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Measuring Judicial Independence: The Political Economy of
Judging in Japan (review)

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Lockheed) scandal (p. 231), hardly ones to inspire confidence in his grasp of details.

In the end, the book remains enigmatic. I am still uncertain about the nature of and empirical evidence for a “total employment strategy.” Nor do I understand his mantra, why the “release of market forces” undermined the “expansion of trade and production” rather than *enhancing* incomes and employment. For economists, the real release of market forces stemmed not from the complete legal liberalization of capital flows in 1980, which had in any case been freed in practice by the late 1970s. Instead, the turning point was April 1949, when Joseph Dodge was sent to Tokyo to dismantle the worst excesses of the dirigiste economic policies of the Supreme Command of the Allied Powers (SCAP). The ensuing reforms, both domestic and (less important) international, led not to stagnation but to the incredible expansion of trade and production of the 1950s and 1960s. The release of market forces brought “full” employment and rising incomes, not crisis and stagnation.

Such growth faces diminishing returns and inevitably slows. Losers then have more reason to fight than to move on, leading to the strangling of forces so visible in Japan today. That is also ultimately Gao’s conclusion. While independent of the book’s arguments, his last chapter is full of common sense. The last three paragraphs in particular note that ongoing (and in his opinion piecemeal) reforms add to uncertainty, hampering both consumption and investment and hence growth. This is reinforced by Prime Minister Koizumi Jun’ichirō’s concern to limit government expenditures. Gao thus sees further stagnation, which is also my expectation.

Measuring Judicial Independence: The Political Economy of Judging in Japan. By J. Mark Ramseyer and Eric B. Rasmusen. University of Chicago Press, Chicago, 2003. xii, 201 pages. \$45.00.

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Writing with Frances Rosenbluth over a decade ago, Mark Ramseyer made the startling assertion that politicians in the ruling Liberal Democratic Party (LDP) policed, punished, and thereby “aggressively” manipulated the courts.¹ Ramseyer offered no evidence. Even his admittedly anecdotal data

1. J. Mark Ramseyer and Frances McCall Rosenbluth, *Japan’s Political Marketplace* (Cambridge, Mass.: Harvard University Press, 1993), pp. 2, 3.

showed only that the personnel section of the General Secretariat of the Supreme Court, responsible for hiring, assigning, and promoting Japan's 2,700 career judges, had acted to weed out or at least reduce the influence of actively leftist judges who had entered judicial service at the height of student radicalism in the 1960s. The Miyamoto affair was their prime example. In 1971 the General Secretariat decided not to include Assistant Judge Miyamoto Yasuaki, by all accounts actively leftist, on the list for formal cabinet appointment for a regular ten-year term as full judge. This was the first and, with the exception of a judge who refused to accept a routine transfer, the last time an assistant judge was not included on the list for reappointment and promotion. Thereafter the senior career judges serving in the secretariat simply denied actively leftist judges the best assignments and positions. This, as Ramseyer and Rasmusen now show, eventually led to career cul-de-sacs and lower salaries.

No knowledgeable observer of Japan's judicial administration has ever disputed Ramseyer's observations. His description merely repeated what was widely accepted as fact. What was remarkable was his claim that LDP politicians had had a hand in this. To prove the point, now joined by Eric Rasmusen, Ramseyer undertook an extraordinary effort. The two compiled data and assessed the careers of almost all of the 793 judges who joined the career judiciary between 1959 and 1968. They detailed their results in six articles published during the past ten years. In each article and the book, Ramseyer and Rasmusen repeat the original proposition. The narrative of *Measuring Judicial Independence* is the same, in sections nearly word for word, as the chapter on judges in *Japan's Political Marketplace*. Unidentified critics in the 1970s, they say, were right. "Judges who flouted the majority party paid with their careers" (p. 2). Over and over again, as before they tell the reader "the politicians control the judges." Yet, with hard data now added to substantiate anecdote, the authors still do not prove the case.

Writing with or without Rosenbluth or Rasmusen, Ramseyer fails to demonstrate that Japanese politicians control judges. All that *Measuring Judicial Independence* shows is that over the course of two decades the various senior judges assigned to the secretariat tended to treat the few leftist judges who actively defied the Supreme Court and the collective views of their colleagues on the bench less well in assignments than those who did not. They offer no data, not a single incident, not even one anecdote, of any LDP politician intervening, directing, seeking to monitor, police, or indeed to punish any judge during the entire postwar period, not even a whisper, a wink, or a nod. The silence deafens.

After the Miyamoto incident, most observers, including myself, accepted the critics' complaint that Japan's senior judges sought to weed out and discipline young judges considered to be too far and too actively to the left in their decisions. We could not be sure of their motives, but we thought

we could reasonably infer their intent from their background, words, and deeds. These judges, we believed, shared with other members of Japan's conservative establishment deep concern over the potential influence of the generation of student radicals who entered the mainstream of Japanese institutional life in the decade between 1960 and 1970. We thus rejected the argument that Ramseyer and Rosenbluth made ten years ago. They miss the point, we said. The judiciary may be conservative and institutionally controlling, but it is still staunchly politically independent, indeed perhaps the most politically independent judiciary on the globe.² Ramseyer and Rasmussen actually confirm most of what we believed and said. Throughout the book, their data and analyses substantiate our claim. What they add to what we thought we knew is just how conscientious the senior judges in the secretariat were to ensure that talent and competent work were rewarded and how little political beliefs mattered.

The book's central claim is an academic folktale and ends in tautology. The tale posits politicians, like wicked stepmothers, as "principals" with senior judges in the secretariat as their "agent" henchmen through whom all judges as lesser "agents" are effectively controlled. The henchmen, the story goes, carry out the politicians' wishes and thereby the politicians control the courts. The proof of this is in a tasting. The henchmen have punished judges who did indeed "flout" the politician. How, the listener asks, could this happen so smoothly and so quietly? So perfect, comes the answer, was the mutual knowledge based on years of LDP rule that politicians need not even communicate with their henchmen for them to know what their masters wanted them to do. The henchmen know by long experience what the politicians desire. Thus, like the best English butlers, these prescient agents could carry out their masters' wishes without any need for instruction, indeed in silence with nary a whisper, wink, nor nod.

This tale might have made some sense if Ramseyer and Rasmussen had identified some particular interests or preferences of LDP politicians that were distinctively different from the views and general preferences of the senior judges assigned to the secretariat or indeed from the Japanese general public (the electorate). Perhaps the judges in the secretariat acted the way they did simply as judicial administrators attempting to advance their own interests or particular preferences. Or they might in fact have acted not as henchmen "agents" but merely in pursuit of preferences they shared with other members of the general public. In either event, politicians are not in control. On the one hand, the politicians might coincidentally share the views of politically independent judges, and thus the outcome would be the same irrespective of whether judges are doing the politicians' bidding or

2. See John Owen Haley, *The Spirit of Japanese Law* (Athens: University of Georgia Press, 1998), especially pp. 97–108, 114–22.

pursuing their separate interest. Or perhaps, as one might expect in a democratic system, the senior judges' views merely reflect those of the electorate. As Ramseyer and Rasmusen acknowledge (pp. 159–60), voters are the primary principals. Because Japanese voters, in every election since the end of the allied occupation, have preferred conservative politicians, most Japanese voters appear to be quite conservative. If so, then as voters, most senior judges too can be expected to be conservative and therefore judges too can be expected to seek to prevent leftist judicial behavior irrespective of the wishes of politicians. In either case, the claim made by Ramseyer and Rasmusen becomes tautological in effect. The data prove nothing. The end of the story is always the same whichever explanatory narrative you choose.

Overlooked—or purposefully ignored—in Ramseyer's telling of the tale are conclusions he and Rasmusen explicitly draw from their analysis of their own data. Ramseyer and Rasmusen test their story in four separate chapters in which they carefully evaluate the career patterns of judges who were members of the Young Jurists League (Seinen Hōritsuka Kyōkai; YJL), an organization of young progressive lawyers, law professors, and judges said to be communist or even more radically left. Their findings first refute the claim that judges assigned to the secretariat either on their own volition or as politicians' henchmen singled out judges and penalized judges for their political beliefs or affiliations. Presumably because the judges who belonged to the YJL included many of Japan's best and brightest, over the course of their careers, Ramseyer and Rasmusen find, these judges as a group tended to receive better than average assignments and as a result, over the course of their careers, better positions and better pay. In fact, the only YJL judges who fared worse than average were those who "flouted" not the LDP but the law as expressed in Supreme Court precedents and generally shared judicial interpretations. They found no evidence, for example, of any negative effects on a YJL judge's career in cases where his or her decisions in criminal or administrative cases, especially taxpayer appeals, consistently differed in outcome (chapters five and six, pp. 82–121). "No politics there," concede Ramseyer and Rasmusen (p. 25).

In other words, they found no evidence of possible political influence in cases in which the government and an increasing number of individual politicians—including a sitting prime minister in the mid-1970s—had much at stake: crime and taxes. Indeed, they concluded that the secretariat rewarded those judges who were the most talented, worked the hardest, and decided difficult cases correctly (p. 95). (They also concluded that high rates of conviction in Japan appear equally related to competence and not political policing and control. Their data confirm the consensus of the voluminous literature on the Japanese criminal justice system³—that conviction

3. See David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (London: Oxford University Press, 2002), pp. 214–42.

rates are high because prosecutors do not prosecute unless they are certain themselves of the defendant's guilt and are equally certain that they have more than sufficient evidence to convince any judge of that belief. In other words, prosecutors do not prosecute those they think might be or might be found innocent. The careers of those who do take such "adventures" tend to suffer. Prosecutors too are rewarded for competence and hard work.)

Among four remaining categories of cases were decisions holding unconstitutional statutory restrictions on door-to-door election canvassing. Ramseyer and Rasmusen make a reasonable argument that the decisions in these cases were "anti-government" in that they exceptionally affected the political interests of majority party (LDP) politicians—although one can at least imagine that such measures might have wide voter appeal. Many might prefer not to suffer the personal inconvenience and bother of door-to-door political campaigning. Two other clusters of cases characterized as "politically charged" and "anti-government" were those challenging the constitutionality of the U.S. security arrangements and the Self Defense Forces under Article 9 and of elections and election laws for legislative malapportionment. Also included were cases in which injunctive relief against an entity of local or national government was granted. All were lawsuits brought by private litigants and their attorneys, whose political affiliation would have been easy to identify.

What they found should not surprise anyone. In each category of decisions, judges who were YJL members and who also handed down decisions or granted injunctive relief consistently in opposition to established Supreme Court precedents or well-established strictures of judicial restraint tended subsequently to receive less prestigious assignments than those who did not. As Ramseyer and Rasmusen themselves point out (p. 58), the Supreme Court had consistently upheld the ban on election canvassing. Judges who defied these precedents were more apt subsequently to be denied plum assignments. Similarly, judges who openly defied Supreme Court precedents on malapportionment or on the constitutionality and reviewability of Japan's defense policies or refused to adhere to judicial construction of legislative constraints on injunctions against government offices and officials were less likely to receive prestigious assignments and positions (pp. 67, 70–72, 75–76).

Thus, by their own admission Ramseyer and Rasmusen confirm a very different story from the one they tell and attempt to prove. Their data and analysis confirm the tale of a professional secretariat administering the judiciary to ensure the highest level of judicial integrity, talent, and consistency *without* considering the political beliefs or unexpressed bias of any individual judge. This is a story of judicial autonomy, integrity, and public trust.

Substitute the public trust for political intervention, and the actions of Japan's senior judges can be readily explained by concern over any possible

public perception of judicial corruption or incompetence or that judges might act out of partisan preference or extreme ideological commitment. Albeit perhaps hoodwinked into belief in the possibility of “neutral” principles of law, the public is unlikely to approve of decisions overtly motivated by a leftist ideological bias. Such perceptions by a conservative electorate would, surely in the eyes of senior judges, have inexorably undermined public trust in the judiciary as a whole, hence the vigilance of senior judges assigned to the secretariat to prevent any judges—especially young assistant judges fresh from college campuses traumatized by radical student demonstrations—from behaving in a manner that might discredit the judiciary. This would include any judge perceived to be dishonest or incompetent or who in deciding cases transgresses well-established precedents established by the Supreme Court or legal parameters that have been widely accepted within the judiciary as a whole. True, were the public’s trust lost, they might also fear political intervention as a result. Some might thus wish to resuscitate Ramseyer’s brief. But it would now be a story of public trust, not political control.

Japan’s Failed Revolution: Koizumi and the Politics of Economic Reform.

By Aurelia George Mulgan. Asia Pacific Press, Canberra, 2002. ix, 260 pages. \$A42.00.

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White knights rarely ride to the rescue at the beginning of the twenty-first century. Their samurai equivalents are generally no more readily in sight. Yet, confronted by modernity’s numerous fire-breathing monsters—the bevy of complex, interlaced, and intractable problems that confront most societies today—many people naturally yearn for the arrival of a dragon-dispatching knight with the purest of souls and the most keenly honed of swords. Koizumi Jun’ichirō took up the office of Japanese prime minister in April 2001, and his bold promises combined with his media-savvy image as a maverick reformer quickly gave him credibility as the rare warrior who would dramatically dispatch the country’s interwoven amalgam of nettlesome economic and political problems. The stronger the expectations surrounding Koizumi’s arrival, the deeper have been the subsequent disappointments.

Aurelia George Mulgan is among the most disheartened. Her book examines the deep-seated political and economic problems enmeshing Japan