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COASE-SANDOR INSTITUTE FOR LAW AND ECONOMICS WORKING PAPER NO. 676
(2D SERIES)
PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 460

JUDICIAL ROLES IN NONJUDICIAL FUNCTIONS

Nuno Garoupa and Tom Ginsburg

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

February 2014

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Research Papers Series No. 14-24

Judicial Roles in Nonjudicial Functions

Nuno M. Garoupa*
Tom Ginsburg**

*Professor and H. Ross and Helen Workman Research Scholar, University of Illinois College of Law at Urbana-Champaign
**Leo Spitz Professor of International Law at the University of Chicago Law School

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JUDICIAL ROLES IN NONJUDICIAL FUNCTIONS

NUNO GAROUPA*
TOM GINSBURG

ABSTRACT

Judges perform nonjudicial functions in many contexts. Most jurisdictions regulate these functions in multiple ways, by statute and by custom. We provide a theory of judicial demand and judicial supply for nonjudicial functions. By teasing out the determinants of judicial involvement in nonjudicial functions, we show the potential market failures and the need for regulation. We suggest that some limitations on the judicial exercise of nonjudicial functions seem justified. However, these limits might vary across jurisdictions depending on institutional and contextual factors.

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* Nuno Garoupa is Professor of Law and the H. Ross and Helen Workman Research Scholar at the University of Illinois College of Law. Tom Ginsburg is the Leo Spitz Professor of International Law at the University of Chicago Law School and a Research Professor at the American Bar Foundation. We thank the University of Illinois faculty retreat participants for their helpful comments. Dawood Ahmed, Constanza Bodini, and Wei Li provided excellent research assistance. The usual disclaimer applies.

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INTRODUCTION

We all know that the job of judges is to decide cases. Yet in many jurisdictions, judges also engage in multiple nonjudicial functions ranging from serving on law commissions, playing management roles, serving as public intellectuals, and even serving as interim executives. In a notable recent example, in the midst of a serious political and economic turmoil, the President of the Greek Supreme Administrative Court was appointed to be the interim Prime Minister.[1] Justices have also served as acting presidents in Bolivia,[2] Bangladesh,[3] and Pakistan.[4] One of the most significant constitutional crises in Brazilian history in October 1945 was resolved when the incumbent president was forced to resign while the Chief Justice was appointed as acting president.[5]

Are there any limits to judicial engagement in nonjudicial functions? Evidently the distinction between a judicial and a nonjudicial function is in itself complicated and convoluted.[6] Case law has struggled to establish clear legal doctrines that offer a concise definition of a judicial function.[7] Impartiality, non-partisanship, and adjudication seem to be associated with

1. *See* Helena Smith, *Greece's Interim Government Sworn in Before Fresh Election*, GUARDIAN (May 16, 2012), http://www.guardian.co.uk/world/2012/may/16/greece-interim-government-sworn-in.

2. MARITES DAÑGUILAN VITUG, SHADOW OF DOUBT: PROBING THE SUPREME COURT 185 (2010) (describing resignation of Bolivian president and appointment of Chief Justice as caretaker).

3. *Former Presidents: Justice Abu Sayeed Chowdhury*, THE BANGABHABAN: THE PRESIDENT HOUSE OF BANGLADESH, http://www.bangabhaban.gov.bd/sayeed.html (last visited June 27. 2013).

4. *The President: Previous Presidents*, THE PRESIDENT: THE ISLAMIC REPUBLIC OF PAKISTAN, http://www.presidentofpakistan.gov.pk/index.php?lang=en&opc=2&sel=4&pId=9 (last visited June 27, 2013).

5. President Getúlio Vargas lost popular support for his authoritarian government and was forced to resign in October 1945. He was replaced by the Chief Justice José Linhares as acting president from October 1945 to January 1946. *José Linhares*, PORTAL BRAZIL, http://www.brasil.gov.br/linhadotempo/epocas/1945/jose-linhares (last visited June 27, 2013).

6. For example, under Australian law, judges play a judicial function when they address a dispute to be resolved by application of law in order to establish facts and a binding resolution accepted by parties. *See* Patrick Emerton & H. P. Lee, *Judges and Non-Judicial Functions in Australia*, *in* JUDICIARIES IN COMPARATIVE PERSPECTIVE 403 (H. P. Lee ed., 2011).

7. *See* Mistretta v. United States, 488 U.S. 361 *passim* (1989).

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a judicial function.[8] However, this conceptualization leaves an enormous gray area of functions that fundamentally are also adjudicative in nature and where judges are welcome due to their perceived independence and impartiality. For example, when judges are involved in private arbitration, is this a judicial function or not? The answer to this question is all but clear.[9]

The involvement of judges in nonjudicial functions also raises significant questions concerning the separation of powers doctrine.[10] In fact, when judges take an important role outside of the judicial branch of government, they could be interfering directly with other branches as well as undermining the independence of the judiciary by endorsing extrajudicial adjudication or effectively undermining judicial review, for example. Additionally, nonjudicial functions could seriously compromise the impartiality of the judges in question. Furthermore, judicial participation in extrajudicial roles raises questions concerning the extent to which immunity privileges enjoyed by judges extend to nonjudicial functions.[11]

Not surprisingly, most jurisdictions regulate judicial involvement in nonjudicial functions. In the United States, the Code of Judicial Conduct allows some involvement (mostly related to legal activities, education, and charitable work) and prohibits others.[12] Participation in government commissions and public hearings is usually the most controversial.[13] Other jurisdictions, such as South Africa, have developed a specific incompatibility test to decide on possible nonjudicial functions.[14] Yet there are also jurisdictions that have very few formal restrictions.[15] Most

8. *See generally id*.; *see also Kable v DPP (NSW)* (1996) 189 CLR 51 (Austl.) (showing same point in the context of Australian law).

9. For example, New Zealand law has struggled with the meaning of tribunal until it was clarified in 2008. *See* Geoffrey Palmer, *Judges and Non-Judicial Functions in New Zealand*, *in* JUDICIARIES IN COMPARATIVE PERSPECTIVE, *supra* note 6, at 452.

10. *See* Emerton & Lee, *supra* note 6.

11. In the United Kingdom, it has been clarified that judicial immunity applies only to judicial functions. *See* Abimbola A. Olowofoyeku, *Judges and Non-Judicial Functions in the United Kingdom*, *in* JUDICIARIES IN COMPARATIVE PERSPECTIVE, *supra* note 6, at 493.

12. *See* Jeffrey M. Shaman, *Judges and Non-Judicial Functions in the United States*, *in* JUDICIARIES IN COMPARATIVE PERSPECTIVE, *supra* note 6, at 512.

13. *See id*.

14. The incompatibility test was conceived after the *Heath* case when a High Court judge was appointed to a special investigation unit in 2001. Later the Judicial Service Commission Amendment Act 2008 was passed, which opened the way for further limitations on nonjudicial functions in the future. *See* Cora Hoexter, *Judges and Non-Judicial Functions in South Africa*, *in* JUDICIARIES IN COMPARATIVE PERSPECTIVE, *supra* note 6, at 474.

15. For example, in Canada there are no significant constitutional constraints and only some minor statutory limitations under the Federal Judges Act of 1985. *See* Patrick Monahan & Byron

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jurisdictions make a sharp difference between nonjudicial functions during tenure and post-tenure, with less intensive restrictions for the latter. In the words of the United States Supreme Court in *Mistretta v. United States*, "[t]he ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch."[16]

Absent significant statutory limitations, Canada and Australia have seen the development of the *persona designata* doctrine to regulate judicial participation in activities outside of the judicial branch of government. Perceived to be based on the doctrine of separation of powers, the goal is to undermine possible uses of judicial power outside of judicial functions.[17]

For the purpose of our analysis, we consider a judicial function an activity exercised by a judge inside the courtroom whereas by nonjudicial role we understand an activity exercised by a judge outside of the courtroom.[18] Thus, the phenomenon recently characterized as the judicialization of public policy is usually achieved through formal court decisions, and hence is considered a judicial function within our analysis.[19] We recognize that there is some relationship between judicialization and nonjudicial roles in the sense that an infinite judicialization would inevitably eliminate nonjudicial roles as we understand them. However, by clearly distinguishing nonjudicial functions from other well-known phenomena, we provide for a better understanding of judicial behavior.

Based on our theory of judicial reputation,[20] we provide an explanation for why judges might be involved in nonjudicial functions. Notice that

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Shaw, *The Impact of Extra-Judicial Service on the Canadian Judiciary: The Need for Reform*, *in* JUDICIARIES IN COMPARATIVE PERSPECTIVE, *supra* note 6, at 428.

16. Mistretta v. United States, 488 U.S. 361, 404 (1989).

17. *See* Emerton & Lee, *supra* note 6. The landmark cases are *Drake v Minister of State for Immigration and Ethnic Affairs* (1979) 24 ALR 577 (Austl.), which questioned the appointment of a judge of the Federal Court of Australia to the Administrative Appeals Tribunal, and *Hilton v Wells* (1985) 157 CLR 57 (Austl.), which challenged a particular statute that allowed tapping by a warrant issued by a judge of certain specific courts, therefore raising questions concerning the distinction between "judge" and "court". Later *Grollo v Palmer* (1995) 184 CLR 348 (Austl.), clarified the extent to which a function exercised by a judge is within persona designata. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 (Austl.), the High Court of Australia decided that a judge of the Federal Court could not be involved with preparing a particular report in relation to a public policy issue that demanded taking sides.

18. This is consistent with the Oxford English Dictionary which defines "extrajudicial" as "[l]ying outside the proceedings in court." OXFORD ENGLISH DICTIONARY 613 (2d ed. 1989).

19. On judicialization, *see* ALEC STONE SWEET & MARTIN SHAPIRO, ON LAW, POLITICS AND JUDICIALIZATION (2003).

20. *See* Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. TRANSNAT'L L. 451 (2009); *see also* Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. OF COMP. L. 226 (2010);

judicial involvement in nonjudicial functions requires two explanations. First, judges have to be willing to perform such functions voluntarily, meaning that they must enjoy some benefits generated within nonjudicial tasks—the supply side. Second, other political and social relevant actors must desire judicial participation. Judicial participation in nonjudicial functions must yield certain payoffs to the relevant actors who select them—the demand side. We contend that both parties are motivated by reputation concerns; the judges wish to enhance their reputations, while other actors seek to draw on the reputation of the judiciary for impartiality and integrity. However, given that nonjudicial functions impose some costs in terms of collective reputation on the judiciary, some limitations are likely to be appropriate. In fact, we contend that potential market failures justify some form of regulation in this context.

This Article proceeds as follows. Part I summarizes possible nonjudicial functions and the degree to which we expect them to be performed by judges. Part II develops a theory of judicial participation in nonjudicial functions. Part III concludes the Article.

I. NONJUDICIAL FUNCTIONS

We can consider a continuum of nonjudicial functions in terms of being more or less similar to judicial functions. At one end of the spectrum, there are nonjudicial functions that can be seen as quasi-judicial in nature or seemingly judicial functions. Next we move to nonjudicial functions that benefit from judicial expertise or are related to courts and the legal system more generally. We also have nonjudicial functions that simply reflect community engagement. Finally, we have nonjudicial functions attached to the other two branches of government: legislative and executive. We also add business activities at the end of the list. In particular, we suggest the following framework:

(i) Seemingly judicial functions: private arbitration, serving in tribunals as a mediator or in ad-hoc tribunals on restorative justice;

(ii) Quasi-judicial functions: auxiliary functions such as electoral courts, deciding presidential powers, supervising political parties;

(iii) Nonjudicial functions related to judicial functions: management of courts, serving in judicial council or other

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see also Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Party and Judicial Politics*, 28 ARIZ. J. OF INT'L & COMP. L. 539 (2012).

commissions related to the court system or to judicial selection, retention, promotion, or disciplinary action;

(iv) Nonjudicial functions that are adjudicative in nature: chairing inquiries (royal commissions in the United Kingdom or in Australia, public hearings in the United States), special prosecutors, specialized investigations on corruption or terrorism, adjudicating impeachment of political actors;

(v) Nonjudicial functions that promote law: teaching and writing, working in judicial associations;

(vi) Social and community activities: involvement with nonprofit activities, participation in nonjudicial associations;

(vii) Seemingly legislative functions: participation in law making commissions or working groups, serving on electoral boundaries commissions, supervising constitutional amendments;

(viii) Seemingly executive functions: chairing administrative agencies (usually crime prevention related); serving as ambassadors or executive officers;

(ix) Full legislative functions: legislator;

(x) Full executive functions: member of the administration, serving as ambassador; and

(xi) Business activities: involvement with for-profit activities, including lawyering and serving on corporate boards or directorships.

These nonjudicial functions are not equivalent in nature. Arguments that certain activities benefit from judicial skills and independence might apply to the top of the list, but they are very unclear when we consider the bottom of the list. Similarly, arguments against judicial involvement in nonjudicial functions are apparently stronger for those at the bottom than at the top of the list. Not surprisingly, most jurisdictions are permissive with seemingly judicial or quasi-judicial functions but regulate more extensively any judicial involvement in legislative and executive functions.

Business activities might benefit from judicial knowledge and human capital, in particular if the activities are law-related, but they expropriate from the entire judiciary its collective investment on reputation and prestige. They also undermine judicial impartiality and raise considerable

concerns in relation to professional conflicts of interest. It is not surprising that most jurisdictions prohibit such activities.

II. A THEORY OF JUDICIAL ROLES IN NONJUDICIAL FUNCTIONS

A. Supply Side

Judges perform nonjudicial functions because they want to, but it is unclear why this is the case. Multiple reasons might explain judicial willingness to accept such a workload; these reasons are the determinants of the supply side. It could merely be a question of remuneration, either because the nonjudicial functions pay more or because they generate rents to be recouped in the future. Monetary payoffs, immediate or deferred, would be a good reason to opt for nonjudicial functions. A second possible set of reasons is related to enhancing individual prestige or reputation. Nonjudicial functions could provide better or new opportunities for individual judges to become more popular with relevant audiences. Nonjudicial functions could also reduce individual workload if they are less demanding in terms of hours or intensity of work, though nonjudicial functions might increase leisure opportunities. Finally, a third possible argument would be political and social influence. An individual judge with a particular ideological or social agenda could see a nonjudicial function as instrumental in promoting such agenda.

Let us begin with our theory of reputation.[21] We argue elsewhere that judges need a good reputation in order to accomplish their tasks. Furthermore, reputation requires team production; it has both an individual and collective component. A judge's reputation contributes to that of the judiciary as a whole, but also depends on that collective reputation. We analyze how different sets of legal institutions are organized to emphasize the individual or collective investment in reputation.

A judge taking on nonjudicial functions must compare the benefit to the potential cost. Nonjudicial functions might generate two significant costs. First, the judicial aura of impartiality and independence could be compromised by a nonjudicial function. As the U.S. Supreme Court said in *Mistretta v. United States*, "[t]he legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political

21. *See* Garoupa & Ginsburg, *Building Reputation in Constitutional Courts: Party and Judicial Politics*, *supra* note 20.

branches to cloak their work in the neutral colors of judicial action."[22] An erosion of judicial prestige and reputation, or even political compromise, in the future might be a significant risk both in terms of monetary and nonmonetary payoffs. Second, nonjudicial functions could preempt or undermine further judicial advancement in terms of career goals and promotion to higher courts, depending on the response of others to a judge's actions.

At the same time, judges may benefit from engaging in nonjudicial functions. One benefit is diversification of markets in which reputation is built. A judge who works entirely within the judiciary may be less well known outside of it and may want to diversify sources of reputation building. This may only make sense once a certain amount of internal reputational capital has been built. Furthermore, some judges may have particular skills, such as writing books and magazine articles. These judges may receive more marginal payoff to reputation-building by engaging in extrajudicial activities, at least up to a certain point. The existence of multiple markets for reputation building may enhance the overall prestige of the judiciary, given the range of judicial skills and personalities.

The balance between anticipated benefits and expected costs will determine the extent to which an individual judge might accept a nonjudicial function. It is likely that the profile of benefits and costs for the same nonjudicial function varies among individual judges. The possibility of nonjudicial functions induces a selection effect. Certain types of individuals will be more prone to seek nonjudicial appointments than others. For example, consider the standard distinction between career and recognition judiciaries.[23] Nonjudicial functions are likely to appeal more to recognition judiciaries for whom external audiences are more important than to career judges who are usually more focused on internal incentives. The potential costs of nonjudicial functions are also plausibly more significant when judicial selection and promotion is totally depoliticized and there is a well-structured career. The reason is that contamination by nonjudicial issues is likely to be more costly in a career judiciary than in a recognition judiciary given the institutional design. An immediate prediction would be that the role of nonjudicial functions will be more visible in recognition judiciaries than in career judiciaries, an observation that seems fairly consistent with the evidence.

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22. Mistretta v. United States, 488 U.S. 361, 407 (1988).

23. *See* Nuno Garoupa & Tom Ginsburg, *Hybrid Judicial Career Structures: Reputation Versus Legal Tradition*, 3 J. LEGAL ANALYSIS 411 (2011).

There are also significant moral hazard implications. The existence of nonjudicial functions is likely to distort or influence the incentives for judicial performance. To the extent that nonjudicial functions are generated or created by certain external audiences, individual judges might be more willing to appeal to such audiences. In some ways, this willingness could enhance judicial independence if judicial independence is instrumental to get these outside opportunities. In other ways, it could undermine judicial independence if partiality or partisanship is important to benefit from nonjudicial payoffs.

Another plausible effect that nonjudicial payoffs could have is an adverse selection effect at entry level. Certain individuals might be more interested in a judicial career or appointment if nonjudicial functions are available. This could be problematic if it induces individuals to perceive a judicial appointment as merely instrumental to achieve a nonjudicial function. If the skills and attributes of judicial and nonjudicial functions are aligned, such effect is not very relevant. However, if the skills and attributes of a nonjudicial function conflict with those of a judicial function, individuals with the "wrong" skill sets might seek judicial appointments.

Shifts in the supply function will respond to changes in the balance of benefits and costs. For example, a continuous erosion of judicial monetary payoffs (because salaries are not increased) might see an increase in willingness to serve on nonjudicial functions. Fewer opportunities to receive promotions in the judicial career could also expand the supply curve. At the same time, excessive political polarization in nonjudicial functions is likely to diminish the supply curve as judges may become cautious about surrendering their prestige. The perception that nonjudicial functions might increase the likelihood of being expelled from the judiciary could have a significant chilling effect.[24]

B. Demand Side

We turn now to explanations for why certain groups or other branches of government might want judges to perform nonjudicial functions. The most immediate explanation is judicial skills and human capital. Certain tasks or jobs benefit from specialized skills or accumulated human capital particular to the judiciary. Therefore, unsurprisingly, judges are recruited

24. *See, e.g.*, Raphael Minder, *Spanish Judge Is Acquitted of Abusing His Authority*, N.Y. TIMES, Feb. 27, 2012, at A8, *available at* http://www.nytimes.com/2012/02/28/world/europe/prominent-spanish-judge-cleared-of-abusing-powers.html.

to perform such nonjudicial functions. The examples relate to law, adjudication, interpretation, review, and even fact finding.

If in some cases there is a genuine demand for judicial independence and impartiality, in other cases recruiting judges allows political actors to free ride on such convenient prestige. One example is using judges to lead politically sensitive inquiries or involving them in consultations for new legislation.[25] Judicial participation in these nonjudicial functions might be beneficial given judicial human capital, but it also gives credibility or legitimizes a particular, potentially politicized outcome. Certain tasks performed by judges will be regarded in better consideration than if performed by politicians or other actors.

There are collective costs of using judges to perform nonjudicial functions, however. The most serious cost is eroding judicial prestige, which could undermine judicial independence and separation of powers in the future.[26] Another potential cost is the creation of alternative methods of adjudication that will inevitably compete with and possibly undermine the public system of adjudication.

The general quality of institutions might determine shifts in the demand curve. In a system of generally poor institutions but with a good judiciary, we expect demand to be high and judicial involvement with nonjudicial functions to be more frequent. Where the judiciary is poor but other institutions good, demand will likely be low.

A generalized loss of prestige by the political elites usually induces the demand curve to expand; more judicial involvement in nonjudicial functions is expected. We thus see politicians turning to judges at times of crisis to restore integrity to the system. On the other hand, excessively controversial judicial decisions could see the demand curve reduced in following periods.

C. Potential Market Failures

Having explained demand and supply curves for judicial involvement with nonjudicial functions, we can easily derive an equilibrium in which

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25. *See infra* text accompanying notes 48–52 (judges in royal commissions); *see also* J.B. Coyne, *Judges and Royal Commissions*, 37 CAN. L. TIMES 416 (1917) (describing early criticism of the practice).

26. For example, simple participation in constitutional conventions could change judicial preferences. *See* Edward N. Beiser, Jay S. Goodman, & Elmer E. Cornwell Jr., *Judicial Role in a Nonjudicial Setting: Some Empirical Manifestations and Consequences*, 5 LAW & SOC'Y REV. 571 (1971). Notice, however, that in this empirical study there was a serious selection effect since judges participating in those conventions had a political past.

judges will serve in nonjudicial functions in response to demand and supply determinants. There are good reasons to suspect that such equilibrium is not efficient because there are potential market failures. The most immediate is that the demand-side costs might be externalized and therefore not actually borne by those who seek judges in nonjudicial functions.

Rationally we should say that judicial involvement with nonjudicial functions would be appropriate when the benefits outweigh the costs. The critical issue is that such benefits and costs are not symmetrically distributed across the population of interested parties. In many occasions, the benefit is concentrated in a particular political or social actor who has the power to appoint a judge to a nonjudicial function. Yet the cost is disseminated, if not borne heavily by the judiciary at large. Those who bear such costs might not be in a position to effectively oppose judicial involvement with nonjudicial functions.

The unbalanced distribution of benefits and costs might justify regulation of judicial involvement in nonjudicial functions as a pre-commitment mechanism to avoid opportunism by those who benefit. Inevitably this regulation has to be effective and sufficient to avoid conflicts of interpretation that could impose significant costs on the judiciary if the courts are required to adjudicate cases where they have a direct interest. Another possible solution is self-regulation by the judiciary. However, it is unclear if the interests of the judiciary are always aligned with those of the community at large.

Not all nonjudicial functions have the same balance of potential costs and benefits. In fact, those that are more similar to judicial functions in nature are likely to maximize the net benefit for both judges and the relevant actors. Therefore, most legal systems are more permissive in terms of allowing quasi-judicial functions even if under some particular contexts such as a leave of absence without remuneration.[27] As we go down the list, not only is it less likely that there will be an aggregate net benefit, but also conflicts of interest across actors emerge. Unsurprisingly, most legal systems prohibit such nonjudicial functions.[28] Some even limit such functions after judges retire by imposing some time lag between leaving the bench and performing such nonjudicial functions.[29]

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27. *See infra* Part III.

28. *Id.*

29. *See infra* text accompanying note 131 (Chinese judges restricted from serving as lawyers for two years after retirement).

Another possible interpretation of this problem is to consider the nature of judicial independence and prestige as a public good among judges. Judges contribute to creating the public good, which forms a collective stock of reputational capital. But once built, there is a danger that it will be over-used and dissipated in nonjudicial functions that may benefit only a particular group of political actors. The public good nature requires some form of regulatory intervention to avoid excessive dissipation.

A second potential market failure is the possibility of supply-induced demand. The judiciary could engage in strategic development of a reputation for independence and impartiality to induce additional demand for nonjudicial functions. This is a risky strategy since judicial decisions would be merely instrumental in order to achieve a longer-term goal unrelated to judicial functions. Furthermore, this strategy could be perceived as an expropriation strategy. The external benefits created by an independent judiciary are to be appropriated by individual judges seeking nonjudicial functions. Such expropriation is problematic in terms of efficient incentives and adequate distribution of payoffs. It seems appropriate to limit the possibility for supply-induced demand. Self-regulation by the judiciary would not be an efficient mechanism since it could easily be captured to promote such supply-induced demand. Regulation by an external body or by statutory intervention seems advisable.

Another related failure concerns the different market structures in judicial and nonjudicial functions. Judges have a monopoly on judicial functions, with the exclusive ability to engage in them. However, when it comes to nonjudicial functions, judges inevitably compete with other groups or professions. One possible consequence is that judges could use their monopoly rents obtained in judicial functions to promote their involvement in nonjudicial functions. One might think of this in economic terms as exercising a form of dumping against competing groups. Judges might shape adjudication and judge-made law to promote their reputation with relevant audiences and undermine possible competition for nonjudicial functions. For example, imagine a judicial decision *requiring* certain forms of investigative commission have judicial membership. These strategies are more costly when they promote the interests of the judiciary, but not those of society. Regulation might be necessary to restrict judicial ability to exploit these monopoly rents. In this context, it is also unlikely that self-regulation by the judiciary would be enough since, precisely due to monopoly power, there is little pressure within the judiciary to curtail their monopoly rents. However, regulation by a third party should also be carefully designed because competing groups might

lobby for excessive limitations so to avoid the competition of judges for nonjudicial functions.

III. DISCUSSION OF EXAMPLES

A. United States

Judges in the United States, at both federal and state level, engage in a range of nonjudicial functions. This has been the topic of public debate, academic commentary, and official hearings.[30] The very first Chief Justice, John Jay, was given ex officio roles serving on a debt commission and inspecting the mint.[31] He later ran for Governor of New York, and eventually resigned the Court to take that position.[32] Chief Justice Jay was also sent to England to negotiate the treaty that bears his name.[33] Although there has been less explicit involvement in public offices in more recent times, some have asserted that particular justices have political ambitions.[34] And there has, by some accounts, been an increase in judges writing commentaries and giving speeches.[35]

Nonjudicial functions are regulated by judicial codes of conduct, found in virtually every state. The ABA Model Code of Judicial Conduct includes as Canon 3 a requirement that "[a] judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office."[36] The rules include relatively strict prohibitions against judicial engagement in nonjudicial functions.[37] For example, Rule 3.4 requires that "[a] judge shall not accept

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30. *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 91st Cong. 136 (1969).

31. Leslie B Dubeck, *Understanding "Judicial Lockjaw": The Debate Over Extrajudicial Activity*, 82 N.Y.U. L. REV. 569, 589 (2007).

32. *Id*. at 590.

33. Treaty of Amity, Commerce and Navigation Between the United States and Great Britain (Jay Treaty), U.S.–U.K., Nov. 19, 1794, 8 Stat. 116; *see generally* SAMUEL FLAGG BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY (1923).

34. BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES 267 (1982) (arguing that Frankfurter believed William Douglas had presidential ambitions); Peter Alan Bell, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587 (1970).

35. RICHARD POSNER, PUBLIC INTELLECTUALS: A STUDY IN DECLINE 364 (2003) (discussing judges as public intellectuals).

36. MODEL CODE OF JUD. CONDUCT Canon 3 (2011), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_ of_judicial_conduct_canon_3.html.

37. Dubeck, *supra* note 31, at 584 (including more commentaries in last seventy years); *see id*. at 587 (including more speeches).

appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice."[38] Typically, judges may speak, write, lecture, teach, and participate in other professional activities on legal and nonlegal subject matters.[39] Judges may sit on professional and nonprofit boards, but are to limit their involvement in organizations that might be engaged in judicial proceedings.[40] On occasion, states discipline judges for such involvement.[41]

The issue has raised particular attention with regard to the U.S. Supreme Court, whose justices have engaged in frequent speech-giving on various topics of public import.[42] The extent of this activity has, by some accounts, increased since the days in which Justice Frankfurter referred to the need for judicial self-restraint as a case of "judicial lockjaw".[43] The standard analysis cautions about the effect on judicial independence from judicial speech-giving, book-writing, and appearances at public events.[44] The same issues arise with regard to other nonjudicial functions, such as serving on commissions or government bodies. The U.S. Supreme Court itself considered the issue in *Mistretta v. United States*, quoted above, which considered the constitutionality of a judge serving on the U.S. Sentencing Commission.[45] It was alleged that, as a rulemaking body, the Sentencing Commission involved administrative rather than judicial power.[46] The Court found that the activity did not violate the separation of powers.[47] In short, the U.S. approach tends to limit judicial involvement through codes of ethics, and has over the years shifted in the direction of limited judicial involvement relative to some other jurisdictions.

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38. MODEL CODE OF JUD. CONDUCT R. 3.4 (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_rule3_4.authcheckdam.pdf.

39. CAL. CODE OF JUD. ETHICS Canon 4(B) (2009), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf.

40. CAL. CODE OF JUD. ETHICS Canon 4(C)(3)(c) (2009), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdfd.

41. *See, e.g.*, Robert J. Martineau, *Disciplining Judges for Nonofficial Conduct: A Survey and Critique of the Law*, 10 U. BALT. L. REV. 225, 238–41 (1980) (listing types of conduct for which judges have been disciplined).

42. Dubeck, *supra* note 31, at 571 n.8 (discussing debate).

43. Felix Frankfurter, *Personal Ambitions of Judges: Should a Judge "Think Beyond the Judicial"?*, 34 A.B.A. J. 656, 658 (1948).

44. Dubeck, *supra* note 31, at 572 (defining extrajudicial conduct to include partisan activities, ex officio activities, academic activities and public speeches).

45. Mistretta v. United States, 488 U.S. 361 (1988).

46. *Id.*

47. *Id.*

B. United Kingdom

Judges in the United Kingdom have a long tradition of leading commissions of inquiry in matters of public importance, including most recently an inquiry into the role of the press and police in the Rupert Murdoch phone-hacking scandal.[48] The role of judges in extrajudicial roles garnered a good deal of public attention in the case of *Ex Parte Pinochet*, when it was learned that one of the judges in the case, Lord Hoffman, had been a director of Amnesty International while hearing the case.[49] A notable recent case involved an inquiry into the death of David Butler, a former U.N. Weapons Inspector.[50] This and other prominent cases led to a debate about the use of judges to chair public inquiries into matters of political controversy.[51] The Government Department of Constitutional Affairs subsequently produced a Consultation Paper on "Effective Inquiries."[52] This reported that there had been 30 major inquiries since 1990, costing an estimated £300 million. It concluded that it can be appropriate for judges to chair inquiries because "[t]he judiciary has a great deal of experience in analysing evidence, determining facts and reaching conclusions, albeit in an adversarial rather than inquisitorial context. The judiciary also has a long tradition of independence from politics, and judges are widely accepted to be free from any party political bias."[53] The report seems to double down on judicial leadership, as it recommends the expansion of statutory powers for inquiries to include powers to compel attendance of witnesses and production of documents, as well as other quasi-judicial processes.[54] Other cases of judges becoming involved in nonjudicial functions include a recent case in which a private company appointed a sitting judge to inquire into its own financial malpractice.[55]

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48. THE LEVENSON INQUIRY, http://www.levesoninquiry.org.uk/ (last visited June 27, 2013).

49. Warren Hoge, *Pinochet Lawyers Challenge Judge's Impartiality*, N.Y. TIMES, Dec. 16, 1998, at A3, *available at* http://www.nytimes.com/1998/12/16/world/pinochet-lawyers-challenge-judge-s-impartiality.html.

50. THE HUTTON INQUIRY, http://webarchive.nationalarchives.gov.uk/20090128221550/http://www.the-hutton-inquiry.org.uk/ (last visited Jan. 28, 2009).

51. Tim Buley, *Judges Chairing Public Inquiries: Observations on DCA Effective Inquiries*, 9 JUD. REV. 293 (2004).

52. GR. BRIT. DEP'T OF CONST. AFF., EFFECTIVE INQUIRIES: A CONSULTATION PAPER PRODUCED BY THE DEP'T OF CONST. AFF. (2004).

53. *Id.* ¶ 46.

54. *See id.*, Summary and Request for Views (including a list of powers for possible future legislation: the taking of evidence, cross-examination, legal representations, oaths, and other quasi-judicial procedures).

55. Jonathan Russell, *Olympus Appoints High Court Judge to Head 'Improper Payments' Probe*

C. Israel

Like other common law jurisdictions, judges in Israel routinely lead commissions of inquiry. High profile examples include the Agranat Commission on the Yom Kippur War, the Kahan Commission, which investigated the conduct of the 1982 Lebanon war, and a recent commission to inquire into the flotilla incident.[56]

D. Canada

Canada also regularly relies on judges to participate in commissions of inquiry.[57] On occasion, such activities have led to controversy. In 2003, retired Supreme Court Justice John Gomery was named to lead an inquiry into allegations of corruption and mismanagement in a federal sponsorship program, and to formulate positive recommendations. The ultimate report, which implicated Prime Minister Jean Chrétien, led to significant controversy and was characterized as overly engaged in partisan activity. When Chrétien engaged in legal action to clear his name, the Federal Court ultimately quashed the finding of the inquiry.[58]

In another case, controversy erupted over Chief Justice Beverley McLachlin's involvement in the awarding of the Order of Canada to a doctor who performed abortions.[59] Yet such controversies have not reduced the practice. It is particularly common for retired judges to play this role, as illustrated by a recent appointment to head an inquiry into so-called "queue-jumping" in the public health system in Alberta.[60]

Panel, TELEGRAPH (Nov. 1, 2011, 5:25 PM), http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/electronics/8863139/Olympus-appoints-high-court-judge-to-head-improper-payments-probe-panel.html.

56. *Agranat Commission*, KNESSET OF ISRAEL WEBSITE, http://www.knesset.gov.il/lexicon/eng/agranat_eng.htm (last visited Mar. 27, 2013); *Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut [Kahan Commission]*, ISRAELI MINISTER OF FOREIGN AFFAIRS, http://www.mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook6/pages/104%20report%20of%20the%20commission%20of%20inquiry%20into%20the%20e.aspx (last visited Mar. 27, 2013); CNN Wire Staff, *Israel Names Head of Commission for Flotilla Inquiry*, CNN: WORLD (June 13, 2012), http://articles.cnn.com/2010-06-13/world/israel.flotilla.inquiry_1_gaza-strip-israeli-policy-israeli-raid?_s=PM:WORLD.

57. Adam M. Dodek, *Judicial Independence as a Public Policy Instrument*, *in* JUDICIAL INDEPENDENCE IN CONTEXT 295 (Adam M. Dodek & Lorne Sossin eds., 2010).

58. Tonda MacCharles, *Gomery Was Biased in Report, Judge Rules*, TORONTO STAR, June 27, 2008, at A1, *available at* http://www.thestar.com/News/Canada/article/450179.

59. Canwest News Service, *Chief Justice Sheds Light on Morgentaler's Order of Canada Appointment*, MONTREAL GAZETTE (Aug. 16, 2008), http://www.canada.com/montrealgazette/news/story.html?id=7d8564bb-eca3-4404-9d6b-f96c66b5416c.

60. Canadian Press, *Retired Judge to Head Alberta Queue-Jumping Health Inquiry*, CBC NEWS (Mar. 5, 2012), http://www.cbc.ca/news/canada/edmonton/story/2012/03/05/calgary-health-inquiry-

E. Australia

Judges in Australia have a long tradition of engaging in a number of non-judicial functions, including sitting on the Law Reform Commission,[61] the Australian Competition Tribunal,[62] and taking on various executive tasks—at least three members of the senior judiciary have served as Ambassadors.[63] Judges regularly serve as leaders of the Administrative Appeals Tribunal, which is an administrative body.[64] And recently, the Chief Justice of the New South Wales Supreme Court was appointed chairman of the Australian Broadcasting Corporation.[65]

This practice has prompted a nuanced jurisprudence and some good academic commentary, including a recent contribution from Chief Justice R. S. French.[66] The courts in at least one state have taken the position that sitting judges should not be able to sit on extrajudicial government bodies, as it might undermine public confidence.[67] There has also been discussion over whether the proper role of judges might vary with conditions, such as wartime or emergency.[68]

Australian law defines judicial power as involving a dispute to be resolved by a binding decision applying specified legal criteria to ascertained facts.[69] In cases refining this test, Australian courts have found that judicial engagement in some inquiry-type functions is incompatible with the judicial role.[70] One distinction in Australian law is between nonjudicial tasks conferred upon the office of the judge and those

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head-announced.html.

61. *Commissioners*, AUSTRALIAN LAW REFORM COMMISSION, http://www.alrc.gov.au/about/commissioners (last visited Aug. 29, 2012).

62. *Members of the Australian Competition Tribunal*, AUSTRALIAN COMPETITION TRIBUNAL, http://www.competitiontribunal.gov.au/about/members (last modified Jan. 11, 2012).

63. Emerton & Lee, *supra* note 6, at 403.

64. *Id*.

65. *James Spiegelman Named as New ABC chairman*, SYDNEY MORNING HERALD (Mar. 8, 2012), http://news.smh.com.au/breaking-news-national/james-spigelman-named-as-new-abc-chairman-20120308-1ulfw.html.

66. R. S. French, *Executive Toys—Judges and Non-judicial Functions*, 19 J. JUD. ADMIN. 5 (2009); *see generally* Emerton & Lee, *supra* note 6, at 403. Some of the practices analyzed by Chief Justice French are, in our view, standard functions of executive oversight, such as issuing search warrants and orders for preventative detention. *See Grollo v Palmer* (1995) 184 CLR 348 (Austl.) (judges participating in issuing covert warrants to authorize interception of communications).

67. Emerton & Lee, *supra* note 6, at 414 (describing position of Victorian judiciary in 1923).

68. Fiona Wheeler, *Parachuting In: War and Extra-Judicial Activity by High Court Judges*, 38 FED. L. REV. 485 (2010).

69. *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Austl.). *See* Emerton & Lee, *supra* note 6, at 405–06.

70. *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 (Austl.).

conferred upon an individual judge in her personal capacity, known as the so-called *persona designata* exception. Courts tend to ask whether the conferral of the function in a personal capacity will undermine the performance of judicial functions or the appearance of independence.[71]

For example, in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*, the Court considered whether a sitting federal judge could be nominated, in his personal capacity, to provide a report to the government in accordance with a scheme in which outsiders were called on to evaluate Aboriginal claims for preservation of particular lands. It found the scheme violated the separation of powers, as it involved the judge in a function that was essentially political in character.[72]

F. South Africa

South African judges sometimes lead commissions of inquiry.[73] In one notable case, the South African Special Investigating Units and Special Tribunals Act (SIU Act) empowered the president to set up special units, including judges, to investigate corruption.[74] In *South African Association of Personal Injury Lawyers v. Heath*, the Constitutional Court found that the functions conferred on a judge by the SIU Act compromised the separation of the courts from other arms of government.[75] Citing several Australian cases, the Court argued that it blurred the line between the courts and other branches of government, undermining the independence of the judiciary.

G. Other Common Law Jurisdictions

Judges in South Asia are among the most respected figures in government, and hence are sometimes called upon to take on very high profile nonjudicial tasks.[76] A judge in Sri Lanka was recently appointed to

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71. Emerton & Lee, *supra* note 6, at 410–12.

72. *Wilson* (1996) 189 CLR at 17–19.

73. *See, e.g.*, Nthambelini Gabara, *Judge Appointed to Probe Cricket SA Saga*, ALLAFRICA (Nov. 4, 2011), http://allafrica.com/stories/201111041280.html.

74. Denise Meyerson, *Extra-Judicial Service on the Part of Judges: Constitutional Impediments in Australia and South Africa*, 3 OXFORD U. COMMONWEALTH L.J. 181, 181–82 (2003).

75. *South African Association of Personal Injury Lawyers v. Heath* 2001 (1) SA 883 (CC) (S. Afr.).

76. *See* Case Comment, *MD Aftauddin v Bangladesh & Ors: Independent Judiciary-Consultation Required for Promotion of Judge to a Non-Judicial Post*, 3 COMMONWEALTH HUM. RTS. L. DIG. 38 (1996).

a cabinet post.[77] Judges in India have headed the Press Council, a body that serves as a press watchdog, the Human Rights Panel of West Bengal,[78] and the Competition Tribunal.[79] They also routinely serve as heads of commissions of inquiry, including cases involving foreign policy, such as when a former Chief Justice was sent to investigate the change of power in the Maldives in 2012.[80] In 2012, a retired Justice of the Supreme Court of India aroused controversy by engaging in an extensive debate in print over the merits of a decision in which he had been involved.[81]

Pakistan's judiciary has likewise been involved in commissions investigating such matters as the causes and circumstances of the 1971 civil war,[82] the sheltering and killing of Osama bin Laden in Abbottabad,[83] and the murder of a journalist that had reported on Al-Qaeda.[84] In one notable case, a two-judge panel of the Supreme Court of Pakistan heard corruption allegations against the Court itself, gave a verdict, and found the Court and its judges not guilty.[85]

In The Gambia, a Court of Appeal Judge was recently appointed as Attorney General and Minister of Justice.[86] Other countries use judges regularly for commissions of inquiry.[87]

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77. Quintus Perera, *Justice L K Wimalachandra Appointed as Commissioner for Tourism*, ASIAN TRIBUNE (Feb. 23, 2008), http://www.asiantribune.com/?q=node/9733.

78. *Retd SC Judge to Head State HR Panel*, TIMES OF INDIA (May 31, 2012), http://articles.timesofindia.indiatimes.com/2012-03-31/kolkata/31265952_1_retd-sc-judge-chief-justice-permanent-judge.

79. *See Introduction*, COMPETITION APPELLATE TRIBUNAL, compat.nic.in/introduction.html (last visited Oct. 5, 2013) (mentioning former justices).

80. Maneesh Chhibber, *India Sent Former CJ to Probe Maldives Transfer of Power*, INDIAN EXPRESS (May 22, 2012), http://www.indianexpress.com/news/india-sent-former-cj-to-probe-maldives-transfer-of-power/952108.

81. Arghya Sengupta, *A Case for Judicial Lockjaw*, HINDU (Feb. 22, 2012), http://www.thehindu.com/opinion/lead/article2935696.ece (discussing case of Justice Kumar Ganguly).

82. Zafar Abbas, *Pakistan Declassifies 1971 War Report*, BBC NEWS (Dec. 31, 2000), http://news.bbc.co.uk/2/hi/south_asia/1094788.stm.

83. Hanif Khalid, *Abbottabad Commission Points Finger at PM, Others*, NEWS INT'L (May 2, 2012), http://www.thenews.com.pk/Todays-News-13-14305-Abbottabad-Commission-points-finger-at-PM-others.

84. SALEEM SHAHZAD MURDER INQUIRY, REPORT OF THE COMMISSION OF INQUIRY (Jan. 10, 2012).

85. Qaiser Zulfiqar, *Dr. Arsalan Iftikhar Case: Verdict Clears Court, Judges of Wrongdoing*, EXPRESS TRIB. (June 15, 2012), http://tribune.com.pk/story/394065/dr-arsalan-iftikhar-case-verdict-clears-court-judges-of-wrongdoing/.

86. *6 More Cabinet Appointments*, DAILY OBSERVER (Feb. 13, 2012), http://observer.gm/africa/gambia/article/6-more-cabinet-appointments.

87. *See, e.g.*, *Cocaine Was Swapped Before Being Tendered in Court—Justice Dordzie Committee*, GHANA NEWS AGENCY (Jan. 10, 2012), http://www.ghananewsagency.org/details/Social/Cocaine-was-swapped-before-tendered-in-court-Justice-Dordzie-Committee/?ci=4&ai=37825.

H. France

In France, nonjudicial functions by judges are regulated by statutory law, mainly the *Code de l'organisation judiciaire* and the *Ordonnance n° 58-1270 portant loi organique relative au statut de la magistrature*.[88] The enforcement of the appropriate rules is mainly left to the Judicial Council.[89] According to French law, the exercise of judicial functions is incompatible with the exercise of all public functions and any other occupation or employment.[90] Individual exemptions may, however, be granted to the judges by decision of the president of the court in which they work.[91] These exemptions cover teaching and other functions or activities that do not harm independence.[92] However, arbitration activities are excluded.[93] Still, judges may without prior authorization engage in scientific, literary, or artistic work.[94]

French judges are traditionally not known for becoming involved in nonjudicial roles, which is consistent with the local legal culture that has historically been based on a general distrust of the "noblesse de robe."[95] The participation of judges and prosecutors, unlike in Germany or in Italy, is merely residual.

I. Germany

In Germany, there is a long tradition of judges serving in high profile nonjudicial functions. For example, Roman Herzog held the office of President of Germany (a largely ceremonial role) from 1994 to 1999 as a member of the center-right Christian Democratic Union (CDU).[96] Prior to

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88. *See Code de l'Organisation Judiciaire* [Code for the Organization of the Judiciary] (Fr.), *available at* http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071164&dateTexte=20080505; *see also* Ordonnance 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature [Order 58-1270 of Dec. 22, 1958 concerning the Organic Law on the Status of the Judiciary], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE] Dec. 23, 1958, p. 11551, *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069212&dateTexte=20090320.

89. *See* Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 BERKELEY J. INT'L L. 53, 73–75 (2009)

90. *See* Ordonnance 58-1270, art. 8 (Fr.).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. "Nobility of the robe," referring to the hereditary judiciary in France before 1789. *See Noblesse de Robe*, BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/416997/noblesse-de-robe (last visited Oct. 5, 2013).

96. *Roman Herzog*, BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/264038/

this political office, Herzog served as a judge of the German Constitutional Court (*Bundesverfassungsgericht*).[97] He was appointed to the federal court in 1983 and, from 1987 to 1994, he was the President of the Constitutional Court.[98] He went straight from this post to the presidency of the country.[99]

In Germany, nonjudicial functions are generally regulated by statute. For example, a judge may act as chairman in conciliation agencies and in corresponding independent agencies pursuant to section 104, sentence 2 of the Federal Personnel Representation Act (*Bundespersonalvertretungsgesetz*).[100] A judge can additionally act as a conciliator in disputes between associations or between the associations and third parties.[101] A judge may only be granted permission to act additionally as an arbitrator or give an expert opinion in arbitration proceedings when the parties to the arbitration agreement jointly designate her, or when she is appointed by an agency that is not a party to the proceeding.[102] Such permission must be refused if, at the time of the decision regarding the granting of permission is made, the judge is seized of the case.[103] Furthermore, "a professor of law or of political science who has civil servant status and who is also a judge may draw up expert legal opinions and give legal advice with the permission of the highest public authority administering the courts. Such permission shall only be granted generally or in an individual case where the judicial activity of the professor does not exceed the scale of an additional activity and it is not to be feared that official interests are being impaired."[104] A judge may "undertake research and give lessons at a scientific institution of higher education, at a public teaching institution, or at an official teaching institution and perform duties in matters concerned with examination."[105] Finally, statutory provision can be made to the effect that, where the situation in the labor market is such that there is an exceptional shortage of

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Roman-Herzog (last visited Oct. 5, 2013).

97. *Id.*

98. *Id.*

99. *Id.*

100. Bundespersonalvertretungsgesetz [BPersVG] [Federal Personnel Representation Act], Mar. 15, 1974, BGBl. I at 693 (Ger.), *available at* JURIS. *See also* Deutsches Richtergesetz [DRiG] [German Judiciary Act], Apr. 19, 1972, BGBl. I at 713 (Ger.), § 4, *available at* JURIS (translation available at http://www.gesetze-im-internet.de/englisch_drig/).

101. DRiG, § 40.

102. *Id.*

103. *Id.*

104. *Id.* § 41.

105. *Id.* § 4.

applicants and consequently an urgent public interest exists in employing larger numbers of candidates for the public service, a judge shall on application be granted unpaid leave for a duration of one to six years. During the period for which permission has been granted, he will refrain from engaging in paid additional activities and only engage in paid activities pursuant the law without infringing his official duties.[106] Also, a judge shall be granted part-time employment up to half of normal service. The judge may undertake, during the period in which permission is granted, to enter into professional commitments outside his activities in the judiciary only to the extent to which the exercise of paid additional activities is permitted under section 71 of the Act read in conjunction with section 42 of the Federal Civil Servants Act (*Bundesbeamtengesetz*).[107] Clearly German judges face significant limitations on nonjudicial activity, but these are largely comparable to other civil servants.

J. Other Civil Law Jurisdictions in Europe

In Italy, nonjudicial functions are regulated by statute, in particular the law of judicial organization (*ordinamento giudiziario*). Most of the effective enforcement of the statute, however, is left to the Italian Judicial Council.[108] For example, a judge may only be granted permission to act additionally as an arbitrator or give an expert opinion in arbitration proceedings by the Judicial Council (*Consiglio Superiore della Magistratura*).[109] Furthermore, a judge may be in charge of the management in a public charity institution, but he is not allowed to receive any fees or remuneration.[110] A judge may "undertake research and give instruction at a scientific institution of higher education, at a public teaching institution, or at an official teaching institution and perform duties in matters concerned with examination."[111] Some political functions are expressly allowed. To start, judges can serve in the Judicial Council. They can also be a senator or serve in the National Council.[112]

There has been some involvement of the Italian judiciary in nonjudicial roles. To a large extent, the strict rules announced by statute are diluted by the practices of the Italian Judicial Council that grants permission for

106. *Id.* § 48b.
107. *Id.* § 76c.
108. Regio Decreto 30 gennaio 1941 n.12, art. 16 (It.).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

many of these activities. Italian judges and prosecutors have been active in party politics and have served in the executive and legislative branches.[113]

A similar observation can be made for Spain and Portugal. In both countries, nonjudicial functions are regulated by law (*Estatuto dos Magistrados Judiciais* in Portugal and *Ley Orgánica del Poder Judicial* in Spain).[114] These statutes broadly impede judges' ability to serve in nonjudicial functions but also allow the local Judicial Council to make exceptions. In fact, these statutes tend to establish that serving judges shall not be appointed to judicial functions unrelated to the work of the courts without the authorization of the competent Judicial Council.[115] The practice of these councils (dominated by judges) shapes the involvement of judges in nonjudicial roles.

In Spain and Portugal, several judges have served in the executive branch, usually as Minister of Justice, heads of agencies within the Ministry of Justice or Ministry of Interior, or in committees of experts for legislative reforms. These situations broadly result from exceptions granted by the local judicial council. Judicial involvement in the legislative branch (as congressperson or senator) is less common.[116]

K. Latin America

In Latin America, judicial activities are defined by statute (*Ley Orgánica del Poder Judicial* in Argentina, *Ley Orgánica Constitucional del Poder Judicial* in Chile, *Ley Orgánica del Poder Judicial de la Federación* in Mexico, *Lei Orgânica da Magistratura Nacional* in Brazil).[117] These laws tend to be strict, but the practice varies with the political context and the role played by judicial councils. For example, in

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113. David Nelken, *The Judges and Political Corruption in Italy*, 23 J.L. & SOC'Y 95 (1996),

114. Estatuto dos Magistrados Judiciais, Lei No. 21/85 de 19 de Julho de 1985, LEX INTEGRAL (Port.), *available at* http://www.verbojuridico.com/legisl/estatutos/emj.html; Ley Orgánica del Poder Judicial (B.O.E. 1985, 6) (Spain), *available at* http://noticias.juridicas.com/base_datos/Admin/lo6-1985.html

115. Estatuto dos Magistrados Judiciais, art. 13, § 1.

116. The most famous and emblematic case is that of Judge Baltasar Garzón, who was a junior minister. *See, e.g.*, Giles Tremlett, *Don Quixote—or a Superhero? Profile of Baltasar Garzón*, OBSERVER (U.K.) (Oct. 18, 2008), http://www.theguardian.com/world/2008/oct/19/spain-franco.

117. Law No. 5827, July 13, 1955, B.O. 12-07-55 (Arg.), *available at* http://www.gob.gba.gov.ar/legislacion/legislacion/l-5827.html; CÓDIGO ORGÁNICO DE TRIBUNALES [CÓD. ORG. TRIB.] [Judiciary Code] (Chile), *available at* http://www.leychile.cl/Navegar?idNorma=25563; Ley Orgánica del Poder Judicial de la Federación [LOPJF][Enabling Law for the Federal Judiciary], Diario Oficial de la Federación [DO] 26 de mayo de 1995 (Mex.), *available at* http://www.cem.itesm.mx/derecho/nlegislacion/federal/184/index.html; Lei Complementar No. 35, de 14 de Março de 1979, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.03.1979 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp35.htm.

Mexico, judges are only allowed to engage in nonjudicial functions if honorary and not remunerated.[118] Still, involvement in political or quasi-political activities is managed by the Federal Judicial Council (*Consejo de la Judicatura Federal*).[119] In particular, the role of the Electoral Court, where judges can challenge the results of federal elections of legislators and the president, has been controversial .[120]

An identical situation is found in Argentina. The role of the judicial council (*Consejo de la Magistratura*) and of the Supreme Court has been significant in expanding nonjudicial functions in an environment with strict statututory rules. Some judges have been famous for performing seemingly executive functions, such as Judge Norberto Oyarbide, who has served in prominent investigative roles.[121] At the same time, judges investigating political figures have been removed by the judicial bodies in a politicized environment.[122]

Brazil is no different. The recently created judicial council (*Conselho Nacional de Justiça*) has struggled with effectively limiting nonjudicial functions, corruption, and nepotism.[123] Although judges cannot participate in politics,[124] they have an important role. Judicial associations are very active and shape relevant areas of public policy; judges can be involved with associations but cannot be remunerated.[125]

Chile follows a similar pattern. Of particular note, judges can defend themselves in personal lawsuits or lawsuits against their wives, husbands, ascendants, descendants, siblings, or pupils.[126]

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118. Constitución Política de los Estados Unidos Mexicanos [C.P.], art. 101 ("The Ministers of the Supreme Court of Justice, the Circuit Magistrates, the District Judges, the respective secretaries, and the Councilors of the Federal Judicature, as well as the Magistrates of the Superior Chamber of the Electoral Tribunal, may not, in any case, accept or perform office [*empleo*] or responsibility [*encargo*] of the Federation, of the States, of the Federal District or of individuals [*particulares*], except for those non-remunerative offices [*cargos*] in scientific, educational, literary or charitable associations.").

119. *Id*.

120. C.P., art. 98 (Mex.) (describing role of judges in Electoral Tribunal).

121. *Oyarbide, molesto con la Policía por las versiones del hallazgo del explosivo*, LA RAZON (May 23, 2012), http://www.larazon.com.ar/actualidad/Oyarbide-Policia-versiones-hallazgo-explosivo_0_352800155.html (Judge Norberto Oyarbide investigated the alleged conspiracy to kill Colombian Former President Alvaro Uribe).

122. Paz Rodriguez Niell, *Apartan al juez Rafecas de la causa que involucra a Boudou*, LA NACIÓN (Apr. 27, 2012), http://www.lanacion.com.ar/1468623-apartan-al-juez-rafecas-de-la-causa-que-involucra-a-boudou.

123. Constituição Federal [C.F.] [Constitution] art. 99 (Braz.).

124. C.F., art. 95.

125. Lei Complementar No. 35, art. 36, de 14 de Março de 1979, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.03.1979 (Braz.).

126. CÓD. ORG. TRIB., arts. 316, 318 (Chile).

Latin American jurisdictions are similar to European civil law countries in the way they approach judicial involvement with nonjudicial functions. Strict statututory laws mix with a more flexible practice derived from the influence of local judicial councils or the Supreme Court. Corruption seems to be more of an issue in this context than in Europe.[127]

A special note should be made of the Bolivian case. In 2005, the President and Vice-President of Bolivia were forced to resign because of mass protests, and the Chief Justice became interim President. He presided over elections, leading to the historic election of President Evo Morales. Yet shortly afterwards, Congress attempted to impeach the new Chief Justice because of clashes with President Morales.[128] There is, it seems, a real risk of politicization that comes from nonjudicial functions of a certain type.

L. China

Nonjudicial functions in People's Republic of China (PRC) are regulated by statute, in particular the Judges Law of the PRC (中华人民共和国法官法).[129] Article 14 is quite clear: "The judges cannot serve concurrently as members of the Standing Committee of China's National People's Congress; or serve concurrently in the agencies, procuratorate organs, the enterprises and the institutions; or serve concurrently as lawyers."[130] Article 14 adds that "judges cannot act as lawyers, as agents *ad litem* or defense counsel in two years after their departure from the court."[131] So clearly PRC judges are quite limited in their ability to pursue nonjudicial functions. In fact, the PRC Supreme Court has published a notice prohibiting in-service judges from acting as arbitrators (关于现职法官不得担任仲裁员的通知). Published in 2004, the

127. EDUARDO BUSCAGLIA, CORRUPTION AND JUDICIAL REFORM IN LATIN AMERICA (1996).

128. Martin Arostegui, *Bolivian Chief Justice Faces Impeachment Trial*, WASH. TIMES (May 22, 2009), http://www.washingtontimes.com/news/2009/may/22/top-judge-faces-impeachment-trial-in-senate/?page=all.

129. (中华人民共和国法官法) [Judges Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective July 1, 1995), http://en.chinacourt.org/public/detail.php?id=2692 (China).

130. *Id.* art. 14.

131. *Id. See also* (中华人民共和国律师法) [Law on Lawyers] (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Jan. 1, 1997), art. 41 ("A lawyer who once served as a judge or prosecutor shall not act as an agent *ad litem* or defender within two years after leaving his post in the people's court or the people's procuratorate.").

notice rules that any in-service judge should quit from the position of arbitrator within one month.[132]

In the PRC, there are a few exceptions that reflect some of the possibilities we have discussed. The Code of Judicial Ethics of the PRC states the following rule:

> Rule 44: A judge may participate in academic research and other social activities which are helpful in promoting judicial construction and judicial reform. However, these activities should be in compliance with the law, construct no obstruction to judicial impartiality and the preservation of judicial authority and will not conflict with the judge's judicial function.[133]

Finally, the involvement of the Chinese judiciary in the administration of the courts has been regulated by the Judges Law of the PRC, article 6. This rule states that "Presidents, vice presidents, members of judicial committees, chief judges, associate chief judges of divisions shall, in addition to the judicial functions and duties, perform other functions and duties commensurate with their posts."[134]

It is apparent that nonjudicial functions in the PRC are quite limited by a third-party regulation. One possible explanation is that the Chinese judiciary does not have the political influence or prestige to relax these regulations. Supply and demand of nonjudicial functions seem weak in an environment where the judiciary faces other significant challenges, not least of which is corruption. As institutional reform takes place in the PRC and courts become more independent and less corrupt, we could see a shift in demand for nonjudicial functions that might challenge the current strict regulations. However, such a shift seems a long way off at the moment.

M. The Philippines

Non-judicial functions were also at the center of a major controversy regarding the judiciary in the Philippines. In 1984, Ferdinand Marcos created a Judiciary Development Fund (JDF), funded with court fees and

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132. *See* 最高人民法院:现职法官不得担任仲裁员 [*Supreme Court: Serving Judge Shall Not Act as Arbitrator*], CHINACOURT.ORG (July 7, 2004), http://www.chinacourt.org/article/detail/2004/07/id/125571.shtml (Chinese).

133. Code of Judicial Ethics for Judges of the People's Republic of China rule 44, *as translated in* James Spigelman, *Convergence and the Judicial Role: Recent Developments in China*, 55 REVUE INTERNATIONALE DE DROIT COMPARÉ 57, 70 (2003).

134. Judges Law of the People's Republic of China, art. 6.

bar exam fees, to supplement the budget of the judiciary.[135] The JDF was administered by the Supreme Court and was to contribute 80% of its distributions to employee salaries with the rest going to facilities.[136] A group of disgruntled court staff complained that their salaries were too low, and got a congressman interested in their case.[137] After the court refused to provide him with information, the congressman accused the chief justice of illegal use of public funds. The court reacted quite defensively.[138]

An independent investigation found very lax oversight over use of the JDF funds. The congressman then responded with an impeachment complaint that resulted in several months of hearings. Before the complaint could be transmitted to the Senate, the court stepped in, declaring the impeachment complaint unconstitutional, and enjoining the House and Senate from acting on it.[139] The court relied on a constitutional provision stating that no impeachment proceeding could be initiated twice within one year against the same official.[140] Another complaint against the chief justice had just been dismissed.

Administrative responsibilities of managing budgets and personnel are clearly nonjudicial in nature, yet proponents of judicial independence often argue that they must be placed with the courts themselves.[141] The Philippine example illustrates some of the dangers of this approach. By burdening courts with tasks in which they have no comparative advantage, there is a risk that courts will perform the job poorly, exposing them to criticism and controversy.

In the late 2000s, Chief Justice Reynato Puno of the Supreme Court of the Philippines began to be solicited by many to run for president in 2010.[142] In 2009, he met with government officials to discuss his leading a "transition council," a way to ease President Arroyo out of power. This proposed body would amend the constitution to fix various problems in the political system, heightened due to feared technical problems with the

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135. Presidential Decree Establishing a Judiciary Development Fund and for Other Purposes, Pres. Dec. No. 1949 (1984) (Phil.), *available at* http://www.chanrobles.com/presidentialdecreeno1949.htm#.UVOR8BzvuSo.

136. *Id*.

137. VITUG, *supra* note 2, at 61–73.

138. *Id.*

139. *Id*. at 80–81.

140. CONST. (1987) art. XI, sec. 3(5) (Phil.).

141. *See, e.g.*, Shimon Shetreet, *The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration*, *in* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 393 (Shimon Shetreet & Jules Deschenes eds., 1985).

142. VITUG, *supra* note 2, at 176.

elections.[143] When exposed, this led to significant controversy, pressures to resign, and accusations that the Chief Justice had badly overstepped the proper role of the judge.

CONCLUSION

If judges are doing their job well, there will be opportunities for them to become involved in functions outside the courtroom. We have articulated a positive theory of such judicial involvement in nonjudicial functions, emphasizing the interaction of demand (why judges want to perform such roles) and supply (why political and social actors want judges in nonjudicial functions). In this context, the interaction of supply and demand may create a potential market failure due to external costs and the possibility of demand-induced supply. As a consequence, some regulation is appropriate. Self-regulation seems ineffective given the likelihood of capture. Most legal systems seem to take an approach consistent with our theory, limiting judicial involvement in some way. But the range of regulatory approaches is fairly broad, suggesting that there is no universal optimum.

We do not, in this Article, wrestle with normative questions, in part because we do not start with an essentialist view of the judicial role. We recognize that such roles have evolved over time and are likely to continue to evolve. Role conceptions differ dramatically across countries as well. Our empirical survey has shown, though, that there has been a trend toward expansion of the ambit of judicial decision-making and roles in many different traditions.

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143. *Id*. at 186–87.

Readers with comments may address them to:

Professor Tom Ginsburg
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
tginsburg@uchicago.edu

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