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# WELCOME, DEAN ATTANASIO

*Judge Hideo Chikusa\* \*\**

**P**ROFESSOR John Attanasio, guests from the United States, and friends, to all of you, I wish to extend my hearty greetings and welcome.

Allow me to represent my colleagues by saying that all of us welcome Professor Attanasio, congratulate his joining the SMU Law School faculty to take up the position of the new dean, and wish him a happy and bright future.

By request of Mr. Matsumuro, President of SMU Japanese Alumni, I will speak a few minutes.

Being a judge, it would have been appropriate to speak about a current aspect of the court practice in this country. I must confess, however, that I have failed to prepare something intelligible for the topic, due to the extremely tight schedule I have had to face. In the Supreme Court, today is the last day for the deliberation before summer vacation, which begins July 20, just next week, and lasts through August.

As an alternative, I wish to deal with a topic in another area somewhat related to comparative law which happens to be the major field of Professor Attanasio.

To begin, let me quote the name of Professor Rudden of Oxford University whose major field is also comparative law. He stayed here in Japan as a visiting professor of Tokyo University, from last year through the beginning of this year.

Recently, some young Japanese judges went to Oxford University under scholarship and were privileged to be guided warmly by Professor Rudden. As a token of thanks, I invited him and Mrs. Rudden to my home and took them to the neighboring Volkcraft Museum. After he returned to England, he wrote me a few words stating, among other things, that because Professor Attanasio was his student years ago, I would be expected to convey his greetings for his taking the position of the Dean of SMU Law School. By this letter of Professor Rudden, I have come to know of Professor Attanasio's career, background, and his major field. Such a distinguished scholar as Professor Attanasio, who is doubly related to us by virtue of Professor Rudden, enhances our feeling of intimacy, and for this our delight is also doubled.

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\* Justice of the Supreme Court of Japan. Graduated from Tokyo University, Faculty of Law in 1953.

\*\* This Speech was given on July 17, 1998 at the SMU Law School Alumni Meeting in Tokyo, Japan.

As all of you are aware by the correspondences from SMU or otherwise, Professor Attanasio is one of the authorities in comparative law, and I hear that he is now interested in the Russian law. The information available to me is so limited that I do not know if and to what extent he is interested in the Japanese law, but I should like to mention that the Japanese law must be one of the treasure houses for those whose major field is comparative law. If Professor Attanasio comes to know something about Japan, his interest in Japanese law would be intensified.

I say this because Japan, at the time she became a modern state about a century and a half ago, adopted the legal systems of many European countries. Almost all legal systems of this country could trace their own origins to some foreign country. A recent example is the presence of the various provisions relating to fundamental human rights in the Japanese Constitution derived from the Constitution of the United States.<sup>1</sup> For this reason, the Japanese courts pay keen attention to the judgments of the United States Supreme Court regarding issues concerning basic human rights.

This evening, I would like to introduce you to an episode in the history of the field of comparative law.

Professor John Henry Wigmore of Northwestern University, who passed away now almost a half of a century ago, is widely known as the authority in the law of evidence not only in the United States but also here in Japan. Regrettably, however, very few people know that, upon coming to Japan, Professor Wigmore authored a big book about the old laws and judicial system of Japan.<sup>2</sup>

Professor Wigmore was born in 1863 in San Francisco. Yukichi Fukuzawa, whose portrait appears on our ¥ 10,000 bill, is widely known as the man who established Keio University. Just three years before Professor Wigmore was born, by a curious fate, Fukuzawa visited the United States, as one of the crew members of *Kanrin Maru*, the first vessel ever to sail across the Pacific and to reach the West Coast of the United States, aboard which there were members of Japanese envoys.

Twenty-nine years passed when, in 1889, Professor Wigmore came to Japan as a professor of law at Keio University by Fukuzawa's invitation. This timing coincided with the birth of the old Japanese constitution, called "The Constitution of Japanese Empire," which was promulgated in 1889 (Meiji 22). That is, just when Japan was about to start as a new modern state in her legal framework.

Professor Wigmore, besides teaching at the University, devoted his keen interest in the legal and judicial systems of Japan in her Tokugawa era, read through the huge materials and authored *Law and Justice in*

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1. See generally KYOKO INOUE, *MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING* (1991).

2. See JOHN HENRY WIGMORE, *LAW AND JUSTICE IN TOKUGAWA JAPAN* (1969).

*Tokugawa Japan.*<sup>3</sup>

The manuscripts were to be published in several installments, but due to the author's death and the last War, the publications were interrupted, and it was long after the War that all volumes were in print. I think that so far nineteen volumes of the entire twenty volumes have been published by Tokyo Press.

The occasion by which I came to know the above facts was when I saw the Appendix to Volume 75, Number 6 of the *Northwestern University Law Review*. The first article in the Appendix was written by Associate Professor Abbot and was entitled, *Wigmore, the Japanese Connection*.<sup>4</sup> Before I read it, I had not known the episode, but upon asking the people near me, I found that very few knew of it either. Even those with some connections to Keio University did not know of it either, although some of them recognized the name of Professor Wigmore.

I reflected on the possible reasons for this ignorance. My immediate guess was that the modern Japan was much too busy absorbing the European and American cultures to pay attention to her own by-gone days' achievements. One proof of this guess is the fact that when Professor Wigmore requested access to the old laws and judicial precedents, the officials in the Ministry of Justice adamantly refused to comply, saying they did not exist. Professor Wigmore had to wait years until he obtained access to those materials. It seems that for the Japanese officials at that time, the legal system of Tokugawa era was something to be ashamed of, and there was absolutely no value in it being shown to the foreigners. But the volume of material on the customs and practice of justice in Tokugawa era discovered by Professor Wigmore are now very valuable in both the Japanese and world history of legal systems. Professor Wigmore unearthed and left them as legacies for posterity.

The second reason, I guess, for the ignorance of Wigmore's contribution in Japan must have been the fact that the volumes were written in English, preventing them from being known by the Japanese. Additionally, the dark age of the War must have aggravated it.

A third reason would be that the scholars in law and lawyers in this country tend to be much too busy focusing on current problems to be bothered by a comparison between the past and present of their own country.

When Professor Wigmore revisited this country in 1935 (Showa 10), he gave a speech entitled *Evolution of Law* in which he commented on the position occupied by Japanese law in the world legal systems.<sup>5</sup> The es-

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3. JOHN HENRY WIGMORE, *LAW AND JUSTICE IN TOKUGAWA JAPAN: MATERIALS FOR THE HISTORY OF JAPANESE LAW AND JUSTICE UNDER THE TOKUGAWA SHOGUNATE 1603-1867* (Japan Foundation trans., 1967). The "indices and vocabularies" is designed to be published as an extra-volume, and so far the publication has progressed up to the nineteenth volume out of twenty volumes.

4. Kenneth W. Abbott, *Wigmore, The Japanese Connection*, 75 *Nw. U. L. Rev.* 10 (1981).

5. John Henry Wigmore, *Evolution of Law*, 7 *HORISTU JIHOB* 6 (1935).

sence of his presentation was as follows.

Upon studying the sixteen independent legal systems of the world, the five legal systems, namely, Jewish, Islamic, Roman, English and Japanese systems, are found to have developed from case law traditions. Of those five systems, the first three were developed by non-official scholars, not by the judges as officials, but the last two, namely the English and Japanese systems, were developed by judges: in England by judges appointed by the King and in Japan by judges appointed by *Shogun* in the Tokugawa era.

Professor Wigmore added that one of the most interesting problems in the evolution of law is why, in two countries such as England and Japan where the relevant conditions differ so much from one another, the same system of developing laws by the judges as officials happened to be adopted. This brought him to Japan. Professor Wigmore wished to collaborate on the completion of the publication of the translation of the materials on the legal history of the Tokugawa era. He closed that portion of his speech by inviting the Japanese scholars to join the attempt to solve this problem.

I would think that there is a common factor between England and Japan, both of which are insular countries. For a long period of time, both countries' legal systems were fermented in secluded societies. I feel that Professor Wigmore endorsed this thought in his speech.

Upon modernization, Japan based its codified laws on the laws of some foreign countries. For this reason, Japan is earmarked as one of the countries of codified laws, unlike the countries such as England and America that adopt the case law system. But the truth may well be, as Professor Wigmore pointed out, that for some ages in the past, Japan was a country of judge-made laws. This discovery would be of much help in the study of the present Japanese society.

Sharing the common ground that all of us have connections with the SMU Law School, we wish to contribute something meaningful for the exchange of views and mutual understanding between the United States and Japan, and, considering that it would be important to review the great contribution made by our predecessors, I have just introduced to you an episode of the late Professor Wigmore.

Wishing that the relationship between SMU and the Japanese alumni members becomes tighter, I would like to close this speech by cordially inviting your further cooperation and contributions. Thank you for your patience in listening to me.