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Hybrid Judicial Career Structures: Reputation versus Legal Tradition

Nuno Garoupa
ngaroup@gmu.edu

Tom Ginsburg

HYBRID JUDICIAL CAREER STRUCTURES:

REPUTATION VERSUS LEGAL TRADITION

Nuno Garoupa, and Tom Ginsburg[1]

ABSTRACT

Scholars have distinguished career from recognition judiciaries, largely arguing that they reflect different legal cultures and traditions. We start by noting that the career/recognition distinction does not correspond perfectly to the civil law/common law distinction, but rather that there are pockets of each institutional structure within regimes that are dominated by the other type. We discuss the causes and implications of this phenomenon, arguing that institutional structure is better explained through a theory of judicial reputation/legitimacy than through a theory of legal origin or tradition. We provide some preliminary empirical support for our account.

1. INTRODUCTION

Comparative lawyers have contrasted the "career" and "recognition" models of judicial organization.[2] The career judiciary, in which judges join the judiciary at a young age and remain there for their entire careers, refers to the system prevalent in most though not all civil law jurisdictions.[3] The recognition judiciary, in which judges are appointed later in life in recognition of other career achievements, is frequently associated with the USA and most common law jurisdictions (Posner 1996).

1 Garoupa is affiliated with UIUC. E-mail: ngaroupa@law.uiuc.edu. Ginsburg is affiliated with University of Chicago. E-mail: tginsburg@uchicago.edu. We thank César Alonso Borrego, Fernando Gómez Pomar, Mitu Gulati, Sarah Harding, Dan Klerman, David Law, Eric Posner, Mark Ramseyer, two anonymous referees and audiences at Chicago-Kent Law School, Universitat Pompeu Fabra Law School, CUNEF (Madrid), and the 2011 annual meeting of the American Law and Economics Association for helpful comments. Carolina Arlota, Arushi Garg and Taimoor Aziz provided excellent research assistance. The usual disclaimer applies.

2 See, among others, Georgakopoulos 2000.

3 Scandinavian jurisdictions are exceptional in this regard. For a short summary of the current selection practices in Scandinavian countries (including the ongoing reform in Sweden), see http://internationallawobserver.eu/2010/04/21/reform-of-the-judiciary-in-sweden-%E2%80%93-the-procedure-for-selection-and-appointment-of-judges/ (last accessed June 3, 2011).

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The career and recognition systems are usually seen as involving a cluster of institutional characteristics that reinforce each other. For example, in career judiciaries: (i) judges are initially appointed to junior positions either in trial courts or assisting senior judges; (ii) judges are promoted to senior positions at later stages, culminating in positions on the Supreme Court; (iii) tenure is not attached to a particular position but to the entire career; and (iii) transfers to courts of equal seniority are generally allowed.[4] Frequently, the appointment mechanisms used in civil law jurisdictions insulate career judiciaries from political considerations, sometimes through the use of powerful judicial councils to mediate between politics and judicial management (Garoupa & Ginsburg 2009a,b). Furthermore, many civil law jurisdictions have created and developed judicial training institutes to train young lawyers who opt for a career in the judiciary, reinforcing the image of judging as a distinct profession.

Recognition judiciaries, by contrast, tend to include the following institutional features: (a) Judges are selected after an initial career related to the legal professions; (b) Judges are not usually promoted; (c) Tenure is in many cases for life, and is attached to a specific court, and (d) transfers to courts of equal seniority rarely occur (Ramseyer & Nakazato 1999).[5] A recognition judiciary tends to rely on appointment mechanisms that involve the other branches of government, and therefore are usually more politicized in nature (including the use of direct election in some states of the USA) (Georgakopoulos 2000). A position in the judiciary does not demand any particular previous training or experience as a judge.[6]

The distinction between career judiciaries and recognition judiciaries is not unproblematic. In fact, the labeling may be misleading in some ways. In Britain, judges traditionally tended to be selected from among those who have served as barristers and later as Queen's Counsel (or King's Counsel). All current justices of the UK Supreme Court were recruited from the English and Scottish appellate courts (High Court of Justice, Court of Appeal and Court of Session). Some scholars have seen this as a form of career (Posner 1996).[7] In Israel, most appointments to the Supreme Court are individuals who have served previously as clerks. Although India's constitution provides that the composition of the

4 *Id.*

5 "Where an American judge might be appointed to the Northern District of Illinois, a Japanese judge is not appointed anywhere. Instead, he is simply a judge."

6 However, such experience could enhance the likelihood of obtaining nomination for a higher court.

7 See also Bingham (2009) detailing that only eleven Law Lords had no previous judicial experience. The appointment of Justice Sumption (QC but without previous judicial experience) in May 2011 was extremely controversial.

Supreme Court can include lawyers of high recognition, it is overwhelmingly dominated by the senior judges from the states' high courts (Neuborne 2003; Iyer 2007).[8] In the USA, all but one of the current Supreme Court justices have served previously in appellate courts, confirming a trend established long ago (Klerman 1998). These recognition judiciaries have some careerist elements. However, we should distinguish these forms of "career" in three substantial ways. First, career judiciaries are fundamentally dominated by a bureaucratic approach to the career, in which apolitical seniority considerations are central, while recognition judiciaries have an informal or unstructured "career" mingled with a selection mechanism that is more politicized in nature. Second, judges in career judiciaries have a judicial position as the formal first step in the career, while judges in recognition systems start in a non-judicial position. Finally, as noted before, transfers to courts of equal seniority are generally part of the career path in career judiciaries but not in recognition judiciaries.

At the same time, we should not neglect the rich diversity of arrangements within each category. If we look at the Supreme Courts of U.S. states, it is easy to observe different selection mechanisms, all within the broad category of recognition judiciaries. However, as easily observed from Table 1, the size of these courts is fairly stable across states and across selection mechanisms (in unreported analysis, we also calculated the average age of the current justices and we could not find significant variation within U.S. states).

The remarkably consistent size of these courts across the USA contrasts dramatically with the Supreme Courts of Brazilian states, where the numbers presented in Table 2 show considerable variance. Unlike the Supreme Courts of

8 Based on the Federal Court of India under the British, the Supreme Court of India was constituted in 1950. It had seven justices, six (including the Chief Justice) had served in the British court. The composition of the Supreme Court of India has been expanded five times by constitutional amendments. The current composition is 26 justices. The selection of justices has been a matter of political tension. As to the appointment of the Chief Justice, there was supposed to be a norm that the senior justice becomes Chief Justice, a norm imposed by the Court itself in 1951. Indira Gandhi violated the rule twice (1973 and 1976) to impose her candidate against senior justices (there were resignations at the Court as consequence). The seniority principle was reaffirmed in 1978 and since then has been followed. As to the selection of associate justices, the Indian Constitution is ambiguous in the effort to avoid both the British and the American models. Appointments should be achieved by consultations between the executive and the Chief Justice. Inevitably problems emerge when there is disagreement. The practice is for the executive to dominate. Three famous judicial cases have shaped the process (1982, 1994 and 1999) and minimize political influence by creating a powerful collegium of the five most senior justices (at the expense of the Chief Justice). This collegium has reinforced the trend to pick senior judges from the states' high courts. The system of collegium has currently been challenged before the Supreme Court of India (http://www.hindustantimes.com/StoryPage/Print/681311.aspx, last accessed June 3, 2011).

Table 1. American States' Supreme Courts

State	Court size	Mechanism of appointment
Alabama	9	Election
Alaska	5	Merit selection
Arizona	5	Merit selection
Arkansas	7	Election
California	7	Appointment
Colorado	7	Merit selection
Connecticut	7	Merit selection
Delaware	5	Merit selection
Florida	7	Merit selection
Georgia	7	Election
Hawaii	5	Merit selection
Idaho	5	Election
Illinois	7	Election
Indiana	5	Merit selection
Iowa	9	Merit selection
Kansas	7	Merit selection
Kentucky	7	Election
Louisiana	8	Election
Maine	7	Appointment
Maryland	7	Merit selection
Massachusetts	7	Appointment
Michigan	7	Election
Minnesota	7	Election
Mississippi	9	Election
Missouri	7	Merit selection
Montana	7	Election
Nebraska	7	Merit selection
Nevada	5	Election
New Hampshire	5	Appointment
New Jersey	7	Appointment
New Mexico	5	Merit selection
New York	7	Merit selection
North Carolina	7	Election
North Dakota	5	Election
Ohio	7	Election
Oklahoma (Civil)	9	Merit selection
Oklahoma (Criminal)	5	Merit selection
Oregon	7	Election
Pennsylvania	7	Election
Rhode Island	5	Appointment
South Carolina	5	Appointment
South Dakota	5	Merit selection
Tennessee	5	Election
Texas (Civil)	9	Election
Texas (Criminal)	9	Election
Utah	5	Merit selection
Vermont	5	Merit selection
Virginia	7	Appointment
Washington	9	Election
West Virginia	5	Election
Wisconsin	7	Election
Wyoming	5	Merit selection

Source: Websites of the American States' Supreme Courts.

Table 2. Brazilian States' Supreme Courts

State	Court size	Specialized section on constitutional review
Acre	9	No
Alagoas	15	No
Amapá	9	No
Amazonas	19	No
Bahia	35	No
Ceará	43	No
Distrito federal (Brasília)	35	Yes
Espírito Santo	23	No
Goiás	35	Yes
Maranhão	24	No
Mato Grosso	30	No
Mato Grosso do Sul	31	Yes
Minas Gerais	127	Yes
Pará	28	No
Paraíba	19	No
Paraná	110	Yes
Pernambuco	39	Yes
Piauí	17	No
Rio de Janeiro	179	Yes
Rio Grande do Norte	15	No
Rio Grande do Sul	45	Yes
Rondônia	19	No
Roraima	6	No
Santa Catarina	59	Yes
São Paulo	285	Yes
Sergipe	13	No
Tocantins	12	No

Source: Websites of the Brazilian States' Supreme Courts.

U.S. states, all Brazilian courts in Table 2 have the same selection mechanism (four-fifths are career judges while one-fifth are appointed through recognition mechanisms). Even though the Brazilian Constitution demands that these courts address constitutional review *en banc*, the larger courts have organized a (smaller and manageable) specialized section to address such questions, due to the large number of judges on the entire court. In short, there are considerable variations in relevant institutional variables within any given system.

Each judicial model raises different challenges in terms of incentives and performance. Furthermore, the precise design of the mechanisms for judicial appointment—assessment, selection and removal—provides for a specific relationship with the relevant external and internal audiences (Garoupa & Tom 2009c, 2010). By internal audiences, we mean those that operate within the judiciary itself, typically more senior judges charged with supervising inferior judges. By external audiences, we focus on other branches of government,

lawyers, law professors, litigants, and the public more generally. These incentives tend to be reinforced by other aspects of the judicial system, including the possibility of issuing separate opinions and dissents, sentencing and procedural discretion, the scope of appeals (for example, *de novo* review), the use of citations, the court's powers to select cases and control the docket, the management and budget of the court system, and the size of the courts. Not surprisingly, the career and recognition judiciaries emerge in very different institutional settings (*Id.*).

The distinction between career and recognition judiciaries is useful to identify general approaches to the balance between independence and accountability. It is also important to analyze particular incentives and institutional attributes.[9] In particular, identifying the relevant institutional design can help inform models to evaluate and discuss legal reform. However, in order to understand the proper functioning of any particular judiciary, we cannot rely exclusively on this particular classification because it is too general and probably too divorced from other important institutional details.

We believe that the key distinction between career and recognition judiciaries corresponds generally with our own approach to the study of the judiciary. Our framework is based on a team production model of judicial organization (Garoupa & Ginsburg 2009). Career systems emphasize collective reputation (in which internal audiences prevail over external audiences); recognition systems emphasize individual reputation (thus targeting more openly external audiences). Collective reputation emphasizes collegial aspects of the judicial profession. Individual reputation focuses on the particular salience of a given judge. The choice between collective and individual reputation depends in part on the primary social function of the judiciary, such as social control, dispute resolution or lawmaking.[10] We believe that collective reputation dominates when the legal system emphasizes social control: hierarchical systems reduce agency costs by allowing superior levels to supervise lower levels. On the other hand, when judges are delegated with the task of lawmaking, ex ante screening is a better device to ensure optimal law. In our view, these observations help in explaining why we observe a dominant structure within any particular legal systems.

At the same time, by distinguishing different functions of the judiciary, our own model helps to elucidate the particular balance between the career and recognition models exhibited in any given system. The judicial role in social control and lawmaking are present in all legal systems, although with different

9 See different approaches by Posner (1993, 2005, 2008).

10 This distinction comes from Shapiro (1981). See also Damaska (1986).

degrees of intensity. Not surprisingly, pockets of career (recognition) judiciary develop in legal systems dominated by recognition (career) judiciaries in areas that are better served by a different institutional arrangement. For example, in constitutional law, where lawmaking is presumably the dominant function of judges engaging with the grand principles of democratic governance in high-stakes issues, most common and civil law jurisdiction use recognition judiciaries. On the other hand, in many areas of administrative law, where social control of lower officials is the more relevant consideration, both common and civil law jurisdictions have shown a strong preference for career judiciaries. Administrative law involves the control and monitoring of technical decisions by experts, frequently involving relatively low stakes; constitutional law involves establishing the general principles regulating the role of government, and hence usually has higher stakes.

Our theory explains the relevant differences between career and recognition judiciaries from a novel perspective. It also helps to understand why legal systems favor a mix of the two, rather than a pure institutional design. From this starting point, we argue that all systems are institutionally hybrid, and there are good reasons to be so.

Legal scholars tend to argue about the merits of career and recognition judiciaries as pure types. For example, career judiciaries resemble a bureaucracy, and so raise issues of shirking and sabotage of the agency's mission that are familiar to organizational theorists (Posner 2005). Not surprisingly, we observe a formal reliance on codes and significant procedural limitations to constrain the judges, limit their ability to sabotage the law, and decrease the costs of monitoring their performance (Posner 2005; Arruñada & Andonova 2008a,b). As a result, a career judiciary is methodologically conservative and systematically unadventurous, and unwilling to acknowledge its role in lawmaking (Posner 2005). Strict rules predominate, especially at the level of ideology. Recognition judiciaries are different. They are dominated by lateral entry; and promotion is of little significance to the individual judge. Since ex ante quality is easier to observe, judges are less constrained and tend to apply more flexible standards as opposed to clear rules (*Id.*). There are two possible behavioral consequences for the recognition model. First, the judiciary is more politicized (but not necessarily more democratic since it might not follow the legislator). Second, recognition judiciaries will be more creative in establishing and developing precedents (presumably inducing higher rates of reversal) (*Id.*).[11]

11 Although it is difficult to compare rates of reversal across systems when the legal importance of precedent varies.

Our point is that precisely because each type of judiciary has different institutional implications, legal systems tend to use both. We do not observe career and recognition judiciaries in their pure form, but instead see the types interact in a given legal system within a particular contextual and historical experience. In short, we observe hybrid arrangements. Obviously the particular mix of career and recognition varies across countries. We recognize that, notwithstanding hybrids, one type of judiciary tends to dominate in any given legal system. This might in fact be an artifact of historical factors: particular institutional patterns may become established through contingent factors and remain relatively stable thereafter (Arruñada & Andonova 2008; Glaeser & Shleifer 2002).[12] However, by neglecting the presence and persistence of hybrid systems, the existing literature has failed to understand the coexistence of both ideal types and its implications. We offer an institutional account of the emergence of hybrids using the principal-agent model, while recognizing that the dominant structure in each system might still be explained as a result of historical contingency and limited convergence (Legrand 1996, 1997, 1999; Garoupa & Ogus 2006). Another way to express our idea is that legal systems develop a default institutional arrangement due to historical and contextual factors. However, the default arrangement can be modified, depending on institutional needs and responding to significant contextual changes, thus promoting the existence of pockets. For example, as we will elaborate in some detail later on, higher courts in civil law jurisdictions were traditionally made up of exclusively career judges following the classic French model. However, these courts have evolved to partially accommodate a recognition structure (usually a particular fixed quota of the new appointments to the court).

We should distinguish our account of hybrid systems from the standard comparative law literature. Comparativists describe Louisiana, Scotland, or South Africa as hybrid or mixed legal systems, focusing on the coexistence of code law and case law (or more mundanely, the application of both common and civil law in those particular jurisdictions) (Palmer 2007). We are less concerned with the formal sources of law than the institutional structures of judicial organization. Therefore, we argue that most, if not all, legal systems are institutional hybrids. In a sense, our understanding of hybrid legal systems is narrower since we are only looking at institutional structures, and not substantive or procedural law. However, as a consequence of our approach, the pool of hybrid legal systems is much broader than the one usually considered by

12 Legal economists have suggested possible rational explanations for the development of career judiciary.

comparativists, since it is difficult to find a pure type legal institutional arrangement that pervades an entire system.

The simple observation that legal systems frequently combine career and recognition judiciaries (although in different ways and degrees) indicates that pure solutions are unlikely to be optimal in institutional terms. Our theory explains positively and normatively why hybrids are the norm and seem to be more functional than pure types. In mathematical language, if jurisdictions maximize the net benefit from their institutional arrangements, a combination of career and recognition judiciaries is generally optimal whereas corner solutions are suboptimal.

The article is structured as follows. First, we motivate the discussion by providing several prominent examples of the coexistence of career and recognition judiciaries. In Section 3, we provide our theory of pockets. In Section 4, we discuss the implications of the analysis, and provide a preliminary empirical analysis in Section 5. Section 6 concludes the article.

2. EXAMPLES OF POCKETS

In this section, we consider several prominent examples of pockets: recognition judiciaries in the traditionally "careerist" civil law, and career judiciaries in common law jurisdictions usually considered to be "recognition" systems.

2.1. Recognition Systems in Civil Law

2.1.1. Constitutional judges

The design of most constitutional courts in the Western world has been influenced by the original ideas and legal theories of Hans Kelsen (1942) (for a general discussion see Sweet 2000). Kelsen emphasized a normative hierarchy of law. Under his legal theory, ordinary (career) judges are mandated to apply law as legislated or decided by the parliament (the legislative branch of government). Consequently there is subordination of the ordinary (career) judges to the legislator, and judicial review of legislation would be incompatible with the work of an ordinary court. Hence, only an extrajudicial organ can effectively restrain the legislature and act as the guarantor of the will of the constitutional legislator. The Kelsenian model proposes a centralized body outside of the structure of the conventional judiciary to exercise constitutional review, namely a constitutional court.[13]

From its origins in interwar Austria, this model has spread around the world and is now a conventional choice for constitutional designers. The application

13 Const. Austria, Arts. 137–148 (1920).

of the Kelsenian model in each country has conformed to local conditions, so there are a variety of institutional designs with different judicial competences, access, composition, and appointment mechanisms. Kelsenian-type courts for constitutional review exist now in most European countries of the civil law tradition, with the Netherlands and the Scandinavian countries being the most striking exceptions. Also most former communist Central and Eastern countries have now developed a similar institutional structure. Korea, Thailand, Taiwan, Colombia and Chile, among others, also follow this model.

The centralization of constitutional review in a body outside of the conventional career judiciary has been attractive during periods of democratization after a period of an authoritarian government in many countries in Europe, Asia and Latin America. The career judiciary is usually suspected of allegiance to the former regime, and hence, a new court is expected to be more responsive to the democratic ideals contemplated in the new constitution.[14]

The particular composition of constitutional courts differs across the world, but the appointment mechanisms tend to be political in nature. Unlike the traditional career judiciary, which is politically insulated and generally subject to some form of judicial council, constitutional judges are selected in a manner closer to the recognition model. They are usually chosen by a combination of the other branches of government (executive and legislative) and, in some cases, third parties (law societies, the judicial council, even the military in the Turkish case); Table 3 provides some examples in Europe. In practice, in most countries, a large fraction of constitutional judges is originally from the career judiciary; in some countries there is even a mandatory minimum quota for career judges in the constitutional court. However, the politicization of the appointment mechanism is inevitable, thus making it significantly different from the standard career judiciary.

In some instances, there is a *de facto* quota system. Each political party has a number of slots on the court, and new appointments are the product of party negotiations with little resemblance to judicial appointments in other courts.[15] The main consequence is the alignment of the preferences of the constitutional judges with those of the political parties, not surprising given that political interests tend to prevail in the selection of candidates (Garoupa 2010). In turn, the perception of a politicized constitutional court (mostly because of the selection and appointment mechanisms) generates conflicts with the career

14 On the prestige of constitutional courts, see Garoupa & Ginsburg (forthcoming).

15 This also applies to renewal of judicial terms. Generally speaking constitutional judges have a fixed term in office, although Belgium and Austria, for example, have life tenure subject to mandatory retirement.

Table 3. Selected European Constitutional Courts

	Germany	France	Italy	Spain	Portugal
Year of creation	(1951)	(1958)	(1955)	(1979)	(1982)
Composition	16	9	15	12	13
	8 by the Bundestag and 8 by the Bundesrat	3 each by President, Senate and National Assembly	5 each by President, Parliament and Judiciary	4 by Congress, 4 by Senate, 2 by Government and 2 by Judiciary	10 by Parliament and 3 by Constitutional Court
Term duration	12	9	9	9	9
Renewable term	No	No	No	Yes, once (if the previous term was less than 3 years)	Yes, once (before 1997), No (after 1997)
Minimum number of career judges	6	0	5	2	6

judiciary that populates the ordinary courts, which we have described elsewhere (Garoupa & Ginsburg forthcoming; Garlicki 2007). Significant fluctuations in the political composition of the constitutional court tend to exacerbate these conflicts (*Id.*).

2.1.2. Commercial courts in France

The French commercial courts (*Tribunaux de commerce*) are not populated by career judges (Kessler 2009). It is a system of courts that can be traced back to 1563 and survived the important reforms of the professionalization of the French court system. The enforcement of the 1807 *Code du commerce* is entrusted to these courts staffed only by businessmen that deal with litigation concerning commercial matters (including company law, bankruptcy, business contracts including unfair competition and patent litigation). These lay judges are elected for terms of 4 years by the members of the local chamber of commerce after practicing as businessmen for at least 5 years.[16] In the court, they sit in panels of at least three.[17] Commercial litigation is dominated by oral proceedings unlike the general arrangements in the civil law tradition. They are considered to be reasonably fast as compared to the regular courts. There are few appeals to the *Cour d'appeal* and even fewer reversals.[18]

16 Only the court recorder (*greffier*) has legal training. See Bell, Boyron & Whittaker (2000).

17 Simple cases are heard by the president and around 30 percent by the three judge panel, see Bell, Boyron & Whittaker (2000).

18 *Id.*

2.1.3. Recognition judiciaries in Higher Courts

Many civil law countries reserve some places at the higher courts for non-career judges, usually introduced as lawyers, prosecutors or law professors recognized by the appropriate committee as of high merit. For example, in Spain, under some conditions established by law, lawyers and law professors can become judges at the higher courts without previous experience serving as lower court judges (they are called the *cuarto turno* in reference to the fact that it used to be the case that the three previous hiring seasons had to be completed with career judges). The process of appointment is administrative in nature (involving an examination plus assessment of merits), but they are conceptually closer to recognition judiciaries. A similar example is found in Brazil, where the President can appoint up to one-fifth of the federal appellate judiciary from among lawyers and prosecutors. Such judges are called the *quinto constitucional* by virtue of the fact that they constitute one-fifth of the judiciary in the higher courts. The remaining seats are taken by career judges. The *quinto constitucional* candidates are suggested by the law society and the federal prosecution body respectively. The President picks up one name out of the three suggested (Oliveira & Garoupa 2011).

Another example can be found in Japan. While the lower courts are populated with career judges, the Supreme Court is different. The justices are appointed by the Prime Minister and include a mix of career judges from lower courts, law professors, prosecutors, bureaucrats, and lawyers. The appointment mechanism is potentially politicized and many believe that the Supreme Court appointees tend to be aligned with the preferences of the ruling party.[19] In France, the *Conseil d'État* is the supreme administrative court. There is a separate career for the judiciary in the regular courts and in the *Conseil d'État*. However, the appointment to the highest rank in the *Conseil d'État* is open to highly prestigious bureaucrats and lawyers (called the *tour éxterieur*; they are suppose to constitute a third of the new *conselleirs d'État* appointed every year).[20] In the Netherlands, entrance to the judiciary is open to lawyers, law professors and civil servants with a law degree. They are evaluated by a committee on the merits that usually proposes a training period before making

19 See Ramseyer & Nakazato 1999. But see Haley 1998, 2007; Law 2010. See also Haley 2002 ("By nearly all accounts, Japan's judges are collectively the most politically autonomous and individually the most honest in the world, as well as among the most trusted.").

20 A similar mechanism applies to the intermediate rank, *maîtres de requêtes*; one quarter of the selected candidates should be from the *tour éxterieur*.

a final recommendation to appointment. The outsiders account for 70 percent or more of all judges now.[21]

2.1.4. *Other specialized courts*

Many civil law countries have specialized courts for electoral matters, military courts, or courts for certain specific business matters (such as antitrust law, intellectual property, or bankruptcy). Usually these courts are not composed of career judges, but of individuals who are subject to a special selection and appointment process. Specialization in the particular relevant area of the law is generally the main criteria for these judiciaries. The special selection and appointment process is frequently more administrative and less political in nature, but nevertheless different from the standard career judiciary, and the judges usually have an ambiguous relationship with the ordinary judiciary. While these specialized judges are part of the judiciary, they are not always perceived as such by the ordinary (career) judiciary.

2.2. Career Systems in the Common Law

Despite the general view that the USA and UK have recognition judiciaries, this imagery is drawn from higher judiciaries in both countries: the federal judiciary in the USA and the group nominally identified as "judges" in the UK. But the fact is that most judges in both the systems operate in structures that look more like career judiciaries than recognition ones. This is especially apparent in administrative law, in which judges are utilized as monitors of government agencies.

2.2.1. *Administrative law judges in the USA*

Administrative law judges (ALJs) in the USA appear to be a hybrid institution. They are established by the Administrative Procedures Act to act and are considered to be "Article I judges" meaning that they are part of the Executive rather than the judicial branch (which is set up by Article III of the U.S. Constitution).[22] They sit within particular agencies, and in many cases their decisions are considered to be subject to being overturned by the head of the agency. These decisions can be appealed to the federal courts under the APA, and the ALJ decision is part of the record to be taken into account when reviewing agency action.[23] Nevertheless, they are guaranteed independence

21 See the words of Mr Nichoras Schipper (President of the Committee for Selection of Judges in 2003) http://www.nichibenren.or.jp/en/activities/meetings/20030202_2.html (last accessed June 3, 2011).

22 5 U.S.C. § 556.

23 *Universal Camera v. NLRB (194X).*

and insulated from the line staff of agencies (Harders 1999).[24] ALJs are appointed on the basis of a comprehensive written and oral test,[25] and so entry to the profession looks much more like the merit-based "career" approach than the political process used for the federal judiciary. They can be fired only for good cause, based on a decision by a Merit Systems Protections Board that sits outside the agency.

America states also have systems of administrative law judges, though there is a good deal of variation in the structure of the system. Several states have central panel systems for administrative law judges, so that all agencies share a pool of ALJs (Rich 1983; Thomas 1987). In other states, administrative law judges sit within the agency, paralleling the federal system. In either case, they serve in a hierarchical bureaucratic career model characterized by merit selection and long careers.

There are thousands of administrative law judges in the USA, in both the state and federal systems. They form the primary decision-makers for hundreds of thousands of decisions, and hence ought to be considered part of the overall judicial apparatus in the country. Clearly this pocket is a significant and important one, in terms of the number of cases they decide and the impact they have on ordinary people's lives.

2.2.2. *Tribunals in the UK*

While it is true that the senior judiciary in the UK is appointed nearly exclusively from the ranks of practicing barristers, there are other systems within the British judiciary that look more like career systems. The British system of tribunals is established to hear cases against the administration.[26] There has historically been great diversity within the tribunal system and many cases, especially involving specialized areas are decided by panels in which only the chairman is legally qualified. But recent years have seen efforts to standardize the tribunals system, ensuring that the judges who sit in it are qualified and are independent. They are now subject to appointment from the Judicial Appointments Commission, and some five hundred of them sit full time.

24 An exception is immigration law judges, who are "attorneys whom the Attorney General appoints as administrative judges" and are appointed to act "as the Attorney General's delegates in the cases that come before them".

25 See Etelson (1991) (critiquing the exam structure).

26 Not all British tribunals are established to hear cases against the administration. For example, Employment Tribunals hear cases brought by employees against employers, including for alleged discrimination.

2.2.3. *Military judiciaries*

Military judiciaries are another career system within the common law tradition. In the U.S. armed forces, Judge Advocates General (JAGs) join the military soon out of law school and will typically spend their whole career within the military service. They undergo special training soon after joining to qualify for the judge. In some branches, they form a separate corps, while in others they are line officers who can be pulled into active duty. JAGs serve as military prosecutors and defense counsel in trials, as well as providing legal advice to the command. Some JAGs will serve as military judges in courts-martial cases. Cases can be appealed to the Court of Criminal Appeals staffed by appellate military judges. The apex of the system is a Court of Appeals for the Armed Forces, which is similar to the federal judiciary in that its appointees are nominated by the President and approved by the Senate. The basic military judge is appointed by the Judge Advocate General in each service. The judges form a standing judiciary that is independent of the parties to the case, and military judges cannot be removed or unseated improperly.[27]

The British military justice system is partially civilianized in that the Judge Advocate General corps, whose "judge-advocates" preside over courts-martial, and the Courts-Martial Appeal Court, are both civilian arms of the government independent from the military (Sherman 1973). Nevertheless, the tradition of British military justice has differences from the U.S. model (Fidell 2000).

2.3. Supra-National Judicial Review

International bodies tend, by their nature, to be "recognition" structures in which judges are appointed by nation states from among senior lawyers, diplomats, and academics (Mackenzie et al. 2010). They serve limited terms (although in some courts such as the European Court of Justice may be subject to reappointment) and are not promoted (though lateral movement across international regimes is possible). In this sense, they resemble the U.S. Federal judiciary rather than the prototypical French judge, even though many of them are drawn from civilian systems.

Some of these bodies, including the European Court of Human Rights, the Inter-American Court of Human Rights, and the European Court of Justice, play an effective supervisory role over national judiciaries, so that cases can be appealed from the national to the supranational level. In Europe, at least, this means that they constitute a kind of pocket within the dominant career model; though to the extent that they supervise courts in the UK and Ireland, they reinforce the recognition structure that is already dominant. These

27 *United States v. Lewis*, 63 M.J. 405(2006).

supranational courts, by their nature, are heavily involved in quasi-constitutional review and serve a lawmaking function.

The relationship between these "recognition" supra-national courts and the national career judiciary in Europe has not always been straightforward. The nature of EU law is derived from the expansionary character of the European Court of Justice, whose active judicial lawmaking has resulted in profound transformations in the governance of the Union (Sweet 2004). It is unlikely that the role of the European Court of Justice would be the same if it had been designed as a conventional career judiciary (Alter 2009). At the same time, national courts have reacted to the ECJ in different ways. Initially, national courts were cautious about the interventions of these "recognition" supra-national courts. However, as the European courts established a good reputation and high prestige for lawmaking in relevant areas, national courts have acknowledged the importance of general principles of law over codification and shifted from mere social control to more active lawmaking. Such change has raised concerns about the role of a career judiciary in dealing with legal activism (Lasser 2004, 2009).

3. THEORY OF JUDICIAL POCKETS

We have demonstrated that the traditional distinction between the common law operating a recognition judiciary and civilian systems operating a careerist one is not fully accurate. What might explain the hybrids we observe? The traditional account of the choice between career and recognition judiciaries relies on legal culture and tradition. The common law system developed a prestigious judiciary because of its evolution from among the King's officers over many centuries. In turn, the U.S. federal institutional design was a strategic response to the perceived shortcomings of the British model. The civil law system fostered career judiciaries as a mechanism to comply with the predominant ideology of state positivism and to ensure legal certainty, particularly in an atmosphere of distrust of judges in the early 19th century. Prior to that time, France had a form of recognition judiciary, but after the codification of the civil law, judges were viewed as being subservient to the will of the legislator. The choice of career or recognition judiciaries was therefore historically determined by different local concerns and ideologies, and, according to many, these initial choices persisted so as to have long-run effects on legal institutions.

However, these historical and cultural explanations leave little space for understanding the current trends within both types of judiciary, unless pure path dependence persists. They also fail to grasp the hybridization of legal

systems in terms of institutional settings that seems to be a feature of many real-world systems.

Another set of accounts focuses on the development of institutional structures as a solution to commitment problems on the part of rulers. According to this literature, the historical development of constitutional structures, including an independent judiciary, arose out of a need for monarchs to tie their hands and make promises credible (North & Weingast 1989). This literature has focused on contingent factors that led to divergent historical experiences, as well as the consequences of institutional choices. We view the precommitment framework as complementary to the agency framework that we develop below, but do not take a stance on which particular form of judicial organization that we consider is superior in terms of commitment.

We provide an alternative account of alternative institutional structures. Our departing point is the principal-agent model of the judiciary, which has been applied with some success in particular national contexts in recent years.[28] In the model, each society has a sovereign, modeled as a unitary actor, that is, the principal. The principal might be the people in a democracy; the government; or an individual in a monarchy. The principal hires judges as agents to accomplish a certain set of tasks. We assume that these tasks include, in every legal system, some amount of judicial lawmaking, as well as a degree of routine social control and dispute resolution functions (Shapiro 1981; Damaska 1986). The precise balance between these three functions is fixed for our purposes. The task for the principal can be seen as hiring, within a budget constraint, a set of agents involving a mix of high skills (making new law) and lower level skills (applying pre-existing rules to factual situations). The high-skill agents have more human capital and hence are more expensive, though they may also find it easier to shirk (since they are better at deceiving the principal since they have an informational advantage). Low-skill agents may be more malleable. Due to these differences in quality of potential agents, there are tradeoffs between hiring large numbers of low-skill agents and a smaller number of high-skill agents.

Judges are like any other agent in that there are agency costs involved in hiring them. Judges may wish to pursue their own vision of justice, or may exert insufficient effort. Loosely speaking, there are two fundamental sources of agency costs in this context. One is that the preferences of the judiciary may be isolated from those of society. In other words, the judiciary attracts the wrong kind of individuals from the perspective of the principal. This is a standard adverse selection issue. The other potential problem is that the judiciary is

28 See, among others, Landes & Posner 1975; Tollison & Crain 1975; Crain & Tollison 1979; McNollgast 1999.

not sufficiently incentivized to perform well and therefore prefers to expropriate from the principal some of the benefits of its performance. Shirking is the classical example, but this category could also include judicial development of doctrines that benefit the judiciary directly rather than society, such as procedural rules that empower judges or force the society to allocate more resources to the judiciary. The most extreme example of judicial expropriation is corruption. These kinds of moves can be seen as raising a moral hazard problem.

Adverse selection and moral hazard generate significant agency costs in every legal system. However, the balance between them varies, and this may lead to different institutional solutions. The institutional designer has a variety of mechanisms to control agency costs. These are familiar. One can "screen" by requiring that agents engage in costly signaling before hiring, through investment in activities that indicate fitness for the job;[29] one can shape the composition of the bench in terms of which agents serve on it; one can encourage or constrain agents to be loyal to the principal by virtue of institutional devices such as requiring the following of legal precedent, and controlling of dockets and jurisdiction; one can hire superior agents to supervise the lower level agents in a hierarchical structure; and one can set up external monitors to watch what judges are doing. The first three solutions deal with the adverse selection problem, while the latter two focus on the moral hazard problem.

3.1. Adverse Selection

Addressing adverse selection frequently requires more screening on the principal's side and more signaling on the agent's side. The creation and disclosure of information concerning the preferences of potential judges is necessary to minimize the misalignment between the goals of the principal and the goals of the agent. The recognition judiciary seems to be a better option to address these issues. Reputation and prestige with external audiences provide more disclosure of information, and previous experience in a legal profession can be used as a proxy to identify judicial preferences. The more intense politicization of judicial appointments associated with the recognition judiciary merely reflects the importance of scrutinizing preferences and avoiding a bench that does not mirror society. By addressing more strongly the adverse selection problem, a system with a recognition judiciary can more easily rely on the judges to engage in the high-skill activity of lawmaking since they tend to reproduce more accurately the options favored by society. On the other hand, the costliness of the

29 See Teles 2008 (describing how early membership in the federalist society serves as a costly signal among conservative jurists).

screening process raises the costs of hiring, and so we would expect fewer judges to be hired.

It is also possible that, once hired, judges will be more susceptible to moral hazard. This might be particularly true if one thinks of the principal as a political party that initially supports the judiciary but loses out of power. However, if the principal is society, alternation in power may enhance the alignment of preferences between principal and agent (Ramseyer 1994). Political and procedural checks and balances have to be used to avoid excessive agency costs due to moral hazard. Developments in many common law jurisdictions seem to be largely responding to these issues (for example, attempts to curb excessive judicialization of public policy, the growing importance of statute law, and the use of sentencing and procedural guidelines to minimize judicial discretion).

There are institutional factors that are relevant to understand the impact of adverse selection. Binding precedents, docket control, and judicially created doctrines on justiciability (including the political questions doctrine), are associated with recognition judiciaries but hardly observable in legal environments with career judiciaries. If the screening mechanism is effective and the misalignment of preferences between agent and principal is minimized, the legal system can develop institutional practices that make lawmaking by courts more effective. Not surprisingly, courts with recognition judiciaries tend to issue binding or absolute precedents, exert some form of docket control (not necessarily as generous as the *writ of certiorari*), and address justiciability questions and conflicts of jurisdiction. If the screening mechanism does not provide for a judiciary with aligned preferences, we tend to observe institutional features that heavily constrain judicial lawmaking. Opinions are explanatory or clarifying of legal rules but not precedential, there is little to no docket control, and justiciability questions and jurisdictional conflicts cannot be addressed by the court. This description applies to courts dominated by career judiciaries. In fact, in civil law countries, precedent *erga omnes*, docket control (by some form of procedural rules of access), and jurisdiction over justiciability questions and jurisdictional conflicts are common features of the constitutional court (recognition judiciary) and not of the Supreme Court (career judiciary), consistent with our theory.

3.2. Moral Hazard

Directly tackling moral hazard usually requires control of agents through monitoring and ongoing evaluation based on output. In the context of separation of powers, the principal cannot do this directly, and so a career judiciary might emerge as the appropriate mechanism to reduce moral hazard. Hierarchical

control, systematic monitoring by a specialized agency composed of judges, periodic rotation to avoid too much local control of expertise and knowledge are consistent with the idea of reducing moral hazard. The shortcoming with this solution is that the principal has little *direct* control over judicial selection, thus enhancing a potential adverse selection problem. Codification and strict limitations on case law are useful to effectively constrain the judiciary and force conformity with the preferences of the principal.[30] Codes that enhance clarity and minimize interstitial lawmaking emerge as a cost-effective technology for reducing preference asymmetry (Halperin 2006).[31] While codification is the common law world is regarded as a mere instrument of organizing legislation in a more systematic and coherent way than dispersed statute law, even this may be effective in restraining the judiciary because it imposes internal consistency and reduces significantly the need for judicial interpretation and creativity. Specialized training encourages the so-called *esprit de corps* (we could translate as strong professional norms) that induce adherence to legalism and its emphasis on the illegitimacy of judicial lawmaking, thus minimizing agency slack.[32]

We have explained how the choice between career and recognition judiciaries can be understood in the context of identifying and reducing agency costs in the form of adverse selection and moral hazard. The career model emphasizes hierarchical supervision to deal with moral hazard and internalized professional norms (*esprit de corps*) to deal with adverse selection. The recognition model emphasizes ex ante screening to deal with adverse selection and external monitoring (through transparent opinions, and the existence of monitors of the courts) to deal with moral hazard.

Corruption can be seen as evidence of a severe moral hazard problem. According to our model, if a particular jurisdiction has a significant concern about judicial corruption, it should favor a career judiciary because the mechanisms of monitoring are more appropriate. Some countries, such as India, seem to have shifted away from a traditional recognition judiciary into a more career judiciary because appointments by elected politicians are seen as

30 Merryman & Perez-Perdomo (2007). For codification as a form of limiting the judiciary in a systematic and significant way (addressing preferences and cognitive biases), see Arruñada & Andonova 2008.

31 Legislative precision and transparency in order to effectively restrain the judiciary were one of the goals of the *Code Napoleón*.

32 The illegitimacy of judicial lawmaking is codified by Article 5 *Code Napoleón (The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them)*. On the importance of *esprit de corps*, see Steiner (2010).

inducing or supporting corruption in the bench. Although this would raise natural questions about democratic legitimacy and the role of the principal, in the context of our model, the argument would be that the traditional institutional design fostered, rather than reduced, adverse selection (from the viewpoint of the corrupt preferences of the politicians).

It is likely that the balance of these agency costs change over time with political, economic, and cultural factors. However, it is also the case that within any given legal system, it is likely that some areas of law raise more adverse selection concerns and other areas of the law raise more moral hazard concerns. In particular, the high skill areas of law, where judicial lawmaking is needed, rely on selecting agents to exercise discretion responsibly, and hence the adverse selection mechanisms are predominant. Lower-skilled areas, in which judges are simply applying pre-existing rules, require less expertise, but raise moral hazard problems of shirking.

For example, consider constitutional law or electoral law. It is likely that the principal is more concerned about the preferences of the judiciary being aligned rather than shirking or expropriation. Lawmaking in these two areas is of capital political importance. Therefore, recognition judiciaries should tend to prevail in constitutional adjudication or electoral disputes. At the same time, higher courts are more likely to address socially and economically relevant principles of law than lower courts that deal more systematically with facts. Adverse selection concerns are likely to predominate in higher courts whereas moral hazard is the greater concern in lower courts. This could explain why civil law jurisdictions develop some pockets of recognition judiciaries in higher courts.

The opposite is true in areas such as administrative law or military law, in which the job of the judiciary is essentially to serve as a monitor of lower level government agents.[33] These tasks are more routine, and hence less likely to involve high-skill recognition judiciaries. In this context, social control is a major goal, and not easily be subverted by the judiciary. Not surprisingly, career judiciaries tend to predominate in these areas of the law.[34]

Our quantitative exploration in a later section seems to largely confirm these observations. We find a strong correlation between the use of recognition

33 It should be clear that we refer primarily to administrative adjudication and not to administrative law in the quasi-constitutional sense as suggested by Ginsburg (2011). We also exclude here disputes between private parties, which can be addressed by administrative agencies in the USA but are not "administrative law" in the civil law sense.

34 The classification of lawmaking and social control also applies to more technical areas of the law such as intellectual property or anti-trust law. Notwithstanding the general approach, some areas of the law could be more about lawmaking in one jurisdiction and more about social control in a different jurisdiction.

judiciaries and constitutional adjudication. At the same time, we find little to no correlation between the use of recognition judiciaries and administrative adjudication. Further confirming this evidence, there is negative correlation between constitutional adjudication and administrative adjudication (a court invested with powers to exert constitutional review is not likely to be invested with identical powers to exercise administrative review).

Of course, many areas of the law, if not all, combine lawmaking and social control. We have provided two extreme examples, constitutional law and administrative adjudication. What about areas of private law such as contracts, torts or property, or criminal law? Since they involve both judicial roles, the principal has to supplement the selection mechanism with an institutional design that minimizes agency costs. Recognition judiciaries address adverse selection problems; hence we should expect moral hazard to be the dominant concern when it comes to private law and criminal law. Not surprisingly, we can observe the expansion of statutory law and judicial guidelines as a method to effectively monitor the judiciary. Career judiciaries address moral hazard problems; therefore adverse selection could be a significant concern in private law and criminal law. As described before, we have observed an expansion in the use of lawyers, prosecutors or law professors recognized by the appropriate committee as of high merit in traditional career judiciaries (mainly in the higher courts) and the development of specialized courts.

Institutional logic seems a better general explanation than mere cultural and historical path dependency, which are highly localized accounts that are not always falsifiable. First, the balance of agency costs derived from adverse selection and moral hazard varies and therefore explains the diversity of institutional arrangements when it comes to selection and appointment of judges. Second, unlike standard accounts, institutional logic provides a rational explanation for the existence and persistence of pockets in certain areas of the law. Furthermore, it also suggests that judicial reforms can move in one or the other direction, depending on the particular type of agency problem to be corrected. Adverse selection problems are likely to be addressed with recognition judiciaries (reconfiguring the judiciary to reflect social preferences) whereas moral hazard shortcomings induce a more structured career judiciary (developing judicial councils or establishing stricter mechanisms of promotion). The diversity of judicial reforms in the last couple of decades attests to a variety of local conditions that reflect one or the other type of agency costs.

To be sure, we recognize that agency problems may not differ that systematically across contexts. It may be that some of the continued divergence among systems is indeed attributable to path dependencies from initial conditions.

Our argument, though, is that the partial convergence on hybrid models call into question "purist" descriptions now dominant in the literature.[35]

4. IMPLICATIONS

There is an institutional logic to the preference for a combination of career and recognition judiciaries in the form of a dominant institutional design with pockets of the other available alternatives. The advantage of combining recognition and career judiciaries is clear. It addresses agency costs by picking the appropriate institution when adverse selection and moral hazard are the main concerns. It tends to a more structured hierarchy with more rigid codification when moral hazard needs to be minimized, using pockets of recognition judiciary in areas of the law that raise concerns about judicial preferences. It favors a more politicized selection mechanism and a more diffused organization when adverse selection emerges as the main source of apprehension, introducing pockets of career judiciary where shirking or expropriation is socially more costly.

The hybrid system combines the benefits of both institutional solutions. It implicates both internal (judicial) and external (mainly political) audiences. Hence a more appropriate balance of incentives is provided, rather than focusing on a particular one. Internal audiences enhance collective reputation. External audiences provide for opportunities to engage in individual reputation building. The combination of both presumably reduces potential conflicts between collective and individual reputation building as we observe in pure types. Career judiciaries tend to sacrifice individual reputation. Recognition judiciaries put less weight on collective reputation. The existence of pockets counter-balances the standard trends. Simultaneously, the hybrid model permits different social and professional backgrounds and diverse degrees of judicial training to coexist in the judiciary, therefore responding in a more specific way to particular needs.

As a consequence, a hybrid system is also more accountable than each of the pure solutions. As we have seen, it combines the accountability standards and practices of both systems. Obviously they are combined in different degrees depending on the relevance and importance of the existing pockets, but still

35 By no means we are the first to criticize or question the "purist" descriptions. However, our reasoning is different. Most of the previous critiques focus on the inability of the "purist" description to explain a particular jurisdiction; in other words, the argument is that generalization does not inform the discussion of a particular jurisdiction. We take the opposite approach. We suggest that generalization provides fundamental insights to understand the observed configuration in a particular jurisdiction. We simply believe that the generalized "purist" description fails to do so.

they promote a more overreaching design of institutional accountability. At the same time, the coexistence of both models permits comparisons. From this point of view, even conflicts such as those that have emerged between constitutional (recognition) judges and Supreme Court (career) judges in many jurisdictions, are welcome because they are informative and reduce the costs of enforcing accountability. Each type of judiciary monitors the other one, thus further reducing agency costs and exposing the shortcoming of each pure solution. In this light, conflicts of jurisdiction or skirmishes over procedural rules are productive and help the principal detecting adverse selection and moral hazard.

Clearly a hybrid system is not all about advantages. Otherwise legal systems would expand their pockets of institutional design infinitely and eventually all converge to a similar institutional arrangement. There are significant costs with allowing and promoting pockets that need to be accounted for when thinking about these institutions. For example, internal rivalries and conflicts of jurisdiction provide information but also waste resources. They can hurt the normal functioning of the courts. A conflict-ridden hybrid system could be highly dysfunctional, therefore undermining appropriate lawmaking and hurting social control.

More realistically, consistency and institutional compatibilities could be a serious concern. Take codification. Enacting codes is more important when we have career judges and less so when we have recognition judges. Once both coexist, it might be difficult to manage the appropriate degree of codification, which should be high in certain areas of the law and low in others. Another example is procedural independence. As we explained before, it should be the case that we need more independence for recognition judges and less for career judges. When both coexist, either different procedural rules are developed, thus creating the usual problems known in the specialized courts literature[36] or they are uniform across courts, hence reducing significantly the benefits of having pockets.

Our account has a number of empirical implications for comparative law, which are consistent with general observation. First, pure recognition judiciaries will be smaller than pure career judiciaries, because the cost of each judge is higher.[37] This seems consistent with general findings in comparative law. Second, we will never see a pure recognition judiciary do primary administrative or criminal adjudication or mere law-applying tasks; we will never see a

36 See discussion by Dari-Mattiacci, Garoupa, & Gómez (2010).

37 In the context of Europe, see the data provided by the CEPEJ. For a discussion, see Cross & Donelson (2010).

pure career judiciary doing policymaking. Administrative courts are unlikely to be staffed through recognition mechanisms, in other words. And constitutional adjudication is almost always left only to the highest courts, formed through a recognition model.

It is also the case that, if our theory is correct, we would never observe a hybrid with recognition for low-level courts and career for higher level. Note that one might, in theory believe this inversion of the current practice would be a good idea, because career judges are more insulated from politics. But this type of hybrid does not deal with agency costs and hence has not been tried.

5. EMPIRICAL ANALYSIS

We have constructed an original dataset to provide for some preliminary empirical testing of our theory. The dataset includes 133 higher courts from 73 different countries; the full list of courts included in the sample is available at the Appendix Table A1 (the sample includes 51 civil law countries and 22 common law countries).[38] Generally speaking, for common law jurisdictions, we include the highest court of the jurisdiction while, for the civil law jurisdictions, we include the various high courts, since they tend to have specialized jurisdictions and multiple high courts. For example, France has three highest courts: the *Conseil d'État* in administrative law, the *Conseil Constitutionnel* in constitutional cases, and the *Cour de Cassation* for ordinary appeals.

For each of these 133 higher courts, we collect the following information:

(i) whether or not they have competence over constitutional review, indicated by a dummy variable (70 courts have competence over constitutional review while 63 courts do not);
(ii) whether or not they have competence over judicial review of administrative acts, indicated by a dummy variable (73 courts have competence over judicial review of administrative acts while 60 courts do not);
(iii) whether the appointment mechanism to the court is mainly based on recognition or career, as operationalized by whether the appointments are professionalized or political (111 courts are mainly staffed with a recognition judiciary and 22 courts are mainly composed of career judges);[39] and

38 In our sample, Israel, Malta, and South Africa are included as common law jurisdictions while the Philippines and Jordan are included as civil law jurisdictions. The empirical results are robust to these classifications.

39 Further confirming that the vast majority of higher courts around the world are not packed by career judiciaries as we have discussed before.

Table 4. Descriptive statistics

Variable	Observations	Mean	Standard deviation	Minimum	Maximum
Size	118	26.75	33.56	3	250
Recognition	133	0.83	0.37	0	1
Constitutional powers	133	0.53	0.50	0	1
Administrative powers	133	0.55	0.50	0	1
Common law	133	0.19	0.39	0	1
Federalism	133	0.26	0.44	0	1
Population	133	42.74	111.46	0.033	1188.69
GDP pc	133	25.87	30.61	0.322	186.175
WB rule of law	133	66.38	25.84	0.9	100
WB control of corruption	132	64.72	25.69	1.9	100
Mauro bureaucratic efficiency	73	7.38	1.74	4.33	10
Mauro ELF	83	27.11	27.66	0	90
DB contract	127	60.02	47.97	1	182
DB overall	127	58.54	41.31	1	172

(iv) the size of the court: when the number of justices is specified by the constitution, we use that figure; for other courts, we have counted the current number of active judges (while recognizing that actual size may vary slightly at any particular point in time).

We also include as control variables such as the legal family (common law or civil law), the rule of law and control of corruption indicators of the World Bank for 2009,[40] federalism,[41] bureaucratic efficiency and ethnolinguistic fractionalization scores (Mauro 1995), GDP per capita for 2010,[42] population estimates for 2009[43] and the Doing Business 2011 rankings for contractual enforcement (quality of courts) and overall ease of doing business.[44] Due to missing data for some of these courts, we only have information about all the variables for a smaller sample. The descriptive statistics are summarized in Table 4.

Table 5 summarizes the basic correlations. All correlations are generally consistent with our model. Constitutional review is positively correlated with recognition mechanisms while administrative review is not (administrative review

40 http://info.worldbank.org/governance/wgi/index.asp

41 http://www.forumfed.org/en/federalism/by_country/index.php

42 GDP per capita in thousands of US dollars. We have used the IMF dataset except for Liechtenstein and Monaco (World Bank, 2009).

43 Population estimation for 2009 in millions. http://siteresources.worldbank.org/DATASTATISTICS/Resources/POP.pdf

44 http://www.doingbusiness.com

Table 5. Correlation matrix

	Size	CON	ADM	Recognition	Common law	Federal	POP	GDP pc	WB rule of law	WB control corruption	Bureaucratic efficiency	ELF	DB contracts	DB overall
Size	1													
CON	−0.49	1												
ADM	−0.04	0.00	1											
Recognition	−0.73	0.54	0.11	1										
Common law	−0.29	0.28	0.41	0.28	1									
Federal	−0.01	0.02	−0.01	−0.02	0.15	1								
POP	0.03	0.12	0.10	0.01	0.22	0.28	1							
GDP pc	−0.04	−0.08	−0.08	−0.04	−0.22	−0.05	−0.23	1						
WB rule of law	0.03	−0.19	−0.14	−0.15	−0.18	−0.01	−0.17	0.73	1					
WB control corruption	0.02	−0.21	−0.16	−0.14	−0.23	0.00	−0.21	0.72	0.98	1				
Bureaucratic efficiency	−0.17	−0.01	0.08	0.07	0.13	0.06	−0.23	0.78	0.74	0.77	1			
ELF	−0.18	0.29	0.27	0.28	0.60	0.32	0.29	−0.05	−0.41	−0.44	−0.12	1		
DB contracts	−0.03	0.13	0.07	0.14	0.20	−0.13	0.33	−0.61	−0.73	−0.74	−0.60	0.31	1	
DB overall	0.09	0.10	0.07	0.05	0.02	0.03	0.30	−0.48	−0.75	−0.80	−0.64	0.25	0.61	1

seems to be correlated with common law which is not surprising given they generally have no specialized jurisdictions at the apex level). Size is heavily reduced when we have recognition judiciaries and when courts exercise constitutional review. Although there is a positive correlation between recognition judiciaries and common law legal origin, such relationship is much less significant than with constitutional review as our theory suggests. This correlation alone suggests a modification of the legal origin story as the explanation for judicial structure.

To fully understand the relationships, however, a multivariate model is necessary. Our primary dependent variable of interest is whether the appointment to the court utilizes a predominately career or recognition model. The independent variables include the powers of the court in administrative and in constitutional law, and the control variables (we only include one of the World Bank's governance indicators since they are heavily correlated as we can see from Table 5). In terms of institutional design, the appointment mechanism and the scope of constitutional law (in particular, the choice of which court performs constitutional review) are likely to be decided simultaneously. As a consequence, there might be an endogeneity problem with the powers of the court in constitutional law.[45] There may be a missing variable that explains both the choice of appointment mechanisms and whether to give the court constitutional jurisdiction.

We start by estimating the probit regression with clustering by country (since some countries have multiple high courts). Due to the potential endogeneity problem with regard to constitutional jurisdiction, we estimate a bivariate probit regression for both appointment and constitutional powers with clustering by country.[46] Table 6 presents the regression analysis (the two simple probits are reported as changes in probability). It shows the expected signs of the coefficients according to our theory for constitutional jurisdiction. Notice that there is no statistically significant effect for administrative jurisdiction on recognition mechanisms (while it has a negative impact on constitutional jurisdiction). This non-result may be a product of the fact that we are looking at apex courts; lower level administrative adjudication is careerist everywhere, but some systems with a unified apex court may be likely to assign administrative judicial review powers to the top court constituted by recognition mechanisms.

45 Notice that the same observation does not apply to administrative review since the choice of court jurisdiction in this matter is usually not a matter of constitutional law. In most civil law jurisdictions it actually predates the current constitution by many decades. For example, the French *Conseil d'État* can be traced to the Napoleonic revolution, while the current constitution dates from 1958.

46 We use STATA 11.

Table 6. Probit model of recognition appointment mechanisms

	Probit recognition [change in probability]	Probit constitutional [change in probability]	Bivariate probit recognition	Bivariate probit constitutional
Constitutional powers	0.34***			
	(0.09)			
Recognition		0.62***		
		(0.06)		
Administrative powers	0.07	−0.38***	−0.12	−0.86***
	(0.05)	(0.08)	(0.24)	(0.22)
GDP pc	0.001	−0.003	0.01	0.01
	(0.002)	(0.004)	(0.008)	(0.008)
Population	−0.0002	0.002	−0.0001	0.003*
	(0.0001)	(0.001)	(0.0009)	(0.002)
WB rule of law	−0.003*	−0.003	−0.02***	−0.01*
	(0.002)	(0.004)	(0.008)	(0.009)
Federalism	0.04	−0.03	0.19	−0.06
	(0.06)	(0.12)	(0.44)	(0.29)
DB contracts	−0.00002	0.002	0.002	0.005
	(0.0007)	(0.002)	(0.04)	(0.004)
DB overall	−0.0003	−0.002	−0.005	−0.007
	(0.0009)	(0.002)	(0.005)	(0.005)
Rho			0.87***	0.87***
			(0.08)	(0.08)
Constant			2.49***	1.27*
			(0.75)	(0.71)
Observations	127	127	127	127
Clusters	70	70	70	70
Pseudo R^2	0.3032	0.2688		
Prob > χ^2	0.0068	0.0000	0.0002	0.0002

Standard errors in parentheses.
***$p < 0.01$, **$p < 0.05$, *$p < 0.1$.

We also observe a negative effect for the World Bank's rule of law scores on recognition mechanisms and constitutional powers, which could be driven by some of the jurisdictions with recognition judiciaries that perform quite badly, such as India, Kenya, Mexico, Uganda, Venezuela, Zambia, and Zimbabwe. Many of these poorly performing judiciaries are plagued with corruption, realizing the moral hazard risk associated with the recognition model.[47]

47 We also performed the analysis with the two other control variables, bureaucratic efficiency and ethnolinguistic fractionalization scores. However, these regressions are only possible with a much reduced dataset (they exclude all the former socialist countries in Europe). The econometric results presented on Table 6 are largely robust.

Table 7. Models of court size

	OLS	3SLS
Recognition	−53.63***	−73.12***
	(12.14)	(6.87)
Constitutional powers	−12.29***	−16.24***
	(3.74)	(4.21)
Administrative powers	0.92	2.98**
	(5.49)	(1.21)
Common law	−7.87**	−5.81***
	(3.38)	(1.22)
Federalism	1.71	
	(4.66)	
GDP pc	−0.05	−0.1***
	(0.13)	(0.01)
Population	0.01(0.01)	
WB rule of law	0.15	
	(0.13)	
DB contracts	0.04	0.0001
	(0.07)	(0.005)
DB overall	0.11	0.04***
	(0.06)	(0.008)
Constant	62.3***	98.31***
	(21.2)	(3.83)
Observations	112	112
Clusters	68	68
Pseudo R^2	0.535	0.469

Robust standard errors in parentheses.
***$p < 0.01$, **$p < 0.05$, *$p < 0.1$.

The second dependent variable we analyze is the size of the court to test our conjecture that recognition judiciaries are smaller. The independent variable is whether the appointment to the court is career or recognition, and we include the control variables as in the previous analysis. We estimate the regression with ordinary least squares with clustering by country (for the same reason as before).[48] We argue that the endogeneity problem in this context is less severe since, for most countries, the court size is either independent of constitutional design (for all those courts without constitutional powers) or set after the initial constitutional design, in many cases, by later constitutional amendment (for example, India). However, in order to assure robustness, we also present the estimations using a 3SLS (with recognition mechanisms and constitutional powers being the other two dependent variables and the remaining

48 In unreported robustness checks we also run a Poisson model, which is appropriate given that we are analyzing count data, and a negative binomial model with both delivering similar results.

control variables performing as instruments).[49] Table 7 presents the results, which indicate a strong negative relationship between recognition systems of appointment and court size, even controlling for common law tradition. Courts with constitutional jurisdiction tend to be significantly smaller than those exercising administrative jurisdiction. The evidence suggests that judicial structure is explained by more than legal tradition, as argued by our theory, and that institutional factors are important in understanding the design of courts.

6. CONCLUSIONS

Our article examines the distinction between the career and recognition judiciaries from a new perspective. We suggest that the design of judicial institutions responds to particular agency problems, namely adverse selection (the misalignment of preferences between the judiciary and society) and moral hazard (shirking and expropriation by the judiciary of the benefits created by social control).

We provide evidence that certain areas of the law are better served by career judiciaries while others are better served by recognition judiciaries. Hybrid systems try to supplement the choice of a particular pure arrangement with some pockets of a different nature that can benefit certain areas of the law. Constitutional law and administrative law provide two good examples. In systems dominated by career judiciaries, constitutional adjudication tends to be assigned to recognition judges. In systems that are primarily based on recognition, administrative adjudication tends to be decided by career judges. Consistent with the theory, we find that constitutional courts are smaller and more likely to be composed through a recognition mechanism; we find no statistically significant effect for administrative courts.

A mix of a dominant system with pockets of the other pure solution seems to be an appropriate technique to address agency problems. However, we have recognized that there are inevitable costs, including institutional inconsistencies and incompatibilities. Conflicts between co-existing models may be informative and productive (in terms of helping institutional monitoring) but also can waste resources and be dysfunctional. Pockets therefore tend to be self-contained and are usually not generalized to the entire court system.

49 We started with a two-stage probit least squares estimation (the routine *cdsimeq* in STATA 11), but the second stage regressions with instruments were affected by collinearity. This is not surprising since this method is only recommended for a dataset with at least one hundred independent observations. We turned our attention to a 3SLS estimation that technically is less correct because two dependent variables are binary. However, since we focus only on the regression with the continuous dependent variable, the estimation results seem acceptable to us. The results on Table 7 concerning the limited sample should be taken with extreme caution since the number of independent variables is small.

Rather, they are tailored to particular functions of the legal system and special areas of the law. Because we see hybrids as responding to institutional needs, we suspect that there will continue to be evolution in observed patterns. For example, we might imagine that all systems will eventually shift toward appointment after at least a medium-length career (as in the recognition model) followed by possibilities of promotion, transfer, etc. (as in the career model). This might solve adverse selection problems on the front end while addressing moral hazard on the back end, though it could also exacerbate other problems: late appointment with subsequent promotion might lead to pressures to politicize the promotion process to an even greater degree than is currently found in recognition judiciaries.

There are two important implications of our article for legal reform. First, we provide a useful taxonomy to identify areas of the law that could benefit from different institutional arrangements. At the same time, such changes should be limited and significantly constrained by the potential costs we have enumerated. Second, in contrast with the influential literature on legal origins, our agency cost approach is one in which judicial reform can potentially overcome historical and cultural path dependence. If the nature of agency costs changes in a certain jurisdiction, we suggest that policy-makers ought to, and frequently do, respond by considering institutional reforms to the judiciary to address the new conditions. Obviously there are short-run costs to institutional change, including sunk costs of human capital and institution-specific assets. However, at minimum, our approach shifts the explanatory focus away from institutions predetermined by fate of history into a more productive incentive analysis with greater capacity to explain variation across time and space.

In our view, the structure of judicial institutions is not predetermined by history, although the historical context is obviously important. Instead we see institutional structure as responding to broader incentives within any particular jurisdiction. From a positive perspective, hybrid judiciaries have emerged in many jurisdictions because the default regime (career or recognition) was not the most appropriate in certain areas of the law. From a normative perspective, we suggest that hybrid judiciaries are attractive because variation in agency costs across different areas of the law and different political environments shape optimal institutional design in a variety of ways. Our approach thus provides a theoretical basis for comparative law beyond categorization by legal origin.

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Appendix A

Table A1. List of courts included in the dataset

Country	Court
Albania	Constitutional Court
Albania	Supreme Court
Argentina	Corte Suprema de Justicia
Australia	High Court
Austria	Oberster Gerichtshof (Supreme Court of Justice)
Austria	Verwaltungsgerichtshof (Administrative Court)
Austria	Verfassungsgerichtshof (Constitutional Court)
Bangladesh	Appellate division of the Supreme Court
Belarus	Supreme Court
Belarus	Constitutional Court
Belarus	Supreme Economic Court
Belgium	Court of Cassation
Belgium	Constitutional Court
Belgium	Council of State
Bosnia-Herzegovina	Constitutional Court
Bosnia-Herzegovina	Court of Bosnia & Herzegovina
Brazil	Supremo Tribunal Federal
Brazil	Superior Tribunal de Justiça
Bulgaria	Supreme Court of Cassation
Bulgaria	Supreme Administrative Court
Bulgaria	Constitutional Court
Canada	Supreme Court
Chile	Tribunal Constitucional
Chile	Corte Suprema de Justicia
Colombia	Corte Suprema de Justicia
Colombia	Corte Constitucional
Colombia	Consejo de Estado
Croatia	Supreme Court
Croatia	Constitutional Court
Cyprus	Supreme Court
Czech Republic	Supreme Court
Czech Republic	Constitutional Court
Czech Republic	Supreme Administrative Court
Denmark	Supreme Court
Estonia	Supreme Court
Finland	Supreme Court
France	Conseil Constitutionnel
France	Cour de cassation
France	Conseil d'État
Germany	Bundesverfassungsgericht (Federal Constitutional Court)
Germany	Bundesgerichtshof (Federal Court of Justice)
Germany	Bundesverwaltungsgericht (Federal Administrative Court)
Germany	Bundesfinanzhof (Federal Finance Court)
Germany	Bundesarbeitgericht (Federal Labor Court)
Germany	Bundessozialgericht (Federal Social Court)
Greece	Court of cassation
Greece	Special Supreme Tribunal

(continued)

Table A1. Continued

Country	Court
Greece	Council of State
Greece	Chamber of Accounts
Hong-Kong	Court of Final Appeal
Hungary	Supreme Court
Hungary	Constitutional Court
Iceland	Haestirettur (Supreme Court)
India	Supreme Court
Ireland	Supreme Court
Israel	Supreme Court
Italy	Corte Constituzionale
Italy	Corte Suprema di Cassazione
Italy	Consiglio di Stato
Japan	Supreme court
Jordan	High Council
Jordan	Special Council
Jordan	Court of cassation
Kenya	Supreme Court
Latvia	Supreme Court
Latvia	Constitutional Court
Liechtenstein	Oberster Gerichtshof (Supreme Court)
Liechtenstein	Constitutional Court
Liechtenstein	Administrative Court
Lithuania	Constitutional Court
Lithuania	Supreme Court
Lithuania	Supreme Administrative Court
Luxembourg	Constitutional Court
Luxembourg	Court of Cassation
Luxembourg	Administrative Court
Macedonia	Supreme Court
Macedonia	Constitutional Court
Malawi	Supreme Court of Appeal
Malawi	Constitutional Court
Malta	Constitutional Court
Malta	Court of Appeal
Malaysia	Federal Court
Mexico	Suprema Corte de Justicia
Moldova	Supreme Court
Moldova	Constitutional Court
Monaco	Supreme Court or Tribunal Supreme
Montenegro	Constitutional Court
Montenegro	Supreme Court
Netherlands	High Council
New zealand	Supreme Court
Nigeria	Supreme Court
Norway	Supreme Court
Pakistan	Supreme Court
Peru	Corte Suprema de Justicia
Peru	Tribunal Constitucional
Philippines	Supreme Court
Poland	Supreme Court
Poland	Constitutional Tribunal

(continued)

Table A1. Continued

Country	Court
Poland	Supreme Administrative Court
Portugal	Tribunal Constitucional
Portugal	Supremo Tribunal de Justiça
Portugal	Supremo Tribunal Administrativo
Romania	High Court of Cassation and Justice
Romania	Constitutional Court
Russia	Constitutional Court
Russia	Supreme Court
Russia	Supreme Arbitration Court
Serbia	Supreme Court of Cassation
Serbia	Constitutional Court
Singapore	Court of Appeal
Slovakia	Supreme Court
Slovakia	Constitutional Court
Slovenia	Supreme Court
Slovenia	Constitutional Court
South Africa	Supreme Court
South Africa	Constitutional Court
South Korea	Supreme Court
South Korea	Constitutional Court
Spain	Tribunal Constitucional
Spain	Tribunal Supremo
Sweden	Supreme Court
Sweden	Supreme Administrative Court
Switzerland	Federal Supreme Court
Turkey	Constitutional Court
Turkey	Court of Cassation
UK	Supreme Court
Uganda	Supreme Court
Ukraine	Supreme Court
Ukraine	Constitutional Court
USA	Supreme Court
Venezuela	Tribunal Supremo de Justicia
Zimbabwe	Supreme Court
Zambia	Supreme Court