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Anatomy of an informal institution: The 'Gentlemen's Pact' and judicial selection in Mexico, 1917–1994

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Abstract

The Mexican Constitution of 1917 granted the Supreme Court the power to handpick lower court judges and oversee their careers. For almost eight decades this capacity was not regulated. To fill this void, the justices began to take turns filling vacancies which developed into an informal institution – the so-called 'Gentlemen's Pact'. Using original archival data, we document and describe the birth and development of this practice and argue that it consolidated into an informal institution as the judiciary increased in size. We uncover the workings of this social norm that established a patronage model of judicial selection. Our analysis period ends in 1994, when a constitutional reform created a judicial council with the explicit aim of ending patronage and corruption within the judiciary.

Keywords

Judicial selection, patronage networks, Mexico, informal institutions, judicial independence, supreme court, judicial politics

Introduction

The selection, promotion and discipline of judges are critical determinants of their independence and performance. The consensus, as reflected in Principle 10 of the United Nations' *Basic Principles on the Independence of the Judiciary*, requires judges to be chosen from among 'individuals of integrity and ability with appropriate training or qualifications in law' suggesting that merit-based selection will most likely recruit judges who will display actual independence, neutrality and proficiency in their decisions. Judicial councils, appointment commissions and other similar

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formal institutions have been increasingly adopted to foster meritocratic judicial selection: whereas in 1985 only about 10% of the world's jurisdictions used judicial councils in selecting judges, by 2015 such bodies were involved in appointments in over 60% of jurisdictions (Garoupa and Ginsburg, 2015: 110). Moreover, we know that certain characteristics of these formal institutions – such as their composition and competencies – affect their performance (Garoupa and Ginsburg, 2015; see also Ginsburg and Garoupa, 2009a, 2009b; Pozas-Loyo and Ríos-Figueroa, 2011).

Much less is known about the informal institutions that also play an important role in the selection, promotion and discipline of judges. Specifically, the informal institutions that predate the creation of the judicial councils may help explain the specific institutional design of the council (i.e. its mixture of composition and competencies) and also its performance because informal institutions can either co-determine, or compete with, behavior promoted by formal institutions (e.g. Gryzmala-Buse, 2010; Helmke and Levitsky, 2006). For instance, judicial councils in Europe were created to take the appointment and promotion of judges away from the ministry of justice in the executive branch, and thus away from partisan political practices. In Latin America, in contrast, judicial councils were designed to take the appointment and promotion of judges away from supreme courts, and thus away from patronage practices. To fully explain variations in performance of judicial councils across the Atlantic would require examining whether a pre-existing informal institution affecting judges' selection existed and, if so, whether its persistence competes with, or reinforces, the newly created formal institution.

Identifying and analyzing the workings of informal institutions is not an easy task (e.g. Bicchieri, 2006, 2016; Brinks, 2006). We take advantage of a unique case in order to document the birth and development of an informal institution. The Mexican Constitution of 1917 granted the Supreme Court the power to appoint, oversee, and promote federal district and circuit court judges. However, for almost eight decades the organic laws of the judiciary did not further detail how the justices should fulfill this capacity nor did they offer any other guidelines relating to judicial careers. To fill this void, the Mexican justices tried different methods and eventually one proposal – taking turns among justices to fill vacancies – took hold and developed into an informal institution known as the 'Gentlemen's Pact'. We document and describe the birth and development of this informal institution as the judiciary increased in size. We show how it worked to delineate the specifics of the patronage system of judicial selection enacted in the Constitution of 1917. Our analysis period ends in 1994, when a constitutional reform created a judicial council with the explicit aim of ending rampant corruption within the judiciary on the eve of the transition to democracy.

The remainder of the paper is divided into three parts. In the first, we provide clear definitions of key terms such as informal institutions, patronage and merit systems of judicial selection and specify our arguments. In the second, we provide evidence of the birth, development and consolidation of the 'Gentlemen's Pact' as an informal institution and of the workings of the patronage system of judicial selection in the Mexican federal judiciary. The second section draws on original archival data that we have collected from the so-called 'Secret Sessions' of the Mexican Supreme Court from 1917 to 1994; these were the court's sessions devoted to administrative matters (sessions where the judges discussed cases were known as 'Public Sessions'). In the last section, we discuss the findings and point to other avenues for future research in light of the relationship between formal and informal institutions in shaping individuals' behavior in the field of judicial politics.

Informal institutions in judicial selection: Meritocracy and patronage

To take a widely accepted definition, formal institutions are 'rules and procedures that are created, communicated, and enforced though channels that are widely accepted as official' (Helmke and

Levitsky, 2006: 12). On the other hand, informal institutions are 'socially shared rules, usually unwritten that are created, communicated, and enforced outside officially sanctioned channels' (Helmke and Levitsky, 2006: 12). As we argue below, meritocracy and patronage can become informal institutions that interact with the formal institutions which establish the selection, promotion and sanctioning of judges. Whereas the formal institutions are relatively easy to identify by looking at constitutions and codified laws, this is not the case with informal institutions. We follow Brinks (2006: 188–9) who has suggested five questions to ask in identifying informal institutions.

1. Are behaviors consistent with the proposed informal institution observed?
2. Do people describe those behaviors in terms of a rule of conduct?
3. Is there evidence that relevant actors understand the rule, foresee consequences of breaking it and adjust their behavior accordingly?
4. Are deviations from the prescribed behaviors punishable and punished by other relevant social actors?
5. Is the behavior in question observed and not punished by officials in charge of sanctioning it?

Countries around the world have widely differing methods for the selection of judges. Judges may be selected based on merit examination grades, by popular vote (in partisan or non-partisan elections), by political appointment, or by other hybrid methods (see Malleson and Russell, 2003). In more vertical 'career judiciaries' the better qualified applicants join the lower ranks of the judicial hierarchy at a young age and start a career that can span their entire professional lifetime as in most civil law jurisdictions. In more horizontal 'recognition judiciaries' relatively older successful lawyers are selected as trial or appellate judges, usually remaining in that position, as in many common law jurisdictions (Garoupa and Ginsburg, 2015; see also Damaska, 1986). Both career and recognition judiciaries, however, can be permeated by informal institutions. In the recognition system, for instance, the 'career achievements' that prompt someone's nomination may be more objective (e.g. academic or professional) or less so (e.g. ideological affinity, partisan or personal ties). In the career judiciary, the way young lawyers are recruited into the judiciary may also be more objective (e.g. uniform examinations) or less so (personal or political connections).

Meritocracy in the judiciary can be defined as a system in which people enter into and advance within the judiciary, not because of their familiar or political connections but mainly due to their cognitive capacities, social skills, moral qualities and performance while on the job (e.g. Bell, 2015; Longo, 2004). A system of judicial selection and promotion may be designed in such a way that promotes meritocracy: public examinations to capture cognitive capacities, personal interviews to capture social skills, assessments of character by peers, subordinates and bosses to capture moral qualities, and other efficacy or quality measures to evaluate performance on the job (Bell, 2015: ch. 2). Empirical evaluations of the formal institutions in charge of judicial selection can indicate not only the extent to which meritocracy is actually working, but also whether there are signs that it is taking root in society to the point that meritocratic considerations become social norms or informal institutions (e.g. Zayat, 2009).

Clientelism, on the other hand, has been defined as an 'instrumental friendship in which an individual of higher socioeconomic status (patron) uses his own influence and resources to provide *protection or benefits*, or both, for a person of lower status (client) who, for his part, reciprocates by offering *general support and assistance*, including personal services, to the patron' (definition by James Scott, cited in Stokes, 2009: 606). When the clientelistic relationship involves access to public sector jobs (which are not easily taken away) in exchange for certain behaviors (e.g. loyalty, political support, specific favors) it is called *patronage* (Hicken, 2011: 295). Therefore, patronage relationships are characterized by face-to-face personal interactions (*dyadic*) in which exchanges

(*contingent*) between two unequal parties (*hierarchical*) take place more than once during a period of time (*iterative*) (see Hicken, 2011: 288; Hilgers, 2011; Stokes, 2009).

In the more vertical career judiciaries, for instance, patronage relationships can exist between supreme court justices who directly appoint lower court judges and where the latter depend on the former for advancement in their career. The exchanges between these two parties can be 'positive', for instance the justice builds a good reputation among his peers or the legal community when he appoints a high-capacity professional lower court judge (cfr. Katz and Stafford, 2010: 470). But the exchanges can also be 'negative', for instance the justice obtains undue influence over cases being decided by his lower court appointee. Notice that the exchanges in patronage relationships are inter-temporal, thus in order to make them credible a monitoring device must exist (Hicken, 2011; Stokes, 2009). This means that the justice should be able to oversee and somehow sanction his appointee if the latter does not uphold his part of the deal. A judicial patronage network exists if a justice has direct ties (through appointments) with several lower court judges and the exchanges (positive or negative) can be transmitted through the ties that connect judges that were appointed by the same justice.[1]

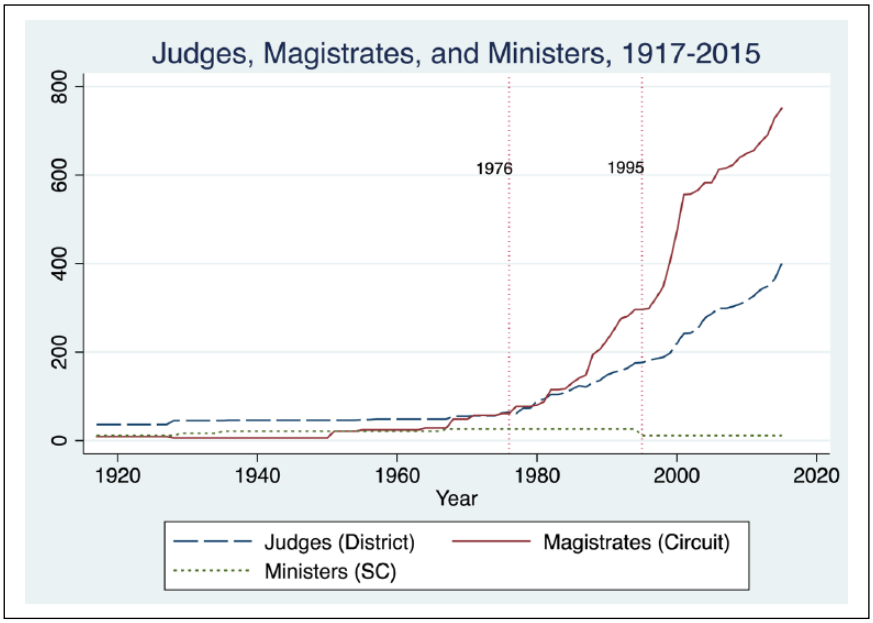
The 'Gentlemen's Pact' and patronage in the Mexican judiciary, 1917–1994

We argue that in Mexico, from 1917 to 1994, what started as a practice for filling lower court vacancies eventually become a fully working informal institution. Specifically, after exploring diverse methods of judicial selection for fulfilling their constitutional capacity to handpick lower court judges, Mexican justices focused on a proposal that became known as the 'Gentlemen's Pact', which consisted of taking turns to fill vacancies. As the judiciary grew in size the taking of turns combined with unanimous approval of each justice's choice and the 'Gentlemen's Pact' became an informal working institution. As this patronage method of judicial selection consolidated, justices became the heads of networks known colloquially as their 'farmyards' (*corrales*) made up of themselves and their appointees. The birth and development of the 'Gentlemen's Pact' and of patronage networks was rocky and non-linear but by the mid-1970s both were clearly established and functioning throughout the federal judiciary.

The original text of the Mexican Constitution enacted on 5 February 1917 established a Supreme Court of nine justices who were elected by a simple majority of the total members of both houses of Congress from a list composed of candidates submitted by each state legislature (Art. 96): they enjoyed tenure 'during good behavior' (Art. 94)[2], and could be removed if a simple majority of the house of deputies initiated an impeachment procedure (Art. 109). The Constitution also delegated the Supreme Court the capacity to appoint and monitor lower court federal judges (Art. 97) without further regulating it. The Organic Law of the Judiciary that was enacted on 2 November 1917 simply added that appointments of lower court judges should be decided by majority vote and that justices could transfer lower court judges across district and circuit courts without reducing their salary or category (Cossío, 1996). Further reforms to the Organic Law of the Judiciary did not add any detail to the processes of selection and monitoring of lower court judges.

The previous formal rules remained essentially unchanged until 1994. The rules of appointment and tenure of Supreme Court justices, however, did change. In 1928, an amendment increased the number of justices from eleven to sixteen and modified their method of appointment giving the President the right to propose a candidate to the Senate for ratification. In 1934, another amendment further increased the number of justices to twenty-one and reduced their life tenure to a six-year term coincident with the presidential administration.[3] Ten years later, in 1944, a new amendment restored justices' lifelong tenure adding an interesting caveat: the President could initiate proceedings to remove a judge who exhibited 'bad behavior'.

Figure 1. Total number of federal judges at all levels.



Source: Consejo de la Judicatura Federal. 2010. *Órganos Jurisdiccionales y Circuitos Judiciales Federales. Reseña Histórica 1917–2008*. México, DF: Poder Judicial de la Federación. And Suprema Corte de Justicia de la Nación. Informe Anual de Labores. México, DF: Poder Judicial, 2008–2015.

We divide the analysis of the birth and development of judicial patronage networks into three periods. The first runs from 1917 to 1935, the year in which the Supreme Court (and, as we will show, the entire federal judiciary) was effectively incorporated into the hegemonic party logic. The second goes from 1936 until 1975, the year in which the number of lower federal district and circuit courts started growing exponentially (see Figure 1). The third period runs from 1976 until 1994, the year in which the Judicial Council and a formal judicial career were created by a constitutional amendment. For the analysis that follows it is important to keep in mind the changing sizes of the Supreme Court and federal judiciary: from 1917 to 1975 there was a rather small judiciary with an average of about 3.5 lower-court judges per justice. But from 1976 onwards the size of the judiciary skyrocketed: the number of district and circuit court judges was 138 in 1976, 219 in 1982, 326 in 1988, and 471 in 1994 (an average of 18 lower court judges per justice by 1994).

The birth of the 'Gentlemen's Pact', 1917–1935

A methodological note is in order. Our analysis is based on archival data obtained through a thorough search of the Mexican Supreme Court archives. Specifically, we read the minutes of the so-called 'Secret Sessions of the Supreme Court', these were the sessions during which the court discussed administrative matters, from the very first session of the court in April 1917 to the last session before the creation of the Judicial Council in December 1994. Within the minutes, with a team of research assistants, we located the discussions related to the appointments of, and complaints about, district and circuit court judges. Each time we found a discussion on an appointment, we collected two types of information. First, we recorded the justices' interventions regarding how to select judges, for instance proposals on whether a specific method should be followed, whether any formal requirements should be established, and whether the method chosen for the specific

appointment being discussed should be used for future appointments. The historical reconstruction of the birth and development of the 'Gentlemen's Pact' offered in this paper is based on these discussions. We ordered them chronologically, and thus in our narrative whenever we use information from these discussions we refer to the date on which they took place.

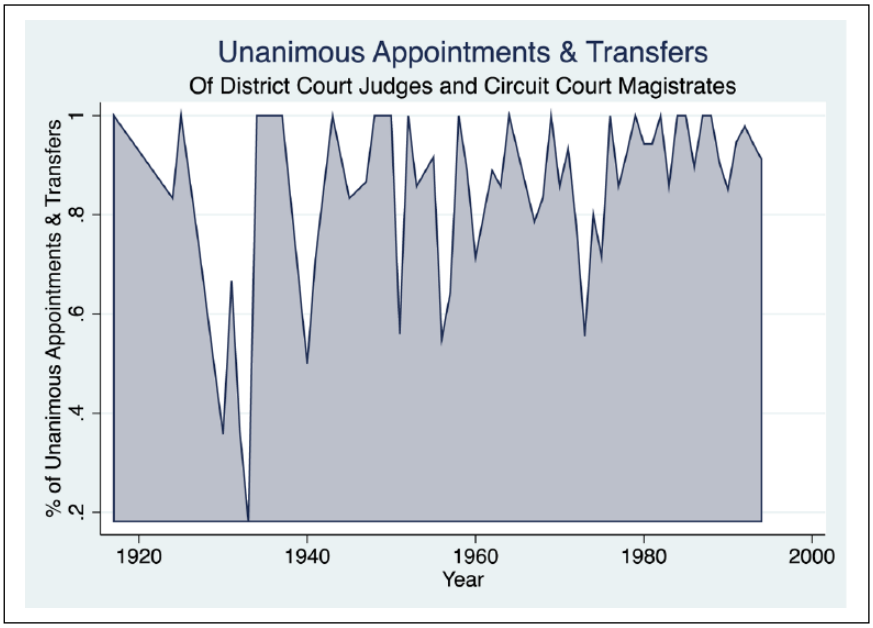
A second piece of information we recorded from the minutes in a systematic manner is about the specific appointment(s) being discussed. We coded the justice who proposed a name to fill a vacancy (when available, because in some discussions there was not any explicit proposal by one justice), the name of the appointee, the position (i.e. district or circuit court judge), and the vote of the Supreme Court (i.e. unanimous or not) on the proposal. In addition, when in the discussions the issue of complaints about a judge or magistrate was raised, we coded the name of the recipient of the complaint (information on the complaint was missing most of the time). In total, our database contains 1278 entries on appointments (960 of which contain the name of both the appointer and the appointee) and 674 complaints. The figures analyzed in the pages that follow are based on this database. [4]

The Supreme Court started working in April 1917. From the very beginning the Supreme Court discussed how to proceed with regards to the appointment of lower court judges. During the session on 28 April 1917 the Supreme Court decided to confirm the appointments of judges made by President Venustiano Carranza before the enactment of the constitution because Congress had not yet passed the law regulating the appointment powers of the Supreme Court. When necessary to appoint or replace a judge, the Supreme Court would make temporary appointments. During the session on 22 August 1917, the court agreed to make decisions on appointments or confirmations during sessions specially devoted to administrative matters 'secret', and use 'secret voting'. On 5 December 1921 the Supreme Court decided that tenure of the lower court judges appointed by President Carranza in 1917 would be four years, and thus they would need to be replaced that year. Accordingly, on 10 December 1921 the court proceeded to appoint new circuit court judges for all nine circuits and then on 16 December 1921 the Supreme Court also appointed all new district court judges, thirty-five in all. Both district and circuit court judges were appointed for a four-year period.

There are at least three noteworthy facts in the first appointments made by the Supreme Court. First, all the appointments were made by majority and secret vote by all members of the Supreme Court (interestingly, the bulk were unanimous until about 1923, see Figure 2), but in these first appointments there is no indication in the *Actas* regarding where the candidates came from (e.g. who proposed them or what the pool of candidates was). Second, two justices' sons were appointed as circuit judges. Third, the selection of the totality of federal judges by the Supreme Court in December of 1921 was made by justices who were finishing their four-year period. The new president for the period of 1920 to 1924, Álvaro Obregón (who was from a different revolutionary faction than Carranza), had a bitter dispute with the Federal Congress over the appointment of the subsequent set of justices, largely because Article 94 of the constitution stipulated that judges appointed after 1923 would enjoy life tenure.

Once the conflicts over selecting justices were sorted out, the procedures for appointing lower district and circuit court judges remained in flux. The Organic Law of the Federal Judiciary that was enacted by Congress did not provide any further details on exactly how the Supreme Court should manage the judicial career. The justices experimented with different procedures. For instance, in 1928 (28 February) the death of a circuit court judge prompted an interesting debate on how to select his replacement. There was a vote among justices regarding three candidates, but no one obtained a majority. Then someone proposed a vote to exclude one of the candidates, which took place, and then a vote among the resulting two: the winner was elected by six votes to three. Notably, by 1928 the members of the Supreme Court had not yet devised the 'Gentlemen's Pact' and were involved in discussions as to how to select new judges.

Figure 2. Annual percentage of unanimous votes on appointment and transfer proposals.



In the session of 13 January 1930 for the first time justices directly proposed names for lower court positions. However, the dynamics were not yet those of the 'Gentlemen's Pact'. From January to April of 1930 different justices suggested various names for the same position prompting a deliberation on the candidates and then a vote. Because the procedure was not regulated, the debates on appointments appear cumbersome and repetitive. Perhaps because of this, during the session of 10 April 1930 Justice Valencia suggested taking turns making appointments. Valencia's motion was approved by a 13 to 2 majority. However, at first each justice in turn proposed various names for a single vacancy and then, after deliberation over the candidates, the court decided which one of them was appointed. The debates over the candidates sometimes included lengthy meritocratic considerations such as whether the most senior or the most qualified candidate should be appointed, or whether other opinions should be heard.[5] These debates often produced divided votes. On 28 April 1930, for the first time (according to our reviews of the minutes), there was a direct proposal of a candidate for district judge by one of the justices and then a vote by the Supreme Court on that candidate. That is probably the birth date of the practice behind the 'Gentlemen's Pact', but it still had not become an informal institution.

Between 1931 and 1934 there were recurring debates as to exactly how the 'turn-taking' agreement should be carried out. Some discussions involved meritocratic considerations. For instance, there was a proposal by one justice to ask the circuit court judges for a list of professional candidates to be appointed to district courts within their circuit (22 August 1931). Another example was a proposal by a different justice to have a vote not to fill each vacancy separately but rather an open vote on a list of many candidates from which each justice would pick two names (followed by the appointment of whoever won a majority of votes). During the rest of 1933 and until about 1940 there was considerable debate in the minutes over the appointments, and several votes on appointments were divided (i.e. not unanimous), which signaled the fact that the 'Gentlemen's Pact' was not yet consolidated (see Figure 2).

The 'Gentlemen's Pact' and the patronage system, 1936–1975

In 1934 an amendment was passed increasing the number of justices and reducing their tenure to a six-year period (coincident with the presidential administration); also new individuals were appointed to the Supreme Court *and* to the entire federal judiciary. The session of 9 January 1935 officially welcomed the new justices appointed by recently elected President Lázaro Cárdenas and approved by a large majority of senators from the *Partido de la Revolución Mexicana*, the PRM (that in 1946 would become the *Partido Revolucionario Institutional* or PRI). In that same session, the newly appointed justices had to appoint the totality of federal district and circuit court judges. The justices created a list of 'acceptable candidates' (the minutes do not reveal how the list was made) and from of it they unanimously voted to select six circuit court and 45 district court judges who presumably had impeccable 'revolutionary credentials' (like themselves, General Cárdenas' recent appointees).

On 9 January 1936 justices discussed how to fill a newly created vacancy and the practice of taking turns was again considered. Interestingly, from that date on the turn-taking method was extended to fill vacancies not only of lower court judges but also all kinds of judicial workers, from clerks to secretaries, to chauffeurs, to actuaries, and even babysitters. In the session of 10 January 1938 when a justice proposed his candidate for filling a district court vacancy, the majority instead decided in favor of an alternative procedure: that the chamber to which that justice belonged propose three candidates to the full court. Interestingly, none of the three candidates obtained a majority of votes, and then a candidate outside the slate of three was proposed by someone else (not identified in the minutes) and finally obtained a majority of votes.

In 1944 a constitutional amendment restored life tenure for justices ('having good behavior') as well as life tenure for lower court judges if they were ratified after a four-year trial period.[6] Thus, in 1944 there was again the need to appoint new district and circuit court judges for the entire judiciary. In the session of 26 September 1944 the Supreme Court again decided to make appointments based on a list of 'unquestionable candidates' (the minutes do not reveal how the list was composed). Whenever there was no unanimity on a candidate, a committee was formed to deliberate. After this *new deal* the idea of taking turns started functioning again for decisions about who obtained life tenure (after the four-year probation period) and also for transfers, new appointments due to death, temporary leaves, and other vacancies.

In 1958 and 1959 we found sessions in which the justices incorporated variations of the selection method, such as a lottery to decide each justice's turn when it was not clear whose turn it was. This is noteworthy because it indicates that justices now considered the appointment of judges and other personnel to be part of their prerogatives while in office, and thus each justice's turn had to be respected. Therefore, by then the practice of taking turns had acquired three of the characteristics of an informal institution: justice's behaviors consistent with the proposed informal institution were not only observed, they were also described as a rule of conduct, plus the justices understood the rule, foresaw the consequences of breaking it, and adjusted their behavior accordingly (Brinks, 2006: 188–9). In the session of 25 October 1960 there was an interesting discussion regarding the appointment of a clerk who did not meet the requirements of having three years' professional practice. In that discussion one of the justices argued against the practice of appointing justices' relatives to positions in the judiciary. Another justice then suggested a secret vote on the issue: a majority of 10 to 6 approved the appointment. Thus, while the 'turn-taking' part of the 'Gentlemen's Pact' had consolidated, the 'unanimous approval' of each justice's choice was not yet a common practice: during those years, there were still a number of non-unanimous votes (see Figure 2).

The relatively few district and circuit court judges until 1976 made the monitoring of appointees relatively straightforward. The Constitution of 1917 stipulated that the justices had to oversee the

work of the federal judges, but this provision was not regulated either. They developed a monitoring system known as *visitaduría*, which consisted of visits by a justice to federal circuit and district courts followed by a report of the visit submitted to the Supreme Court. The relatively small size of the federal judiciary made the *visitadurías* a relatively easy task, and oftentimes justices were sent to oversee the work of courts from their home state or city. The minutes that we read simply state that a *visitaduría* report was filed, but we have not yet been able to locate the actual reports to assess how thorough or systematic they were. For our purposes here, what is relevant is that lower court judges knew that their performance was being monitored not only jurisprudentially through the regular appeals process but also administratively by Supreme Court justices.

Few scholars have analyzed the judicial career in Mexico during this period. In what is the most comprehensive analysis to date, the author emphasizes the existence of a 'mentorship' model (Cossío, 1996) implying that justices used to fill vacancies from a pool composed of their students, their clerks and other judicial officials with experience in the workings of the judiciary. Another scholar also suggests that justices tended to overlook or forgive relatively minor faults that they found in their *visitadurías*, especially when these had been committed by one of their appointees (cfr. Carpizo, 2000: 211–212), which may explain the very small number of corruption scandals in which federal judges were involved during this period (cfr. Caballero, 2010). Therefore, it is possible that during this period the patronage system operated in a benign mode. The last key element of an informal institution, the sanction of deviant behavior according to the norm (Brinks, 2006), is found in this period: a case in point is the 'Caso Burgoa' in which a Supreme Court judge sanctioned a lower court judge when the latter challenged the government (a decision that went against the court's jurisprudence), the lower court judge's behavior was thus against the informal rule that demanded 'loyalty' to the appointers (see Caballero, 2010: 153–4) and was therefore sanctioned.

The 'Gentlemen's Pact' and the patronage system, 1976–1994

As shown in Figure 1 the number of district and circuit court judges skyrocketed from 1976 onwards, especially after 1987, due to an amendment that gave the Supreme Court the power to create new courts and tribunals (this was previously done legislatively by reforming the organic law of the judiciary). The sudden increase in vacancies consolidated the 'Gentlemen's Pact' as an informal institution. Specifically, the taking of turns was no longer questioned and became the standard procedure for nominations: we did not find any more debates or alternative suggestions for selecting judges in 1976. Figure 3 shows that the percentage of directed ties (i.e. appointments in which both the name of the appointer and the name of the appointee or transferee are explicit) approaches 100% at about the mid-1970s (see Figure 3). Moreover, arguably the increase in the size of the judiciary (and thus the speed of the turnaround) required more efficiency and therefore the other element of the 'Gentleman's Pact' (i.e. unanimous approval of each justice's proposal), also became the norm. Figure 2 shows that the percentage of unanimous votes nears 100% from the mid-1970s onwards and remained very high until 1994. We thus find evidence that the increase in size of the federal judiciary consolidated the 'Gentlemen's Pact' as an informal institution for judicial selection.

During this period, from 1976 until 1994, scholars point to a transformation in the nature of the exchanges between supreme and lower court judges. Specifically, it has been argued that during this period 'negative' exchanges became more common, undermining the 'mentorship model' (cfr. Carpizo, 2000; see also Cossío, 1996). These scholars, however, do not offer data to support this claim and there is no systematic data available to assess to what extent this is true. To explore this phenomenon, Figure 4 shows the annual number of complaints recorded in the minutes against district and circuit court judges divided by the annual total number of judges: it is apparent that

Figure 3. Annual percentage of direct appointments of judges and magistrates.

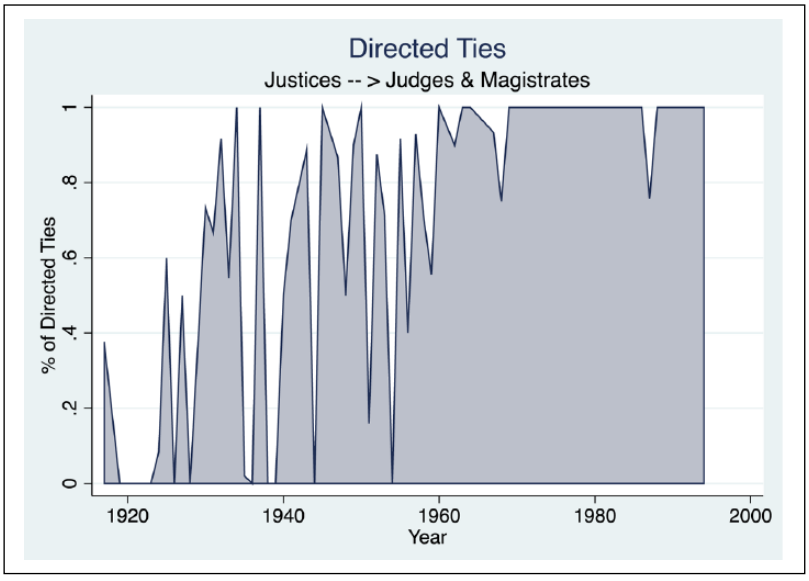
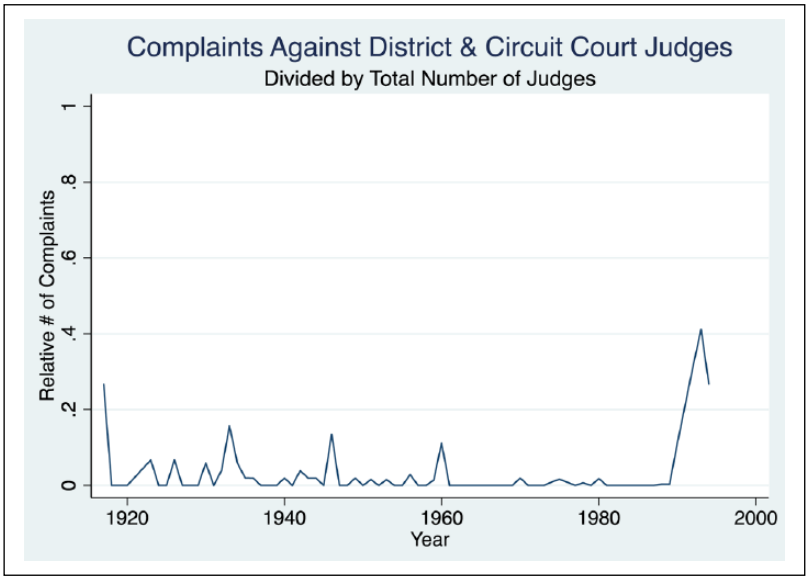


Figure 4. Annual relative number of complaints against judges and magistrates.



these numbers are quite low until the 1990s. This is not hard evidence but at least it is an indication that real trouble with the patronage model of judicial selection began in the period from 1976 onward, and accelerated in the 1990s.

During this period, there were also an increasing number of corruption scandals involving federal judges. For instance, in 1976 federal judges were linked to a drug-trafficking case and the Supreme Court simply transferred them, instead of firing or prosecuting them (cited in Caballero,

2010: 174). In 1982, when a lower court judge decided against the nationalization of banks previously decided on by the government, the Supreme Court took the case, reversed the decision, and sanctioned the lower court judge administratively.[7] In 1988, judge Waldo Guerrero accepted a case against US businesses, which prompted the Supreme Court to force him to resign (cited in Caballero, 2010: 177–8). Well-behaved judges were also rewarded: Judge Salvador Martínez Rojas quickly ascended the judicial hierarchy (and eventually became a supreme court justice) after a 1983 decision imprisoning leftist muralist David Alfaro Siqueiros upon the request of the government and his 'mentor' at the Supreme Court.[8] The scandals reached a zenith in 1993 when a justice, Ernesto Díaz Infante, was convicted on corruption charges in a case where two circuit court judges voted 2 to 1 to liberate a defendant charged with the rape and murder of a six-year-old girl. Díaz Infante received half a million dollars from the family of the defendant and shared the other half of the bribe with two of the judges in the circuit court who were hearing the appeal of this case.[9]

The transformation of the patronage system of judicial selection from a 'mentorship model' to one in which negative exchanges were more common (e.g. from undue pressures on lower court judges to outright sharing of bribes) might be explained by the growth of the judiciary itself, as Jose Ramón Cossío suggests (cfr. Cossío, 1996). The idea is that a smaller federal judiciary enabled a certain level of quality in the selection and monitoring of judges. From 1976 onward, as the number of districts and circuits increased, justices appointed more judges more frequently but this came at the cost of the justices' capacity to guarantee quality in the selection and monitoring of their appointees. This suggestion needs to be properly tested along with other possible explanations. What we do know is consistent with Brinks' last identifier question of an informal institution: questionable behavior was observed and the authority in charge of sanctioning it did not do so. In other words, during this period when the Supreme Court had news of questionable decisions made by unprofessional or dishonest judges they did nearly nothing to sanction them, arguing that scandals produced by some 'bad apples' damaged the reputation of the entire judiciary (Carpizo, 2000: 211).[10]

Just months after the Díaz Infante scandal, the incumbent President Ernesto Zedillo announced and passed the amendment of 1994 that created the Judicial Council and formalized the judicial career. The Judicial Council was delegated the enormous administrative powers formerly enjoyed by the Supreme Court, both in terms of the administration of the judiciary's budget and in terms of the selection of judges and the management of their careers. The political motives behind the creation of the council were clear: to make the interpretation of the Constitution the focus of the Supreme Court, and to move from a patronage to a meritocratic system of judicial selection. Not surprisingly, the Supreme Court from the beginning resisted the creation of the Council (Pozas-Loyo & Ríos-Figueroa, 2011). This turf war had been ongoing during the final phase of the hegemonic party regime and during the first steps of the nascent democracy.[11]

Informal institutions and judicial politics

We have shown that Mexican justices, due to the lack of regulation of their constitutional capacity to select and monitor lower court federal judges, after considering different alternatives of judicial selection arrived at a turn-taking mechanism based on considerations of efficiency. We also showed how the turn-taking gradually became an informal institution, known as the 'Gentlemen's Pact', that regulated not only the justices' behavior but also that of their lower court appointees. We found that the dramatic growth of the federal judiciary that started in 1976 consolidated the 'Gentlemen's Pact' as an informal institution: the taking of turns to fill in vacancies plus the unanimous approval of each justice's selection by his peers. The growth of the judiciary also appears to have transformed the nature of the exchanges between justices and their appointees in the patronage system of judicial selection: from a 'mentorship' model where positive exchanges between supreme and

lower court judges were prevalent to a system in which the negative exchanges associated with patronage became more common. In the remainder of this article, we discuss further avenues of research into informal institutions and their impact on the functioning of formal institutions such as judicial councils.

We believe that one of the most pressing and exciting agendas in comparative judicial politics is the relationship between formal and informal institutions. The expansion of judicial power in many countries started with the formal enactment of constitutional norms on a wider or narrower set of judicial institutions in order to establish judicial independence as a means of checking power and promoting rule of law. But the high expectations created by the enactment of formal institutions have only been met in a few countries. Indeed, a firm skepticism has formed in relation to the idea of modifying the submissive, corrupt, or inefficient behavior by judicial actors by simply changing a set of formal rules (e.g. Levinson, 2011). What, then, explains the gap between formal rules and observed behavior (e.g. de jure and de facto judicial independence) is an open and intriguing question.

To explain this gap, the literature on de jure and de facto judicial independence has stressed the contextual determinants of independent judicial behavior, assuming that the formal rules are well designed for producing the right incentives (cfr. Ginsburg & Melton, 2013). Some studies argue that under certain political conditions, such as divided government or fragmentation, the de jure incentives on judicial behavior are more likely to be enforced (e.g. Chavez, 2004; Ríos-Figueroa, 2007). Others point to high levels of public support for the courts (Staton, 2010; Vanberg, 2005), or a certain judicial ideology and culture (e.g. Hilbink, 2007). In a recent study of a large number of countries, scholars found that stronger formal protections for judges attenuated the effect of concentrated political power on high court deference. 'Where courts are largely unprotected by formal institutions, judges appear to be particularly sensitive to the capacity of government to coordinate on an attack. Where courts are protected, in contrast, judges appear to be less influenced by this capacity' (Carruba et al., 2015: 4).

Informal institutions have been largely overlooked in this debate. Formal institutions are just the tip of the iceberg: informal institutions, the hidden bulk underneath those formations, also shape behavior. Therefore, we believe that systematically analyzing informal institutions, and their relationship to formal institutions, constitutes a promising avenue for explaining the gap between formal rules and observed behavior. But not every observed social regularity is an informal institution. Informal institutions should include identifiable incentives for a certain group of people, common knowledge of the incentive and thus shared expectations, and decentralized sanctions for deviant behavior. Therefore, to empirically identify an informal institution and evaluate its operation in practice is quite difficult. In this paper we have done precisely that, taking advantage of the peculiar way in which the Mexican system of judicial selection operated during much of the twentieth century – but the next steps are yet to be taken.

Specifically, our paper calls attention to the potential impact of pre-existing informal institutions on the performance of formal institutions. The Mexican Judicial Council was created at the end of 1994 with the explicit goal of replacing the patronage system of judicial selection with a meritocratic one. The Judicial Council was originally composed of seven members, of which four were judges from different levels of the judiciary (one district court judge, one unitary circuit court judge, one collegial circuit court judge, plus the president of the Supreme Court) but selected by a lottery thus effectively truncating the link, and thus the influence, of the Supreme Court upon them. Moreover, from 1994 onward public examinations have been a requirement for becoming a federal judge, and other types of evaluations are necessary in order to receive promotions. However, the patronage networks that had been developed over the years and that we document in this article, of course, did not disappear with the enactment of the constitutional reform of 1994. Does their persistence affect the performance of the Judicial Council, the Supreme Court judges, or the lower

court judges? How exactly? Having uncovered the birth and development of the 'Gentlemen's Pact' and patronage networks, analyzing the effects of the persistence of these networks is a natural next step.

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Notes

1. Using the concepts of *Social Network Analysis* (SNA), we could say that in a meritocratic judiciary there would be fewer direct links between judges in the upper and the lower levels of the judiciary, whereas the opposite would be true in patronage judiciaries. Therefore, in a judiciary dominated by patronage networks we should observe a core-periphery network in which supreme court judges occupy a highly centralized network position with relatively high scores in measures such as 'degree' and 'closeness' (e.g. Katz and Stafford, 2010; Katz et al., 2011).
2. Except the first set of justices whose tenure would last only four years.
3. These reforms can be understood as a political reaction to independent Supreme Court decisions during the 1920s that, according to the government, were delaying the implementation of the revolutionary program. Such decisions delayed or limited key issues of the revolutionary agenda such as the expropriation and re-distribution of land, progressive labor legislation or the enlarged military jurisdiction (see James, 2006; Marván Laborde, 2010; Ríos-Figueroa, 2016).
4. The data collection process is still ongoing, but we believe that the general patterns we have uncovered in this paper will not change. Copies of the minutes in which appointments and complaints were discussed are on file with the authors.
5. For instance, in the session of 6 July 1931, Supreme Court judge Cisneros Canto suggested that in order to fill a vacancy in a lower district or circuit court, the Supreme Court should hear the opinion of the justice in charge of the '*visitaduría*' of the respective district so that the most able person with the most merits be chosen. The '*visitaduría*' essentially consisted of a monitoring mechanism by which each Supreme Court judge visited and oversaw the work of district and circuit court judges in a geographically defined space (that sometimes included two or three states).
6. Despite the restoration of lifelong tenure the Supreme Court had already been incorporated into the dynamics of the hegemonic party regime (Caballero, 2010; Magaloni, 2003: 288–289).
7. See the report in the weekly journal Proceso http://www.proceso.com.mx/134534/el-juez-daba-entrada-a-los-amparos-el-senado-aprobo-la-expropiacion
8. See the report in the weekly journal Proceso: http://www.proceso.com.mx/135872/en-mexico-la-justicia-no-es-ciega-mira-hacia-la-recompensa
9. The case was a huge scandal, see http://www.jornada.unam.mx/2006/04/25/index.php?section=sociedad&article=054n1soc for more details.
10. Interestingly, this is similar to what Trochev (in this special issue) argues regarding the case of post-Soviet countries: when patronage networks are centralized in the supreme court a corporative collective interest will be wielded against attempts to infiltrate the judiciary.
11. The contrast with the Chinese case, as presented in Ling Li's article (in this special issue), is interesting. In China, the Communist Party has managed to retain control of the process of appointing bureaucrats, including judges, because the authoritarian regime is still functioning well. In Mexico, the gradual melting down of the PRI's power implied a lack of control over many spheres, including the judiciary where corruption went wild.

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