

Judging the judges

Measuring Judicial Independence: The Political Economy of Judging in Japan

By J. Mark Ramseyer and Eric B. Rasmusen
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Japanese constitutional law is said to be quite simple: The government always wins. In an attempt to empirically test this oft-reached conclusion, *Measuring Judicial Independence* examines factors impacting Japanese judicial decisions. Based on the premise that for a career judiciary, such as Japan's, job assignments and promotion opportunities will affect one's actions, the authors use econometrics to track the careers of judges who render decisions in certain types of cases.

Econometric analysis is somewhat difficult for a noneconomist to understand, although the authors sugar-coat it with an easy-to-understand example of regression analysis. But the authors do make clear that for politically sensitive or constitutional cases, judges who decide against the government suffer career downturns. In other cases, it is the judges who are overturned on appeal who are penalized.

Making this book interesting are anecdotes about individual judges and their career progress, particularly if they show independence that is not consistent with the goals of the dominant political party.

The stand-out tale is that of Judge Shigeo Fukushima, who, while serving on a district court in Hokkaido in the 1960s, flatly held that the existence of the Self-Defense Forces violated Article 9 of the Constitution, which renounces war. Prior cases challenging the SDF had been decided on other than constitutional grounds.

Before issuing his judgment, Fukushima received a memo from his superior, Chief Judge Kenta Hiraga, describing how he would decide the case—predictably on points other than constitutional ones. Fukushima not only ignored the "advice," he also shared the memo with colleagues, and it eventually found its way to the press. Fukushima's decision was overturned on appeal and he eventually found himself assigned to provincial family courts, his career at a standstill, but it is unclear whether his downfall was because of his holding in the case or because of his indiscretion in sharing the memo.

The authors' analysis of how judicial independence is compromised in a single party-dominated atmosphere, such as that of Japan for most of the period between 1948 and 1993, contrasted with the results in a more vigorous two-party system, such as that prevailing in the United States, is also telling.

The authors show that when a political party expects to retain power for a significant period, as the Liberal Democratic Party did for decades, there is no need to shield the judiciary from political pressure. Since there is little risk that the opposition will have the opportunity to pressure the judiciary, there is little to fear from the exercise of political pressure, and much to gain from it. The implication of this theory is that since the LDP's hold on political power has become more tenuous since 1993, we may see the judiciary becoming more independent in the future. That would be something to look forward to.