenants, often including "illegal" squatters who regard the entire scheme of redevelopment as a de facto sentence of marginalization, by which they are exiled from a good locale to the periphery of the city.

In an era of rapid development such as Korean society now is experiencing, the legal recourse provided in such instances, far from instilling a sense that equity and justice are guaranteed, disappoints the expectations of groups who see themselves as disadvantaged and entitled to protection. Consequently, the perception that law is neither a vehicle of justice nor a protector of freedom becomes deeply rooted in their legal consciousness. Predispositions to such attitudes might be ascribed in part to survival of traditional attitudes, but more often scepticism about the fairness of law arises from political practices pervasive under past authoritarian regimes which freely deployed law to execute programs imposed from on high.

(2) Instrumentalization of Law

Another apparent characteristic of Korean legal reality consists in the tendency to apply law selectively and for partisan ends, in short, instrumentally. Law of course is everywhere a primary means of policy implementation and the legislative process is an essential arena of political action. The administration of

law is never completely insulated from politics, given appointments of functionaries by the political organs and so on. Here, however, the instrumentalization of law refers to a subordination of applications of law to political ends, that is, to a situation in which political considerations hold sway not only over legislative enactments but also over the administration of justice. Instrumentalization thus entails that law may be deliberately misapplied or selectively abused contrary to its own purpose. In pluralistic political systems instrumentalization of law meets with criticism and counterpressures, but it has long been prevalent in many Third World countries where rulers do not enjoy legitimacy based on democratic interest intermediation. In contemporary Korean society, despite the transition to democracy that has begun, law is still seen by many as a weapon of incumbent powerholders rather than as a permanent system of impersonal norms protecting individual rights and constraining governmental authority.

A democratic succession took place in Korea through the presidential election of 1992, but an instrumentalist approach to law has persisted even under a civilian government committed to political reform. This was vividly shown when President Kim Young-Sam recently dismissed Prime Minister Lee Hoe-Chang for having insisted upon his constitutional competence to control the cabinet under orders of the President. Former Prime Minister Lee reportedly was viewed as having challenged the so-called "prerogative" of the President, and voices in the Democratic Liberal Party claimed that the power of the Prime Minister's office is limited to supervision of eight Ministries, even though such contention lacked any textual basis in the Constitution.

Instrumentalization of law is closely bound up with its selective application. Law has been highly effective when used as a tool of coercion and for ideological domination of political opponents or a militant working class, but it also can be a cumbersome restriction on administrative powers of the state. As a means of policy implementation, the law has been evaluated above all in terms of the political advantages it confers. Many examples of routinized political manipulation of law may be cited. The pattern of politicized abuse includes selective prosecutions under the National Security Act("NSA"), the Act on Assemblies and Demonstrations, various labor laws and special criminal laws; exercises of discretion in deciding upon detention, indictment and suspended execution of sentences; as well as selective amnesty declarations, all of which have contributed to instrumentalization of law in Korean legal practice.

III. Rule of Law and Law Reform in Korea

1. Rehabilitation of Judicial Review

In 1971, for the first time in Korean legal history, the Supreme Court declared a statute, the State Redress Act, unconstitutional. This decision might have been a historic first step toward the realization of a Rule of Law in Korea, but it was nullified only a year later by a constitutional amendment implemented by the military regime of Park Chung-Hee. For Park the Supreme Court ruling was a tacit challenge to his authoritarian rule, and he reacted imperiously by incorporating the invalidated provision into the text of the Constitution.

Moreover, Park concurrently took the more radical step of stripping the Supreme Court of its jurisdiction to review the constitutionality of legislation. This power nominally was transferred to a "Constitution Committee", but the latter institution remained dormant for more than fifteen years and judicial review of the constitutionality of legislation was not revived until late 1987, when the Constitution was amended to create the present Constitiutional Court. The nine Supreme Court justices who had voted in 1971 to hold the State Redress Act unconstitutional were denied reappointment by President Park Chung Hee. More than one-third of all judges serving at the time, 151 judges, submitted letters of resignation to protest this blatant infringement of judicial independence. The protest was to no avail, however.

In 1993, twenty-two years after the State Redress Act Case, the Constitutional Court declared unconstitutional a series of state interventions related to the 1988 bankruptcy and liquidation of the Kukje Group, which had been among the ten largest business conglomerates in Korea. The Court held that the Finance Minister, acting under the direction of President Chun Doo-Hwan, had contravened Articles 119, 126 and 11 of the Constitution.

Article 119 sets forth the basic principle that the economic order of the Republic of Korea is founded on respect for economic liberty of individuals and private enterprises, which the Court interpreted to mean that the state should not intrude into this sphere of entrepreneurial freedom except on the basis of clear legal authority of the kind contemplated in the Constitution. The Court also based this principle of non-interference on Article 126, which provides that private enterprises shall not be expropriated by the state or be put under state management or control, except in accordance with law in emergency conditions when national defense or a crisis of the national economy makes such action necessary.

In the Kukje Group case the Court endeavored to make it clear that future state action of any kind must meet the tests of a Rule of Law and that the legal norms underlying judicial review must become binding laws of the land. The case thus can be viewed as a manifesto of the judicial positivism which the Court intends to develop when faced in future cases with unconstitutional practices, whether legacies of authoritarian rule or newly emergent.

Implicitly, the Kukje Group case had a powerful subtext as well. The dubious practices used by past authoritarian regimes to raise political funds were tacitly condemned as unconstitutional. By forcing into bankruptcy a private enterprise which had not complied with unlawful demands for political contributions, the past government was seen by the Court as flouting the Rule of Law.

This decision by the Constitutional Court, coming shortly after the inauguration of the civilian government in February 1993, portended a dramatic change of direction in the jurisprudence concerning the relationship between the state and civil society. The Court had previously tried, with limited success, to assert itself as a major institution in the constitutional system. This time, however, it declared the Rule of Law to be a fundamental principle that would be generally available to challenge arbitrary state intervention into the economic realm.

A parallel, if less dramatic, movement also has been observable in recent judgments of the appellate courts. For example, the Supreme Court recently held unconstitutional a regulation issued by the Minister of Health and Social Affairs under the Food Sanitation Act. The regulation prohibited sales of bottled spring water in the domestic market, but the Court ruled that such a prohibition infringed upon constitutional liberties, including the guarantee of freedom to choose one's vocation.

The foregoing types of cases provide affirmative indications that judicial review is beginning to rehabilitate the Rule of Law in Korea, but the piecemeal approach of judicial positivism will scarcely suffice for effective establishment of an improved legal order in Korea. Burdens from the authoritarian past still remain poised to impose undemocratic restraints on civil society, and judicial independence will be an indispensable element of the Rule of Law because judicial review is essential to ameliorate that unhappy inheritance. More fundamental steps were needed, however, to reform and reengineer the existing legal order to make its substance consistent with democratic ideals as a Rule of Law presupposes. The steps taken to date toward such reform will be discussed in the next section.

2. Law Reform toward a Rule of Law

If the Rule of Law is to be more than a vacuous theory, a superficial self-glorification of the legal order itself, that is, if it is to be institutionalized as a working constitutional apparatus with practical consequences, then the legal system has to become more accessible to the lay public. The grounds for optimism are limited, for the legal system is far from solving the problems of the past.

Beyond popular cynicism about law and opportunistic manipulations of legal tools by powerholders, there remain other impediments to the realization of a Rule of Law in Korea. For example, a considerable number of the legal norms presently in effect originally were enacted through extra-legal or unconstitutional processes. The survival of such norms undermines the legitimacy of the presently existing legal order.

> A recent study found that about 32% of all the statutes presently in force were enacted by non-elected organs during various historical conjunctures of revolution, martial law in the wake of coups, or other interruptions of constitutional order. These situations included the aftermath of the 1961 military coup, the Yusin martial law period of 1972, and the "creeping coup" of December 1979 through May 1980 which followed upon the assassination of Park Chung-Hee. Many anti-democratic laws were devised either to reinforce the seizure of power by a miltary junta or else to implement their political agenda at the cost of abrogating basic human rights. More importantly, martial law decrees and other "emergency measures" came to be incorporated as permanent features of the Korean legal system. The retention of extensive portions of these "extraordinary laws" adopted by past dictatorships is a factor that helps to explain why challenges to the legitimacy of law persist not only across a wide spectrum of the populace but also in legal circles.

Some of the unconstitutional elements of existing law have been and will continue to be eliminated through judicial review, as noted above. A more decisive and effective way to rebuild popular confidence in the legal order is to enact amendments and new laws so that the requirements of the Rule of Law are put into practice. Legislation is the primary means to rebuild legal institutions, for it is statutory law that characterizes the exercise of power, gives it direction and makes possible meaningful democratic control over the administration of justice.

Reform of the legal system can facilitate the creation of conditions under which the distance between legal ideals and practical realities can be

diminished. This is not merely or even mainly a question of the content of the positive law; rather, the concern is with how law and legal functionaries actually influence social relations. What really matters for this purpose are the institutional environments and the constellations of social forces that determine the administration of law.

A main objective of legal reforms in Korea has been to institutionalize the process and the outcome of more democratic politics in the form of an authentic Rule of Law. A yardstick for evaluating accomplishments is to be found in the premise of that a Rule of Law is a fundamental constitutional principle in democratic nations.

Such an evaluation begins with establishment of the formal legality of the government. However, beyond that minimal criterion, the legal status of individuals must also be institutionalized in a manner that guarantees their capacity to take active part in political, economic, social and cultural interactions as citizens possessed of affirmative rights, not as merely as objects of adminstrative control.

In the context of administrative processes, any such guarantee of the legal status of individuals at least requires free access to public information, clear advance notice of relevant legal rules, opportunities to participate and to have one's interests represented in regulatory processes, and effective remedies in case one's rights are violated and recourse must be sought. In Korea, none of the foregoing minimal guarantees was secured under past authoritarian governments. In reviewing recent reforms relevant to those basic features of administrative justice, it will also be appropriate to touch upon the belated implementation of local autonomy. Decentralization of the state to allow more immediate democratic representation(and to constrain chronic abuses of power associated with overcentralization) is a principle long enshrined in the Korean Constitution, even though its implementation has been repeatedly postponed and frustrated.

3. Reform Legislation

(1) Legal Control of Public Security Authorities

Legal control of public security authorities is one of many urgent problems inherited from Korea's authoritarian past. The concerned state apparatuses, including the Agency for National Security Planning(ANSP), public security departments of the Public Prosecutor's Offices, military intelligence agencies, and Anti-Communist Bureaus of the police, for decades have been notorious for

their abuses of power and grave violations of human rights. Elimination of these unhappy vestiges of dictatorship by subjecting all criminal law enforcement to the Rule of Law would go far toward improving popular trust in the legal system. Thus, establishment of adequate control over the concerned security agencies has been accorded a high priority in the reform process.

The December 1993 amendment of the Agency for National Security Planning Act(ANSPA) was the first notable achievement of the National Assembly in the era of civilian control. Through this step a bridgehead was secured for parliamentary control of the ANSP and room for improper intervention by the secret police into political affairs was reduced. As a result of the amendment, the National Assembly now can exercise significant control over the ANSP budget, which previously was only reported without any breakdown and was not subject to any effective parliamentary audit or oversight. Under the revised law, the Intelligence Committee of the National Assembly will hold budget reviews in closed executive section, with the ANSP obliged to submit all information needed for substantive monitoring and control. Also, the ANSP's formerly extensive jurisdiction to conduct criminal investigations of political crimes has been reduced to some extent. Another improvement consists in the strengthening of penalties for crimes of abuse of official authority and intervention into political activity, as well as new guarantees of a right to defense counsel and notice to family members of political detainees, which should help protect those charged with political offenses against abuses by the security agencies.

These welcome ameliorations notwithstanding, the ANSPA remains vulnerable to criticism, however. The ANSP lacks a constitutional basis for its existence and competence, though it exercises at least as much power as such standing agencies as the Board of Audit and Inspection or the Central Election Management Commission. Consequently, no parliamentary control is exercised over the President's appointment of its Director. The ANSP has also retained an extraordinary power to investigate and initiate prosecutions of certain political offenses(treason and organization of "anti-state organizations"), a power chronically abused in the past to persecute political opponents of the military dictatorships.

The National Security Act(NSA) has been the most controversial law at the disposal of government functionaries inclined to oppress political opponents by charging them with offenses of "sedition", "treason" or "espionage." As already noted, frequent NSA prosecutions of dissidents by past military governments tended to undermine the legitimacy of the Rule of Law, and for this reason the

retention of the NSA without fundamental change is regarded by many as a serious deficiency in the reform process to date. Debates over the raison d'être of the NSA have been underway since before 1987, and calls for repeal or radical revision of the law are undiminished in the mid-1990s. Recently, however, in response to suggestions by the United States State Department that the NSA should be abolished, the civilian adminstration of President Kim Young-Sam has made it clear that they continue to regard the NSA as indispensable for defense of the liberal-democratic regime.

(2) Political Reform Legislation

On March 4, 1994 the National Assembly passed three bills under the rubric of "political reform legislation". They were an entirely new Act on Elections for Public Office and Prevention of Unlawful Election Campaigns, plus major amendments to the Political Funds Act and to the Local Autonomy Act. This legislation, exalted by the civilian government of Kim Young-Sam as a "great leap" toward political reform, was indeed important and helped to put the civilian administration's reform drive on a secure footing.

1) Integrated Election Act

The Act on Elections for Public Office and Prevention of Unlawful Election Campaigns(commonly referred to as the Integrated Election Act: "IEA") replaced and superseded three distinct election laws, namely, the Presidential Election Act, the National Assembly Members Election Act, and the Local Autonomy Election Act. Of all the reform legislation passed since the inauguration of the civilian government, the IEA merits special attention because it will impact directly upon the quality of democratic representative processes in Korea in the future.

The aim of the IEA, it is said, is to "fetter money and free mouths." Enactment of the IEA can be rated an important achievement, for it undertakes to rationalize election regulations and to alleviate or abolish various impediments to freedom in election campaigns.

Importantly, the new IEA reinforces its own efficacy by strengthening penalties for unlawful campaign practices, especially chronic abuses of "money politics" which in the past undermined the legitimacy of the elective leadership in Korea. For example, it invalidates an election victory if the chief of staff of the candidate or the treasurer of his campaign are sentenced to imprisonment for having exceeded the legal expenditure limit by more than 0.5%. A victory is also nullified if relatives of the candidate, his chief of staff or treasurer are convicted of breaking the rules against buying votes or soliciting illegal

donations.

A general provision prohibiting all campaign activities other than those expressly permitted by law has been repealed. Restrictions on particular campaign activities such as public rallies, interviews, debates and uses of broadcast media have been relaxed or partially lifted.

Major improvements also were made in the proportional representation system applicable to National Assembly elections. Formerly, the non-elective national constituency seats in the National Assembly were distributed according to the seats each party had won in the local constituencies(single-member districts), which distorted the balance of representation without regard to actual party strength. Under the new law, it is now the number of votes polled by each party's candidates that determines the allocation of national constituency seats.

The representation system thus has been reestablished on a truly proportional basis. Moreover, under new regulations, an Assembly member appointed by his or her party to a national constituency seat automatically loses the seat upon voluntarily leaving the party or shifting allegiance to another party.

2) Political Parties Act

The Political Parties Act(PPA), revised on December 27, 1993, contains a series of new regulations of political parties and enlarges political participation in some measure. The number of district parties required for registration of a political party organization has been reduced from 48 to 24 and the reporting requirement for district parties has been lifted. The PPA mitigates limitations on capacity for party membership by directly enumerating in the statute the categories of ineligible persons, something previously delegated to the presidential enforcement decree. Party participation is now allowed for university lecturers and journalists in the print and broadcast media. The changes to the PPA also include punitive sanctions against improper interference with organization of a political party.

3) Political Funds Act

In the past, funds for political campaigns and party administration purposes were raised through voluntary or involuntary contributions from businessmen. Practically speaking, such contributions were compulsory and so came to be regarded in business circles as a quasi-tax. Such an institutionalization by the ruling group of illegal practices vividly epitomizes the nature of government-business collusion in the period of authoritarian rule. Not a few enterprises were subjected to hostile tax audits, surveillance or deprivation of

economic advantages purely because of refusal or reluctance to pay the political "tribute" levied upon them.

A turning point was proclaimed in 1993 when President Kim pledged at the inauguration of his administration not to accept any donations of political funds, however, whether the watershed is real remains to be seen. The Political Funds Act(PFA), originally enacted in 1965, ostensibly for the purpose of publicly disclosing the sources of political funds, recently has been amended for the seventh time as part of the political reform program. The PFA amendments are hoped to bring about changes in the deeply-entrenched pattern of fund-raising practices linked to influence-peddling and collusion between government officials and entrepreneurs. Despite the amendments the PFA continues to prohibit political contributions of any kind by trade unions or other labour organizations. It has been argued by the opposition party that this and other prohibitions should be eased to allow establishment of an equitable and transparent political financing system. Conspicuous shortcomings in the system are that the large subsidies, which favor incumbents, increase burdens on ordinary taxpayers, and the system of recording sources of donations is insufficiently institutionalized to guarantee transparency or to facilitate voluntary participation by the general population of voters.

(3) Administrative Legislation

Improvements in administrative law are also a key component of the recent legislative reforms. The goal of reform legislation in this field is not only to render state functionaries accountable to formal legal constraints on their exercise of power, but also to adapt the administrative process itself to the changed relationship between the state and civil society. There is little doubt that the bureaucratic-authoritarian system of the past must be reorganized if the requirements of a Rule of Law are to be met in the new environment of democratization.

Principal goals of reform are to secure impartial and effective enforcement of existing law against administrative agencies, and also to establish the legal status of individuals as active citizens by furnishing adequate protection against improper retaliation by the state against exercise of legal rights. Administrative law reform proceeds not only by reinforcing or restructuring legal controls of the bureaucracy, but also through improved institutionalization of the public's rights, for example, to be informed about administrative processes, to be heard and to participate in administrative rulemaking and adjudication. The National Assembly has passed several important bills concerning administrative law,

although the pace of change in this sector has been relatively slow in comparison with the political reform program.

1) Laws on Administrative Regulation and Procedure

a. Legislation on Administrative Regulation

The enactment on January 7, 1994, of a Basic Act on Administrative Regulation and Administration of Civil Affairs(AARACA) was a notable achievement by the new civilian government. The law purportedly was devised to alleviate the burdens on citizens and to ameliorate administrative practices. To this end it has introduced a sort of ombudsman system, installing under the Prime Minister an administrative grievance machinery called the National Grievance Council(NGC), which is empowered to investigate people's grievances and to find and recommend desirable solutions for them.

The process of enactment of the AARACA deserves special attention. The bill was initiated by the Administrative Renovation Commission at the behest of the Ministry of Government Administration, but there was substantial input from a private civic organization, the Citizens' Coalition for Economic Justice(CCEJ). This kind of cooperation between state authorities and a civic group in the private sector was a path-breaking development, in view of previous legislative processes which seldom facilitated input from outside the government. In most cases, the ruling party in passing laws merely implemented its predetermined policy. Whether this innovative mode of legislative action will be used more broadly remains to be seen; the administrative procedure act, discussed in the following section, illustrates the other side of the coin.

b. Administrative Procedure Act

It is often acknowledged that representative democracy needs be complemented by relatively direct inputs from the "grass roots," in the form of citizen participation in administrative processes, through hearings or otherwise. To foster such paricipation, a process must be institutionalized in which procedural rights of individuals are recognized. In Korea, a general administrative procedure act has not yet been enacted, although provisions concerning interviews or hearings have been inserted in particular laws.

The manner in which the issue of legislating an APA was dealt with shows vividly that the legislative process continued to be manipulated by the executive branch, just as authoritarian regimes wielded the legislative power arbitrarily in the past by delegating to bureaucrats the responsibility for drafting the very laws and regulations that defined their own powers. Although the institutional

form of administrative procedure is a key measure of democratization, practices in this domain have not changed in essence from the period of authoritarian rule, and it is deplorable that prospects for early enactment of an APA remain still discouraging.

2) New Legislation on Freedom of Information and Privacy

Free access to and free flow of information constitute an indispensable basis for a democratic society. These preconditions for meaningful participation in self-government are implemented through legal recognition of freedom of information, including a "right to know", as well as definitions of privacy rights in the form of personal data protection. The civilian administration of President Kim Young-Sam has taken a significant step toward addressing these issues by enacting a Personal Data Protection Act(PDPA).

The PDPA takes into account the irreversible emergence of the so-called "Information Society". The PDPA regulates the handling of such personal data by public authorities and guarantees individual freedom of information against unauthorized use of personal data and other infringements of privacy. Thus, public agencies holding personal data files are not allowed to use or to transfer them to other agencies for any purposes other than those prescribed by proper regulations.

A salient feature of the PDPA is that it grants to each data subject a right to peruse data concerning his/her person together with a right to demand correction of any incorrect information. Though a more general right of access to public information has not yet been formulated in law, the enactment of the PDPA is considered by many to represent a meaningful first step toward establishing an active status of individual citizens in relation to the state and the public sphere. However, there are certain problems with the new law, such as its limitation of protected personal data to information processed by computer, and also its overbroad grounds for denial of access by individuals to information about them.

Enactment of the Act on Protection of the Confidentiality of Communications (APCC) was another notable legislative improvement made by the civilian administration, while the adoption of a systematic Freedom of Information Act has been delayed despite growing popular pressure. It is important that legislative initiatives on this topic already have been attempted from the sector of civil society, including in the form of a petition submitted to the National Assembly by the Citizens' Coalition for Economic Justice, a product of the legislative initiative movements that are emerging in the 1990s. The political

parties have preferred to assume an opportunistic attitude instead of referring their policy alternatives to public opinion. In fact, policy priorities have been emphasizing the fostering of information technology and industrial development rather than institutionalization of improved public access to information, which has been taken up only as a peripheral aspect of the former concerns. There thus has been little real progress in this area under the civilian administration.

3) Laws on Administrative Remedies

Administrative remedies, including the laws relating to state liability for official wrongs, as well as channels for administrative adjudication are important domains to be addressed by any program of democratic reforms. There have appeared, however, no particular legislative improvements, nor even any noteworthy signs of movement toward legal changes.

To begin with the Administrative Litigation Act(ALA), last revised November 28, 1984 into a form following the model of the 1962 Japanese Law on Litigation of Administrative Disputes, this statute suffers from conspicuous defects. Among these are its improper classifications of lawsuits, unavailability of the remedy of affirmative injunction, insufficient provisions for interim remedies, inadequate recognition of legal standing to pursue vindication of collective interests, and so forth, apart from the shortcomings in application of the existing law. The existing system of administrative adjudication has proven to be defective in that it entails unreasonable procedural delays, while unconstitutional vestiges of the past remain. Reorganization of judicial review of administrative action was dealt with recently by the Chief Justice's Committee on Development of the Judicial System(CDJS). The suggestions presented by the CDJS were implemented through a series of Judicial Reform Legislation in July 1994.

(5) Reform of Judicial System and Legal Education

The Judicial Reorganization Program was formulated through a closed process by a task force appointed by the Chief Justice of the Supreme Court, without any serious public debate. The judicial reform followed was perceived as lacking in credibility and deemed only to be a lukewarm measure. There remained unsatisfactions and growing demand for a more drastical reform of the judicial system and legal service among people. This was the reason why the government set about to reform and renovate the judicial system and legal education on its own initiative. A new judicial reform driven by the Kim administration focuses on transforming and improving the legal service both in

quantity and quality. Its main theme is said to be a transformation from 'Selection through Examination' to 'Bringing Up through Education'. Because it is still an ongoing project, a reliable estimation of its future results cannot be made. No other reform program launched by the civilian goverment, however, could enjoy broader popular support than this, which promises good prospects for it. It is highly probable that the reform will be implemented and begin to take effect not later than 1997.

4. Reform from Above and the Rule of Law: a Critical

Assessment

There have been, to be sure, improvements to be observed in legal reality in Korea. It can be said, with some reservations, that the formative years of the Rule of Law have been witnessed. The judiciary stands now, more decidedly than ever before, for the legitimacy of judicial independence.

To date, however, it has been less the decisions of the courts than the enactment of reform legislation that has begun to move the legal system toward a new order of democracy and a Rule of Law. The driving force has been the civilian adminstration of President Kim Young-Sam. The reform politics of the civilian government has raised many fundamental questions, and the movement toward a Rule of Law faces challenges from various sectors of the society. Potential enemies lie waiting in ambush. Reform legislation has unfolded in a piecemeal fashion without any viable integrating vision of the Rule of Law.

The reform of law is not free from the dilemmas that the civilian government has been facing from its birth. The ruling coalition grew out of political bargaining among factions which include arch-conservatives who strongly supported and benefited from past military authoritarian regimes. Moreover, it inherited the existing bureaucratic apparatus composed of an officialdom largely unsympathetic to the reform agenda, which promised to impose new controls and accountability upon them.

Since the reform and anti-corruption programs of the new government collided, in many cases, with the interests of those closely associated with the former regimes, their stubborn resistance was inevitably encountered. This was one of the foreseeable basic limitations of the reform owing to its nature as a "reform from above". When senior bureaucrats, loyal servants of past undemocratic regimes, assumed at best ambivalent postures toward the reforms, the civilian government found itself in a dilemma: Either drastic measures had to be taken to reform the existing order, which could jeopardize the political

base of the administration, or else it would be necessary to resort to a roundabout, lukewarm policy at the risk of losing popular support.

Such was the situation surrounding the revision of the Public Servants' Ethics Act(PSEA). The civilian government took the first route and by mobilizing popular and mass media support launched an anti-corruption campaign against many high officials who had amassed wealth illegitimately. It was hoped that the political superstructure and the higher adminstrative apparatus could thus be renovated and led to adhere to the political agenda of reform. The result was devastating.

The effect of the anti-corruption campaign was double-edged. Many politicians, generals, senior bureaucrats and even judges were purged from office or resigned rather than disclose their personal wealth. The Kim Young-Sam administration convincingly differentiated itself from the former military governments. Law enforcement authorities, though somewhat slowly and reluctantly, set about to resume their normal duties as public servants. That was a success of undoubted significance, even if it was only a first step to normalize distorted constitution of the state apparatus.

President Kim enjoyed unprecedentedly broad support from the people, but protests against his reform politics began to take shape from another direction. Because the major part of the campaign took place, so to speak, backstage in the political corridors before the PSEA had been formally revised, his "clean government" campaign was criticized for legal insufficiencies. Ironically, this time around the Rule of Law was being invoked by those who had chronically scorned it in the guise of adhering to formal legality.

This controversy, which raised the significant problem of personal rule versus the Rule of Law, in fact was concluded in favor of the civilian government without any threat to the politics of reform. It was argued, for instance, that the anti-corruption campaign was not illegal, though it may have been non-legal.

Another negative outcome of the campaign was more serious and malignant, however, in that it has come to constitute a major impediment to the pursuit of further reforms. Large numbers of government officials recoiled at the purge, finding themselves personally threatened. Far from demonstrating resolve, from the outset many were reluctant to perform tasks imposed by the reform agenda. Not a few sought only to shirk responsibility. This sort of embarrassing phenomenon was one reason why the civilian adminstration recently has been admonishing officialdom to assume a more responsible and active attitude, even by lifting various perceived disincentives. At the same time, such events demonstrate that any reform "from above" can be successfully implemented only

if it is accompanied by mobilization of a reorganized adminstrative apparatus.

The administration of Kim Young-Sam lately has taken an increasingly "moderate" stance in the implementation of its reform program. This tendency is especially visible in the sphere of reforms of socioeconomic significance. Although the August 1993 "emergency" measure introducing the System of Real-Name Financial Transactions was bold, a similarly decisive approach was not subsequently observable in other fields of reform. On the contrary, subsequent changes have been carried out incrementally and in ways calculated to minimize resistance, particularly from major industrialists.

For example, the June 1993 Special Act on Deregulation of Enterprises was pushed through with high priority, whereas the reform of laws restricting freedom of association, particularly those prohibiting organization of trade unions by teachers and public officials, has not been pressed. Such opportunistic selection of reform priorities suggests that the civilian government has not broken with the instrumentalization of law that characterized previous authoritarian regimes. As with powerholders of the past, for whom the law seemed a more effective means than naked coercion for excluding political opposition, law once more seems to be regarded in some spheres, such as labor law, as an undesired obstacle to "efficient administration" and political manipulation. Despite its rhetoric, the civilian administration has been unwilling to disrupt many of the routines of "top-down social control" used by previous authoritarian regimes to steer the political economy.

The civilian adminstration often seems eager to placate an Establishment which disfavors deep and rapid democratization. State intervention into the market is to be limited in favor of "entrepreneurial freedom", but other freedoms receive lower priority. Increasingly, the main theme of the rhetoric of reform sounds more like a political version of cost-benefit analysis than a vision of more democratic legal order, revealing an impoverished philosophy behind the reform of law. Legal reforms are often regarded as peripheral details, little more than "paperwork" recording the outcomes of the reform politics. Such an attitude toward law is not very different from the attitude of past military juntas who treated jurists as adjutant officers. It goes without saying that this view of law and of jurists cannot be squared with a modern understanding of the function of law in a democracy: Law is not just any outcome of the legislative process, its legitimacy as a binding norm must be based on free discussion and due deliberation at the representative instance.

Reform legislation which lacks any vision of a reformed legal order is of little value for realization of an authentic Rule of Law. Legislative reforms often

evoke violent reactions from those who benefited from the status quo ante, as was clearly shown in the recent upheaval concerning the Act on Stabilization of Prices of Agricultural and Fishery Products and their Orderly Circulation(ASPAFP). The amendment of the ASPAFP was a rare instance of reform being legislated at the initiative of National Assembly members. The provision which generated conflict prohibits brokers(but not licensed wholesalers) from participating in auctions, with the prohibition to enter into effect after one year. When the revision was publicized, brokers in the market went on strike and refused to participate in auctions, leading almost overnight to market paralysis and skyrocketing prices. The government almost immediately surrendered and publicly announced that an additional six-month grace period would be allowed before the changes were enforced. The continued subordination of the legislature to the administrative apparatus was brought into perfect focus, for it was the Minister of Agriculture, Forestry and Fisheries who responded to the strike by decreeing a further six-month delay in the implementation of the prohibition.

A similar contemptuous attitude to the Rule of Law had been exhibited earlier when former President Roh Tae-Woo audaciously declared a postponement of local elections despite an express deadline in the statute then on the books. Especially noteworthy in this case was that the brokers insisted that their strike was a protest demanding "Respect for Law," to which the civilian government responded with a decision that was legally irregular, because the Minister lacked legal authority to declare a "grace period" with no basis in the statute.

IV. Perspectives on the Rule of Law in Korea

After a long period of frustration and failure Korean society stands now at the threshold of a new era, an era of democratic reform. The turning point was marked by the February 1993 inauguration of the civilian administration of Kim Young-Sam, who had won the election after weathering factional struggles within the Democratic Liberal Party to obtain the presidential nomination.

With a series of dramatic measures President Kim launched his reform programme, compelling higher officials to publicly disclose their personal wealth, cracking down on corruption by former and incumbent military generals, gradually reorganizing the military chain of command, and without warning introducing the Real-Name Financial Transaction System. As long as the reform programme led by the Kim Young-Sam Administration remains an ongoing project, it is somewhat premature to assess its outcome, let alone to try

to project whether it will bring about lasting change.

Reviewing the reforms made to date is, however, all the more important at a time when the authenticity and tenacity of the reform programme is gradually coming to be doubted among the Korean populace. As is well known, President Kim came to power through an evolutionary political succession, not through any revolutionary "break", although the mass civic protests of June 1987 were very much responsible for his ascendancy. Faced with a necessity to come to terms with established power circles, who served the previous quasi-military government of Roh Tae-Woo, President Kim inherited the bureaucratic and police apparatuses of past authoritarian rule almost intact.

In these circumstances, there remains a latent danger that opposition groups may rouse themselves to renewed action by rallying kindred interests, or that the prevailing atmosphere of distrust and passive recalcitrance in officialdom will derail the course of further reforms. Given this innate structural weakness, the reform politics of the Kim Young-Sam administration has shown an increasing tendency to compromise and regress, as President Kim has made conciliatory gestures toward former presidents Roh Tae-Woo and Chun Doo-Hwan, on one hand, and toward the chaebol(leading conglomerates), on the other hand.

Symptoms that the spirit of the reform is weakening have become more apparent as the administration, after three years in office, shows signs of being overwhelmed by the ideology of "reinforcing international competitiveness" and "revitalizing development". The government thus seems to be losing sight of the most important task of economic reform, that is, the restructuring of the industrial organization of the economy. Recent efforts by the civilian administration to induce private capitalists to contribute to social overhead capital(SOC-Bill) and to privatize the state enterprises of the first and third sector are major examples of such setbacks.

The Korean people are growing sceptical about the real outcome of the reforms, wondering whether the achievements to date are only a one-time step by a single leader, rather than the opening of a major process. They are also expressing, without hesitation, their unsatisfaction with results of the reform. The unprecedented, miserable defeat of the government party in the recent local election was a vivid demonstation of their discontent with this vulnerable reform politics of the civilian government. There is good reason to be concerned about the continuation of the process, with the principle of a single-term presidency firmly established in the Constitution. The President's Commission for the 21th Century recently has suggested that the nation will have to give

serious consideration to system change at the constitutional level in years ahead. Immediately after such statement was report, President Kim excluded any possibility of constitutional reform in this direction prior to expiration of his term in 1998. The choice between alternative constitutional structures is a difficult one, but it will have to be made based on a democratic consensus-building process. At a minimum, the single-term limitation on the office of president may need to be removed in the next period of civilian rule. Although there are many implications to consider, the time to prepare for the future is now, and longer range alternatives for institutionalization of democratic reform need to be more broadly debated.

Past failures and frustrations of the Rule of Law were major factors that undermined the legitimacy of the government and the legal order. Rehabilitation of the Rule of Law, consequently, is crucial for restoration of secure legitimacy to the legal order as a whole. Even though experience has proven the Rule of Law to be a principle of relative rather than absolute value, it can never be abandoned in a democracy. As insurance for the future, the Rule of Law must be pursued through constant effort from all sectors of society to eliminate unjust laws and practices and to lay legal foundations for a democratic political culture. The civilian administration should feel no reluctance about mobilizing civic participation in the process of democratic reform.

Notes

1) The question of where and how conflicts between the state and individuals should be resolved has long divided Anglo-American and civil-law systems. See generally, Franz Neumann, The Rule of Law(Berg 1987).
2) Latin countries adhere to the same notion without having coined a special term for it: the concept of légalité is both broader and narrower(Ehrmann: 48). Weil, in formulating the concept of legality in France(1978: 85) remarks that 'État de droit' had to be above all 'État légal'. For comparison between Great Britain and Germany, see, e.g., Scheuner, 472-484; Hesse, 1968, 557 etc.
3) Stern, 1984: 765.
4) Scheuner, 1964: 16; Ehrmann, 1976, 48; Yoon, D.K., 1990, 1; Collins, 1982, 12; Friedmann, L.M., 1981, 255; Hong, 1991, 35.
5) Yoon, 1990: 2-3.
6) See Gallies, W.B., Essentially Contested Concepts, 56 Proceedings of the Aristotelian Society(1955-56), p.169(quoted in MacCormick, D.N., "Der Rechtsstaat und die rule of law", Juristenzeitung 1984, 65ff.).
7) Ghai, 1986: 184.
8) See Hong, J.H., 1991: 33. In this respect Wolfgang Friedmann's position(1964, 273ff.), that to

give to the 'rule of law' concept a universally acceptable ideological content is as difficult as to achieve the same for 'natural law', refers to only the institutional aspects of the principle. At the highest level of abstraction, however, it is possible to extract minimum content of the rule of law as a legitimating principle of legal order in modern liberal democraty.

9) Ghai, 1986: 182-183.
10) Unger, R.M., Law in Modern Society(1976), pp.52-58, 176-192; Hong, J.H., "A Study on the Rule of Law and Marxist Theory of Law", Ajou Social Science Review, 1987(Vol.1), p.96, p.134; Ghai, 1986, p.181, p.201. Hunt writes: "It is a common presumption that not only is it desirable to have a system of authoritative rules, but that a civilised or democratic society is one characterised by the subjection of all, rulers and ruled, to a common set of rules. The 'rule of law' doctrine thus forms not merely a constitutional dogma, bur constitutes a major element of the general legal ideology. Such a view incorporates the 'universalism' which is embodied in Wester political and legal theory and is encapsulated in the concept of citizenship." A. Hunt, 1978: 142. For critical assesmet to this thesis see Craig, P.P., Administrative Law(1983), pp.37-38.
11) Ehrmann, 1976: 50.
12) E.g., see E.P. Thompson, Whigs and Hunters: The Origin of the Black Act, 1979, London.
13) See Ghai, 1986: 183; Jessop, 1982: 239.
14) Thompson, 1975: 266.
15) See Collins, 1982: 144.
16) Wright, 1973: 339.
17) Hunt, 1992: 118.
18) It was in this vein that Nyerere(1968: 304) wrote: "The Rule of law is part of socialism; until it prevails socialism cannort prevail."
19) Fitzpatrick, 1980: 45; Ghai, 1986: 194-196.
10) Ghai, 1986: 200.
21) Hong, 1987: 126.
22) Weitzer, 1980: 151.
23) Dong-A Ilbo May 14, 1994, p.11.
24) Yoon, supra, at 200.
25) Constituion, Art. 86.
26) Art. 86 II provides that the Prime Minister shall assist the President and control each Ministry with regard to Administration under the order of the President.
27) The judgement concerned section 2 of the State Redress Act, which deprived persons on active military service and civilian employees of the armed forces of the right to bring civil tort suits for damages if such persons and their survivors were eligible for compensation under accident compensation and pension plans. The Supreme Court held this provision unconstitutional as a denial of equal protection of the law. Supreme Court, Judgement of June 22, 1971, 70 da 1010. For a translation of the reasoning in the holding, see Yoon, op. cit. at p.186.
28) Art. 26 1972 Constitution, which survives as art. 29 of the 1987 Constitution. Later the Supreme Court held that the proviso of the sec. 2 (1) State Redress Act be in force, for it doesn't contravene the provision of the Constitution(S.C., June 7, 1977, 72 da 1359).

29) For more details, see Yoon, 1990: 143ff.
30) Supreme Court Judgement of March 8, 1994, 92 nu 1728. The decision was a salvation for many entrepreneurs who already had set up mass production facilities in preparation for a long anticipated entry into the springwater marke, as well as a relieg to the Ministry of Health and Social Affairs, which faced a political dilemma and had assumed an indecisive attitude on whether to permit the domestic sale of bottled springwater against a backdrop of scepticism about the safety of urban tap water supplies. The Ministry complied with the judicial decision by immediately rescinding its regulation.
31) Hankyore-Shinmoon, Oct. 17, 1993.
32) Hayek, F.A., Law, Legislation and Liberty: Rules and Order(Univ. of Chicago Press, 1973), p.65.
33) Yoon, 1990: 202.
34) In the meantime the local election was conducted at last on 27. June 1995, but with the reseult of unprecedentel defeat of the goverment party.
35) For instance, the ANSP has no right to investigate activities of praise and encouragement of anti-state organizations or their members, offenses defined under Art. 7 of the National Security Act.
36) The right is extraordinary because the Public Prosecutors Offices normally have responsibility for supervision of all investigations and to decide independently upon prosecutions.
37) This is the official position of the government pronounced by the Minitry of Justice as reported in Hankyore-Shinmoon, March 5, 1994.
38) IEA, Art. 263.
39) IEA, Art. 265.
40) IEA, Arts. 66-82.
41) IEA, Arts. 189 & 192.
42) PPA, Arts. 10 & 25.
43) Id., Art. 55.
44) The Kukje Group case discussed above illustrates how coercion was at the disposal of the government to intimidate business groups to supply large sums of money. See Mark Clifford, Troubled Tiger: Businessmen, Bureaucrats and Generals in South Korea(Armonk, N.Y.: M.E. Sharpe, Inc. 1994).
45) Korean political fund system at its earliest stage had limited donor to business men and it could not further voluntary participation of general voters through political fund raising process. The incipient PFA had defined the subject of donation as business men, which was clearly reflected in the prospectus of the Federation of the Korean industries(FKI). The 3rd overall amendment of PFA struck out the expression 'business men' and introduced the supporters' association system, while the existing system is still based on the previous idea that the political fund should be raised mainly from rich business men. For example, PFA prohibits contribution from any labour organizations including trade unions(§ 12 v).
46) PFA, Art.12 (v).
47) Craig, 1987: 20-21.
48) The need for a general administrative procedure act in Korea had been advocated as early as the 1960s. There had been a number of recommendations from the Korean Public Law

Association, Seoul Bar Association and the Korean Bar Association. A bill was once brought in to the National Assembly during the 6th lesgislature period and again at the end of 1971 prepared and reviewed. Subsequenty a Legislation Report with a draft APA bill was submitted to the Administrative Reform Commission by several public law scholars in 1975 but was refused by the reason that the time was not yet ripe, wheras it would be recommendable to introduce administrative procedures in particular laws. Kim, Doh-Chang et. al., Study on the Administrative Procedure Act, Korean Administrative Science Institute, 1980.7.

49) The CCEJ has published a pamphlet in preparation for the petition. See Hong, J.H., et al., Open Society, Open Information, 1993, Seoul, Bi-Bong Press.

50) See Hong, J.H., "Right to Free Access to Information and the Freedom of Information Act", 6 Law and Society 1992: 76; "Right to free access to information and Freedom of Information: Centered on Discussions in Germany", in Festschrift for Professor Kim Tscholsu, 1993.

51) Those were as follows: 1. jurisdiction to review administrative decisions should be conferred initially upon the civil district courts(instead of High Courts, as at present); 2. a special administrative court should be organized at the district court level(in Seoul only, at first); and 3. the rule of exhaustion of administrative remedies should be changed from a compulsory to facultative requirement in order to alleviate procedural burdens on litigants(Suggestions for the Development of the Judicial System, 16 February 1994).

52) For example, see the paper presented by Prof. Yang, Kun at the Public Hearing on the Project for the Development of the Judicial System held by the Agency for Judicial Administration on March, 4, 1994.

53) The Dong-A Ilbo, May 5, 1994, pp.1,3.

54) The Dong-A Ilbo, May 11, 1994. Immediately after this was reported, President Kim excluded any possibility of constitutional reform in this direction.

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