Understanding Judicial Reputation

In his new book, Professor Tom Ginsburg uses economic analysis to explore how reputation impacts judges’ behavior.

When the US Supreme Court declared same-sex marriage a constitutional right in the landmark Obergefell v. Hodges ruling last June, Justice Anthony Kennedy wrote a majority opinion that was overflowing with sweeping elegance—as if, Professor Tom Ginsburg observed, “it were written for the ages.”

It was also as if Kennedy, widely viewed as sensitive to gay rights, hoped to solidify the legacy that had been building since his 1996 pro–gay rights majority opinion in Romer v. Evans. He seemed to care what the American people thought.

“He’s an audience was ordinary Americans as he made the case for dignity [in Obergefell], and that’s a very different audience than if he were directing his opinion at the lawyers and the courts,” said Ginsburg, the Leo Spitz Professor of International Law and the Law School’s deputy dean. “If he’d done that, he would have framed the issue in terms of our traditional structure for analyzing equal protection claims, and that is absent from the opinion. This suggests that he knew what he was doing, and that he was speaking quite directly to the public.”

The fact is, image and perception matter in today’s media-driven, globally connected world, and this is particularly true for judges, Ginsburg argues in his new book, Judicial Reputation: A Comparative Theory (University of Chicago Press), coauthored with economist and Texas A&M School of Law Professor Nuno Garoupa. Courts and judges around the world rely on their reputations—both within the profession and, increasingly, among the general public—to establish influence, legitimacy, and compliance. Without it, they’d struggle to do their jobs.

“Judges famously lack the purse and the sword: they don’t have money and they don’t have political or military power, so the only way they can convince people to obey their decisions is if they have a good reputation,” Ginsburg said.

But how those reputations develop isn’t well understood,
and Ginsburg and Garoupa have developed a new framework that uses economic analysis to explain judicial behavior in a way that the more common focus on legal origins and tradition does not. Their approach is predicated on principal-agent theory, or the idea that an informational asymmetry occurs because judges act as agents on behalf of a society that, in general, is unequipped to adequately assess their performance.

“Judges are not gods on high, but they are people with more expertise acting on behalf of people with less expertise, and this makes it hard for us to monitor them,” Ginsburg said. “Reputation is a way of providing a shorthand for that monitoring problem.”

But which reputations matter depends on the institutional design of each judiciary. For instance, countries like France and Japan have “career” judicial systems, where judges join the profession relatively early and advance as they build reputations among those inside the profession, and countries like the United States have “recognition” systems, where judges tend to join the bench after attaining a good reputation more broadly. Because of these and other variations, reforms in a struggling judiciary depend on a solid understanding of how the actors within that system interact.

In the book, the authors examine how different institutional configurations balance individual reputation and the profession’s collective reputation; how they find an optimal, locally appropriate balance between different audiences; and how reputational concerns shape judicial behavior. They also investigate the dynamic nature of judicial structures, which are formed and reformed to meet shifting goals. The rising influence of media exposure, for instance, has spurred a shift toward cultivating external audiences, even in countries where the dominant emphasis has been on building individual reputations among an internal audience.

One of their targets is the traditional distinction between civil and common law. “The interaction between internal and external constituencies is dynamic, and so tradition alone cannot explain the configurations that we observe,” the authors write in the book’s introduction. “We are in an era of nearly continuous institutional tinkering with judicial structures that goes far beyond what was found in earlier eras. Countries are reforming judicial administration, legal procedure, and even constitutions at a rapid rate.”

In many developing countries, the authors argue, judiciaries have found themselves trapped in a reputational spiral: pervasive corruption has damaged the court system’s reputation, which has led to a reduction in resources, which has led to poorer performance, which has further diminished the reputation. This happened in Kenya, and the government responded by trying to break the cycle: in the new constitution adopted in 2010, they created a system for vetting judges.

“They brought in outside judges from other parts of Africa to help perform the vetting,” Ginsburg said. “They were basically asking if these judges were ‘fit’ for the new Kenya. That got rid of some of the worst judges. It was a way of cleaning house and trying to restore the collective reputation. But of course those opportunities are few and far between.”

But there are other opportunities for reform, and this is where the authors’ work can help: it offers a framework for predicting how particular reforms will impact a judiciary.

“As a simple policy matter, if we want to provide advice to judiciaries in developing countries as to how to improve their reputations, we have to know something about how the reputation is produced,” he said. “Let’s use this framework to try and understand what the likely effects of a particular reform are going to be, and what the unintended consequences are likely to be. It might help us reason our way to better reform.”

The authors discuss a number of reforms aimed at ensuring both individual judicial accountability—including transparency, performance-based compensation, and competition for individual judges—as well as ones aimed at improving collective effort, such as random de novo appeals and the ability to rent judiciaries from other countries.

But Ginsburg points out that no universal reform is right for every country. Instead, he hopes the framework will open up new space for academic debate and strategic real-world experiments like the one in Kenya.

“It would be very nice to see more experimentation with judicial organization to try and improve performance,” Ginsburg said. “We’d like to see discussions of judging that are more theoretically informed, particularly in the comparative law context. There’s a lot of data out there—let’s try to understand what judges are doing by understanding the position they’re in.”