On The Rule of Law in Japan  
Keynote Luncheon Speech  
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Thank you very much Mr. Kawamura for your thoughtful and very kind and generous introduction.

It is a great honor for me to be given this opportunity to address such a distinguished group of Asian leaders and friends from the United States. I am also very happy to be back in Singapore, which I first visited back in 1971 as a legal advisor to Daiwa Securities Co., Ltd., a co-lead manager in connection with the preparation for the first Asian Dollar Bond issue by The Development Bank of Singapore. This was the first bond issue on international markets managed by an Asian securities house. Professor Mark Nakamura, who is also a participant in today’s event, was also on the Daiwa team and worked with me in the due-diligence meetings for the Bond issue. Incidentally, this assignment triggered a professional spin-off and led me to establish Hamada & Matsumoto in 1972, and from where I was called to the Bench back in 2001.

At this point I should ideally start off with a routine lawyer's joke, but due to the limited time allocated to me I will reluctantly skip it and move to my topic.

The concept of Rule of Law (Ho no Shihai), as known in Anglo-American jurisprudence, is adopted in Japan’s New Constitution (Constitution of Japan) promulgated in 1947, although the term itself does not actually appear in the text of the supreme statute. Technically, the Constitution was promulgated as a wholesale revision of the so-called Meiji Constitution (Constitution of the Empire of Japan) adopted in 1889, which was heavily influenced by the German (or more precisely Prussian) Constitution and jurisprudence. While under the Meiji Constitution the concept of Rule by Law (Ho-chi Kokka; Rechtsstaat) was adopted technically, Tenno (or The Emperor) was stipulated to head the government and exercise supreme command over the military forces. In heading the government, he was to be assisted by the Diet (or Parliament) and advised by the Cabinet. Also he was designated in the Constitution as being sacred and inviolable. As Japanese modern history illustrates, in the Showa Era the military leaders and politicians, as delegates of and in the name of Tenno, misled the nation into a series of unfortunate and tragic wars involving many nations in the Asian and Pacific regions. Under the Meiji Constitution heed was taken to restrict the function of the Diet and the Judiciary, so that the Administration in the name of Tenno could operate more freely.

This concept of Rechtsstaat is understood in Japan as being quite different from the Rule of Law.
concept in that under Rechtsstaat the legislative branch of the Government can adopt any amendment to the Constitution or subordinate statutes without limitation, wherein the “Law” in Rule of Law, we understand, means some supreme and everlasting ground rule not subject to amendment by legislation and to be found from time to time by the independent judiciary.

The Honorable Masami Itoh, renowned constitutional scholar and former Justice of Supreme Court of Japan, stated in the preface of his publication in 1954 entitled “Rule of Law (Ho no Shihai)” that, in my translation, “Conceptually, Rule of Law constitutes the basis of the Constitution of Japan, and our Constitution expects the concept to become a firm belief of the Japanese nation. This is concretely evidenced by the respect to and reliance on the Judiciary, almost absolute protection of fundamental human rights and the stress on the supremacy of the Constitution over all other statutes. When the conception of the supremacy of law, which rejects the rule of person(s) or rule of power, is embodied firmly as a part of the nation of Japan, this Constitution will be realized truly and it will be the time when a constitutional democracy, an ideal of the Constitution, is established completely."

In this preface, Justice Itoh referred to, as a motive for this publication, his sense of crisis as a scholar against “the recent serious political developments which appear to move towards negation of this Constitution which was proudly advanced as the basis of new Japan” as early as 1954, only seven (7) years after promulgation of the New Constitution. Historically, in the following years, references to Rule of Law in Japanese jurisprudence were gradually outnumbered by references to Rechtsstaat or Rule by Law under strong influence of German jurisprudence, which purported to achieve substantive Rule by Law as distinguished from Rule by Law in the pre-War days which were merely technical and without substantive justice in the statutes. As a result, the demarcation line between Rule of Law and Rule by Law became blurred by the interchangeable use of the terms.

More than half a century passed since then, during which we witnessed the rise and fall of the Japanese economy. Although in recent years certain recovery has been seen in business activities in Japan, the most recent political scene is showing an unexpected turn of events and surprises that could negatively affect Japan’s domestic and international situation. The abrupt resignation of the Prime Minister who advocated “Sloughing off the Post-War Regime” could be received in certain corners with some relief, but no one knows at this stage what is to follow his performance. Needless to say, in Japan the term “War” means the one ended in 1945 and not any other war.

What the departing Prime Minister tried to indicate by the phrase “Sloughing off the Post-War Regime” is not clear. It could have meant a departure from under the umbrella protection of the United States, or alternatively, getting rid of the regime under the current Constitution to return to the pre-War regime under the Meiji Constitution. Judging from his pronounced penchant for amendment of the current Constitution and for elevation of the status of the Self-Defense Forces of Japan, the latter was the more likely interpretation. If so, many inside and outside Japan are
justifiably concerned about revival of the ghost of the Meiji Constitution Regime, where Tenno, who is currently defined as “the symbol of the State and of the unity of the people” and is given only a ceremonial function under the current Constitution, could be utilized by someone or group of people to achieve their unwarranted aspirations and dreams.

I personally hope that the regime under the current Constitution based on the concept of Rule of Law survives the present political and social confusions in Japan so that the nation does not jump from the frying pan into the fire.

Unfortunately, as seen in the political scenes I mentioned before, the hope of Justice Itoh that the concept of Rule of Law be embodied in the nation firmly as a part of it has not been realized. While we have a competent, independent and clean judiciary and the national level of compliance with legal requirements without litigations and lawyering has been relatively high, until recently the Japanese society and economy used to function quite well under the strong administrative initiatives and the industry-wide consensus formulation. Such manner of social engineering had shown to a certain point very high cost-effective performance. The downside of such a system is prevalence of old-boy networks among and between bureaucrats and business leaders and misuse of their privileges and power, such as dango (bid-rigging) and bribery/embezzlement, among others. In other words, lack of transparency and of effective mechanism for detecting and preventing illegal activities for business transactions, corporate management, administrative operations and public works, which were to a great extent dominated by the rule of persons (affiliation and connection), and, accordingly, sometimes fostered insiders’ paradise. It is to be noted that the judiciary throughout these years, has remained clean and free from any scandals other than a few that happened outside the court.

Since the failure of Japanese economy in the early 1990s (which started already in the late 1980s), that is after the bursting of the so-called bubble economy, things have dramatically changed on the surface. In the face of the “globalization of world economy”, partly triggered by the downfall of the Berlin wall, Japanese society has been forced to change its modus operandi to meet the challenges of the revived U. S. economy, a united Europe, the neighboring Asian tigers and others. Compliance with laws and disclosure of information has been much heralded particularly in business circles. Hence, the emergence of Structural Reforms in Administration, politics, local governments, and administrative regulations. In line with such trends, Judicial Reform has been put in force with stress on three (3) areas; (1) to streamline court procedures for a more user-friendly structure and quicker disposition of cases; (2) to increase drastically the annual supply of lawyers (with a target to reach three thousand (3000) per year by 2010 as compared to only around five hundred (500) until the early 1990s, one thousand (1000) in 1999, fifteen hundred (1500) in 2004 and nearly two thousand (2000) this year; the increased number is mostly private practitioners); and (3) to allow lay citizens to participate in trials of certain major criminal cases, including capital cases. Now the judiciary and
lawyers are being called upon by the society to deal with many issues in accordance with laws and regulations to replace a part of the traditional consultation, adjustment and consensus formulation by and among influential businesses and government employees in charge of the industries or businesses in question.

While these phenomena cannot be taken to mean that Japanese society is at last moving towards the Rule of Law necessarily, certainly it is quite significant for the society that laws and rules are socially and officially recognized as to be more rigidly complied with. In recent years, quite a few corporations listed and otherwise reportedly failed because of non-compliance with laws and regulations which until a few years ago would not have brought about such forced withdrawal, even temporarily, from the markets concerned.

The tide of Globalization, hopefully not in the form of tsunami, washes the shores of Japan and other Asian countries with such strength to force some social and economic changes, among others, to all concerned nations alike. In certain cases, traditional social textures, cultures and way of lives have been so much shaken up by such a tide to produce some undesirable social and economic consequences. I believe that each nation and community should be given an opportunity to protect itself from onslaught of such a worldwide movement to achieve their social goals and aspirations in their own informed and wise ways. Likewise, the proposed dissemination of Rule of Law, while its idealistic purpose is commendable, should not be hastily executed so as not to stir suspicion that it is another scheme to export American lawyers worldwide. In some communities, there is a sentiment that while the concept of Rule of Law itself is not objectionable, Rule of Lawyers is not desirable to them. And, among some Japanese bengoshi (practicing attorneys) there is certain negative sentiment against the use of the term Rule of Law based on the theory that the term could be used to justify enforcement of statutes without regard to the fairness of the provisions thereof as applied to certain concrete cases. They hold that the Nazi came into power quite legally and adopted many statutes to legally oppress huge number of people inside and outside their country.

Until around the end of the last century, Japanese statutes tended not to be amended often. Neither the Meiji Constitution before 1945 nor the current Constitution has ever been amended at all. In order to deal with the changing real world which is usually very different from the times when such statute in question was promulgated, Japanese academics are inclined to suggest quite flexible interpretation of statutory provisions stretching literal meanings of the words and terms employed in such provisions to reach “reasonable” interpretation to fit the current conditions relevant to a particular legal question. Japanese judges also show such flexibility in their interpretation of the law to support their judgment on a case at hand. Accordingly, the gap between a literal reading of the statutory provisions and “reasonable” application of the law are bridged by “interpretation” rather than by formal amendment to the statutory provisions. Government agencies also try to interpret the statutory provisions under their jurisdiction so to fit conveniently to their administrative purposes as
much as possible.

Typical examples of such flexibility can be found in interpretations of Article 9 (Renunciation of War) of the current Constitution, which reads in translation;

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

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

The current size and overseas activities of the Self Defense Forces of Japan in recent years appear to suggest that they are certainly full-fledged land, sea, and air forces. The Supreme Court of Japan has managed to avoid confrontation with this very political issue so far. It is well known that administrative interpretation of Article 9 has shown some changes from time to time, but apparently has reached a point where there is virtually no room to show further flexibility to meet the demands for stepped up overseas operations of the Japanese forces by the international community headed by the United States. However, a straightforward approach of amending the Constitutional provisions has created much concern in and outside Japan. Because in view of the recent moves on the part of the ruling Liberal-Democratic Party regarding this and other Articles of the Constitution, together with the proposed “Sloughing off the Post-War Regime” slogan, once Article 9 is amended pre-War-type Imperial Japanese forces may be allowed to be established posing threats to the safety and independence of our neighboring nations. Thus, this issue represents one of the most serious and difficult legal and political questions for the nation.

In Japanese, the term “law” is “ho-ritsu”. The term “ho” came from a Buddhism term dharma (damma in plural), meaning teachings (not necessarily commands) of Buddha, and “ritsu” from vinaya, meaning regulations for groups of Buddhism followers to comply with in their daily lives in their groups. In my view, Buddhism, which has been accepted in Japan for more than fourteen hundred years, is a least aggressive religion or teaching. It is kind to humans, other beings and the environment as well. Traditionally, there are said to be eight million (8,000,000) gods in Japan. Believers in monotheism (meaning a religion which holds that there is one and only supreme God in the world) represent a very small percentage of the nation. These traditions in Japan permit Japanese people to pursue quite flexible spiritual as well as secular lives. This may help explain the Japanese tendency for flexible (or convenient) interpretation of rules to fit the prevailing conditions rather than trying to comply with rules rigidly or otherwise changing rules immediately if it is not possible for many to comply with them.
This pattern of behavior has pros and cons, of course. One of the pros is tolerance. This behavior tolerates rather than aggressively asserts one faith or way of life as the only and exclusive one to the exclusion or extermination of believers in other faiths and ways of lives. Article 1 of the famous Seventeen-Article Constitution (17 Jo Kenpo), said to have been promulgated by Shotoku Taishi (Prince Shotoku) at the beginning of the seventh century (reputedly, the year 604), provides that “Harmony (or peace) should be valued above all.” While the sentence apparently was not originally his and was borrowed from the Chinese philosopher Confucius, the provision constitutes one of the main threads of the tapestry of Japanese culture. Too much stress on harmony or consensus, we need to caution, could result in loss of direction of the group in emergency or promotion of vested interest among friends or intimate group members at the expense of the public or excluded parties.

Japanese in general respect life (inochi) in this life (konoyo; as distinguished from next life, anoyo) of human beings and still maintain animistic view of the world. They respect the life of animals, birds, fish, insects, trees and vegetation, and find sacred elements of Buddha or deities in all such beings and things without life, such as mountains and rocks. All of them constitute environments in which we human beings live, and support our daily lives. Such an attitude, I believe, is very conducive to protection of the environment on the earth that is facing a very critical situation of global warming.

My discussion of the Japanese way of life may give the impression that it lacks rules and principles as understood in the Western world. However, this is not the case. Most of Japanese still maintain quite a high level of morality (higher than the bare minimum required under various statutes); politeness, honesty, diligence and sense of responsibility for family, community and the country. Japanese consider it shameful, in a sense, to resort to legal proceedings because good faith should have helped to persuade the other party in a dispute to reach an amicable settlement of the case without going to the court or to an attorney. I believe that Japanese (including myself) typically believe vaguely in the presence of what Dainichi-nyorai or Mahavairocana, one of the Buddhas in the Shingon (mantora) School, represents, namely, the truth of the Universe. This Universe is much much bigger than the universe Japanese live in, the universe Europeans live in, the universe Americans live in and the universe other respective nations live in. This truth of the ultimate Universe may be interpreted as Justice sought after under the Rule of Law.

It is acknowledged that mere social recognition of the concept of Rule of Law in certain countries does not necessarily mean that the substance of the Rule has been realized in such countries. A prime example of such is the United States, where income disparity among social strata is so great, Medicare systems are deficient and the recent sub-prime loans problem has shaken up world financial markets and real economies. But no country in the world is free from all human vices and follies, whether or not its government acknowledges the same. It appears that like Democracy, the Rule of Law is based on trust in the positive sides of human nature to cope with its negative sides and should be supported and enhanced because as its history suggests human beings as a whole do
not know any better means to survive these difficult times. Now the destiny of every nation is tied up with other nations on the ailing earth overburdened and wasted by the human race. I hope that this meeting and similar meetings in the past and future will contribute much towards the common goal of achieving stable, fair and prosperous communities all over the earth.

Thank you.