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JUDICIAL RECRUITMENT AND PROMOTION: RESPONSES TO PROFESSORS RAMSEYER AND REPETA

SHIN-ICHI NISHIKAWA*

COMMENTS ON PROFESSOR RAMSEYER'S ARTICLE, *DO SCHOOL CLIQUES
DOMINATE JAPANESE BUREAUCRACIES? EVIDENCE FROM SUPREME COURT
APPOINTMENTS*

On September 11, 2010, I received an e-mail from a graduate of my seminar. He passed the entrance examination to the *Shiho Kensyujō* (Legal Training and Research Institute, or LTRI). The Ministry of Justice (*Homushō*) had announced the results two days prior. He and I are both graduates of Meiji University. Because of Professor Ramseyer's Article,¹ I will not advise the graduate to be a judge.² I do not think that he could be on his way up the ladder as a judge. He did not attend the University of Tokyo.

Recently, I published my book *Saibankan Kambujinji no Kenkyū* (Research on Personnel Management of Senior Judges in Japan).³ In this book, I pointed out that many judges who attended the University of Tokyo have served as chief judges of the district courts, family courts, or both, and have become presidents of the high courts.⁴ The ratio is 18.0%.⁵ In the case of judges who graduated from private universities, however, the ratio is just 2.1%.⁶ In my book, I could not explain this gap well. Had I read Professor Ramseyer's Article while writing my book, I would have been able to explain the gap more clearly.

By way of inquiry, I have three technical questions. The first is about how to measure the productivity of judges. In the case of three-judge panels, to whom is the productivity attributed? I think it is very difficult to

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1. J. Mark Ramseyer, *Do School Cliques Dominate Japanese Bureaucracies? Evidence from Supreme Court Appointments*, 88 WASH. U. L. REV. 1681 (2011).

2. I was especially surprised by Professor Ramseyer's findings regarding the very high productivity of the men named to the Supreme Court, most of whom attended the University of Tokyo. See *id.* at 1694–95.

3. SHIN-ICHI NISHIKAWA, *SAIBANKAN KAMBUJINJI NO KENKYU* [RESEARCH ON PERSONNEL MANAGEMENT OF SENIOR JUDGES IN JAPAN] (2010).

4. *Id.* at 71.

5. *Id.*

6. *Id.*

measure the productivity of each judge in a three-judge panel, unlike single-authored cases. It is true that Machida Akira, a former chief justice of the Supreme Court of Japan, published massive numbers of opinions from 1962 to 1965.⁷ He was not, however, the most senior judge on his panel in those days because he was not a full judge.⁸

The next question is about how to determine the rate of failure on the entrance examination for the LTRI. From *Zensaibankan Keireki Soran* (Career Data on All Judges, or *ZSKS*), we know data such as judges' birth dates, but we cannot ascertain the number of times a judge failed the entrance examination for the LTRI. Some judges might have failed the entrance examination for college. If a judge got into college after failing the exam on his or her first attempt, we must deduct the number of additional attempts on the college entrance exam from the number of times the judge failed the entrance examination to the LTRI.

Similarly, some judges might have repeated the same year while at college. For example, Eda Satsuki, a former judge and ex-president of the House of Councilors, repeated the same year twice.⁹ He passed the entrance examination to the LTRI, however, on his first attempt. Therefore, we cannot always correctly estimate the number of times a judge failed the LTRI entrance examination from his year of birth.

The third question is also related to *ZSKS*. There are several blanks in the alma maters category in *ZSKS*. In other words, there are a lot of judges whose alma maters are not listed in *ZSKS*. I counted the blanks of the LTRI classes of 1959 to 1961, and there are 79 blanks in this period.¹⁰ Of course, the implications of this number should not be neglected. The number is about thirty percent of the total number of the LTRI classes of 1959 to 1961.¹¹ Out of those 79 judges, some may be graduates of the University of Tokyo or Kyoto University.

In any case, thanks to Professor Ramseyer's Article, I realized how significant productivity actually is and how wrong my assumptions about university pedigree truly were.

7. Ramseyer, *supra* note 1, at 1694.

8. ZENSAIBANKAN KEIREKI SORAN [CAREER DATA ON ALL JUDGES] 100 (5th ed. 2010) [hereinafter *ZSKS*].

9. See EDA SATSUKI, <http://www.eda-jp.com> (last visited May 2, 2011).

10. *ZSKS*, *supra* note 8, at 84–101.

11. *Id.*

COMMENTS ON PROFESSOR REPETA'S ARTICLE, *RESERVED SEATS ON
JAPAN'S SUPREME COURT*

I wrote my Article *Saikosai no Rutsu wo Saguru (How Was the Japanese Supreme Court Created After World War II?)* two years ago.¹² The objective of my Article was similar to that of Professor Repeta's,¹³ and thus I found his Article very interesting. His Article revealed that I had overlooked the importance of attorneys in my Article. I neglected the Attorneys Act, and I took the process of appointing attorneys to the Supreme Court lightly. I only paid attention to the conflict among the *Hosono* group, the Ministry of Justice (*Shihosho*), and occupation officials.

After reading Professor Repeta's Article, I also understood that it was very important for attorneys to be appointed Justices of the Supreme Court. It was vital for the democratization of Japan, and it was also very interesting for the Supreme Court and the executive branch to have opposed passage of the Attorneys Act.¹⁴

I think that the Advisory Committee for Appointing Justices of the Supreme Court (*Saibankan Nimmei Shimon Inikai*) was very significant, primarily because the committee produced a list of candidates. At first, the committee proposed by *Shihosho* had only one attorney as a member.¹⁵ Then, the committee established by the Yoshida Cabinet had three attorneys.¹⁶ The Katayama Cabinet, however, established a committee of fifteen members including four attorneys;¹⁷ the number of attorneys on the committee was increasing.

Of course, the more attorneys the committee has, the more attorney candidates it selects. *Shihosho* did not show disagreement toward the increase of attorneys, and I do not know why. It is possible that *Shihosho* was too busy negotiating with the *Hosono* group and occupation officials. Or *Shihosho* might have considered that all attorneys had a similar way of thinking. As Professor Repeta pointed out, every attorney had been trained under a constitutional order that denied the primacy of individual rights.¹⁸

12. Shin-ichi Nishikawa, *Saikosai no Rutsu wo Saguru [How Was the Japanese Supreme Court Created After World War II?]*, 78 SEIKEI RONSO 1–82 (2009).

13. Lawrence Repeta, *Reserved Seats on Japan's Supreme Court*, 88 WASH. U. L. REV. 1713 (2011).

14. *Id.* at 1715.

15. Nishikawa, *supra* note 12, at 35.

16. *Id.* at 39–40.

17. *Id.* at 48–49.

18. Repeta, *supra* note 13, at 1716.

As a result, the advisory committee of the Katayama Cabinet selected eleven attorneys, ten career judges, and nine intellectuals as candidates.¹⁹

In addition, this Article refers to the voting process by judges to select their representatives to the advisory committee at the Katayama Cabinet.²⁰ At that time, attorneys also selected their representatives by voting. I am interested in this process as well. It is my task, and also possibly Professor Repeta's, to make the process more clearer.

19. Nishikawa, *supra* note 12, at 56.

20. Repeta, *supra* note 13, at 1718.