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Working Paper

Beyond justices: The legal culture of judges in Mexico

GIGA Working Papers, No. 322

Provided in Cooperation with:
GIGA German Institute of Global and Area Studies

Suggested Citation: Aguiar Aguilar, Azul América (2020) : Beyond justices: The legal culture of judges in Mexico, GIGA Working Papers, No. 322, German Institute of Global and Area Studies (GIGA), Hamburg

This Version is available at:
https://hdl.handle.net/10419/222869

GIGA Working Papers

German Institute for Global and Area Studies
Leibniz-Institut für Globale und Regionale Studien

GIGA Research Programme:
Accountability and Participation

Beyond Justices
The Legal Culture of Judges in Mexico

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No 322 **June 2020**

GIGA Working Papers **322/2020**

Edited by the
German Institute for Global and Area Studies (GIGA)
Leibniz-Institut für Globale und Regionale Studien

GIGA research unit responsible for this issue: GIGA Institute for Latin American Studies
GIGA Research Programme "Accountability and Participation"

WP Coordination and English-language Copyediting: James Powell
Editorial Assistance and Production: Petra Brandt

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Beyond Justices. The Legal Culture of Judges in Mexico

Abstract

Judges' ideas, beliefs, and values are central to adjudication. Empowering the courts was a crucial step in third-wave democracies and, after some unfulfilled promises regarding the potential of the judicialization of politics for rights expansion, we need to learn more about the individuals that were empowered and what their legal culture can tell us about judicial behavior. Do judges consider themselves political actors having a legislative role? What type of legal culture do they have? To advance our understanding of these key determinants of judicial behavior, I use a survey with federal judges in Mexico to explore to what extent judges adhere to a positivist or a principle-based constitutionalist legal culture. Findings suggest that there is a tension in the judiciary, with some judges embracing the idea of legislating from the bench while others prefer to play the role of being "the mouthpiece of the law."

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Beyond Justices. The Legal Culture of Judges in Mexico[1]

Azul A. Aguiar-Aguilar

Article Outline

1 Introduction

Do judges use their power to alter the pathways of political and social processes? Do they behave as policymakers? In the past few decades, Judicial Politics scholarship studying both developed and developing democracies has shown that courts play an active and assertive role in adjudicating political and social cases. The evidence base of these works focuses predominantly, however, on high or constitutional courts.

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Can we extend these results and talk about active and assertive judges in intermediate courts? That is, do judges beyond justices recognize and embrace their role of indirect policy-makers? In general, judges in most Latin American democracies are seen as a legalistic-conservative elite that has traditionally protected the status quo and reproduced the role of the judge as the mouthpiece of the law (Hilbink 2007; Couso 2010; Pásara 2010). Judicial power is recognized as being one of the most bureaucratic and hierarchical institutions within Latin American political systems (Pásara 2010).

Democratic polities, however, have great expectations from courts and judges. After judicial reforms that granted political power and independence to most courts in Latin America, human rights groups, nongovernmental organizations, and international donors (to mention just some of those concerned) came to expect the courts to play an activist role in defending rights, expanding the rule of law, and maintaining a political balance that avoids democratic backsliding (Ginsburg and Huq 2018). Despite the important political and social roles that courts can formally play, we have little evidence to gauge whether the judicial elite's ideas, values, attitudes, and beliefs underpin the interests of society, contribute to fulfilling the expectations of organizations and groups concerned with advancing rights, ensure the proper functioning of the rule of law and democracy, or, by contrast, whether judges use their power to maintain the privileges of political and economic elites.

Scholars of judicial politics in Latin America have hitherto studied judicial power from an external perspective; that is, its institutional design, independence, assertiveness, and power, as well as its relations with the executive, the legislative branch, and with civil society (Bill-Chavez 2004; Martinez-Barahona 2010; Pozas-Loyo and Ríos-Figueroa 2010; Helmke and Ríos-Figueroa 2011; Kapiszewski 2012). However, research needs also to be conducted on the internal dynamics of judicial power (Ansolabehere 2019). For instance, we need data regarding the ideas, values, attitudes, beliefs, and professional trajectories of judges, clerks, and the general judicial family to determine their ideological profiles and to have a solid base for inferences about their behavior. Filling these gaps will better inform us about the role that the judiciary complex (and not only justices) plays in democracies with a dominant civil law tradition and a recent authoritarian past. It will shed light on the expected effects of judges' legal culture on adjudication, and will contribute to further developing the theorization of the ideational accounts used to explain judicial behavior (Hilbink 2007; Couso 2010; González-Ocantos 2016; Ingram 2016).

Judges ideas and beliefs—or legal culture—are central to adjudication. We can expect to see different rulings depending on the types of legal culture judges respectively uphold. Two models of legal culture can be highlighted here. On the one hand, judges might hold legal-positivist (henceforth, positivist/positivism) ideas, values, and beliefs. In this case, we will be before a judge that helps to preserve the status quo and hinders the expansion of rights by strongly advocating judicial restraint and mechanically applying what is written in the constitution—avoiding any moral interpretation in her reasoning that might change the sense of the

enacted law. If there is a violation of rights but it is constitutionalized, the law must in any case be enforced and preserved until such time as the legislative power decides differently. In short, judges believe they cannot change the law because they are not political actors and do not see themselves as having a legislative role.

On the other hand, judges' ideas, values, attitudes, and beliefs can be principled, contributing to building up cases that expand new rights and liberties. Here we can find judges who interpret and weigh the law using their ideas, values, attitudes, and beliefs in decision-making, advancing rights that are not explicitly upheld by the current constitution. Judges with a principled constitutionalist legal culture recognize and make use of their legislative and political roles to reshape the law and protect fundamental rights; they are advocates of judicial activism.

The contribution of this work is to help widen our understanding of the internal dynamics of judicial power by looking to intermediate and specialized court judges in Mexico. I present original data about judges' legal culture—namely their ideas, values, attitudes, and beliefs—when applying the law, as well as on their own role in politics and society. What type of legal culture prevails across Mexican judges? Do they consider themselves political actors having an undisputed legislative role? Do they believe themselves drivers of social change and progress? In answering these questions, one of the least studied aspects within the Judicial Politics literature, the legal ideas of judicial elites, is addressed. Doing so helps us to build up and assess the expectations one can reasonably have about the role and effects of legal culture in judicial decision-making.

In this paper I draw from three different literatures (Socio-Legal Studies, Judicial Politics, and Philosophy of Law) to unpack the concept of "legal culture" and gain analytical leverage to characterize the various models of it that prevail among Mexican judges. My discussion here bridges different disciplines, giving content to the lack of theorization and conceptualization other works in Judicial Politics have demonstrated when discussing the ideas, values, attitudes, and beliefs of judges (for more on this argument, see Robinson and Swedlow 2018). I particularly highlight legal theories developed by philosophers of law, as the main formative source of judges' legal culture. Furthermore, I use a survey with federal judges in Mexico (n=71) to know to what extent judges adhere to a positivist or principled legal culture.

My findings suggest that there is tension between a positivist legal culture and a principled constitutionalist legal culture within the Mexican judiciary. This is consistent with other works that have pursued different methodologies to grasp judges' legal culture (see Ansolabehere 2008: 247). Some judges believe themselves to have a legislative role, while others consider themselves to be apolitical. Judges are keen on using their power to bolster progressive rights and liberties such as abortion, same-sex marriage, or marihuana legalization, for which legislation or legal doctrines exist; they are less likely to favor the rights and liberties that would represent a radical change in the status quo however, such as the decriminalization of drugs,

and that have not been previously discussed either by representatives or by justices in the Supreme Court.

This work proceeds as follows. In the following section I present the discussion and debate around the definition of the concept of legal culture, similarities and differences with related concepts, and a brief review of three legal theories that lead to the concept's operationalization. In section three I describe the process of data collection. In the fourth section I discuss descriptive statistics regarding judges' ideas, values, attitudes, and beliefs toward politics, law, social rights, and liberties, and address the core research questions underlying this paper. In the final section I present concluding remarks and highlight the main findings of the paper.

2 The Concept of Legal Culture

Invoking the concept of legal culture is to open the door to a vast expanse of fog. For some scholars, legal culture might very well be how the legal system and legal institutions work. For others, legal culture is more related to the perceptions and expectations that citizens have toward the law and justice-sector institutions—especially regarding whether, when, and why they decide to resort to these institutions.

Legal and political comparatist scholars agree that legal culture is a concept difficult to define—and, above all, to operationalize and measure (Gibson and Caldeira 1996). Some of them even argue that little can be expected vis-à-vis its explanatory power because it is a fuzzy, incoherent, and amorphous concept (Cotterrell 1997; Hunneus, Couso, and Sieder 2010). Lawrence M. Friedman (1997) maintains, however, that we cannot give up studying or working with the concept because it can nevertheless still reveal meaningful aspects of how the law and legal systems work in practice. In this vein, Erhard Blankenburg and Freek Bruinsma point out that it is important that we treat legal culture as a multilayered concept, either to work at one level of analysis or, as these authors propose, to identify the interrelations between them. That is, the relations amid "the characteristics and behavior of legal institutions, legal consciousness among legal professionals and the general public, and their behavior in creating, using, and not using the law" (Blankenburg and Bruinsma, cited in Nelken 1997: 71).

Thus, one must be careful when integrating the different aspects of the concept of legal culture, defining the unit of analysis, and selecting clear and measurable indicators. While it is a fuzzy concept, legal culture has the potential to shed light on and contribute to explaining why despite having an immaculate institutional design or favorable norms in the protection of rights some judges play a more active and assertive role in such protection than others. In this vein, the literatures of Socio-Legal Studies and Judicial Politics have recognized the need to take seriously, study, and disentangle the role played by ideas and ideational aspects in the protection and expansion of rights, as well as in the judicialization of sociopolitical affairs (Hunneus, Couso, and Sieder 2010). The concept of legal culture can hence be a strategic way

to uncover a core aspect of the study of judicial institutions: how and why judicial elites' legal ideas, values, attitudes, and beliefs all affect their judicial behavior.

In Socio-Legal Studies, the concept of legal culture has an important and longstanding tradition. Since the 1960s, Friedman has emphasized the relevance of discussing this concept so as to form a broader understanding of the varied operation of law in different institutional settings or countries around the globe. Within the literatures of Socio-Legal Studies and Judicial Politics, legal culture has been defined as the set of ideas, values, attitudes, beliefs, habits, or opinions that a group of people (judges, prosecutors, law professors, lawyers, or ordinary citizens) share toward the law or the legal system (Friedman 1969; Garapon 1995; Nelken 1995, 2004; Gibson and Caldeira, 1996; Perez-Perdomo and Friedman 2003). Regarding studies within Anthropology, legal culture has also been defined as "a contested and ever-shifting repertoire of ideas and behaviors relating to law, legal justice, and legal systems" (Huneeus, Couso, and Sieder 2010: 6).

One problem with these definitions is that they group all units of analysis together. On such terms, one can easily—and confusingly—talk about the legal culture of a country, a region, an epistemic community, a group of judges, or of ordinary citizens. Friedman made an important contribution to separating out the different legal cultures that seem to appear across units of analysis. He identified two types of legal culture: external and internal (1975: 194), highlighting different units of analysis for each. On the one side are the elites of the legal system such as judges, lawyers, or justices (internal legal culture); on the other, social groups in general (external legal culture). This is helpful not only for the sake of clarity, but also to acknowledge and tackle the problem that different groups have different legal cultures (Huneeus, Couso, and Sieder 2010). This work here has as its unit of analysis judicial elites in Mexico, so when talking about legal culture I refer specifically to internal legal culture.

Within Judicial Politics and Socio-Legal Studies scholarship several concepts related to legal culture can be identified, such as "a culture or cultures of legality" (Hunneus, Couso, and Sieder 2010), "legal consciousness" (Silbey 2010), "legal ideology" (Cotterrell 1997; Ansolabehere 2008), "legal preferences" (González-Ocantos 2016), or "judicial ideology" (Segal and Spaeth 1993). One important difference between these concepts is that they analyze different units of analysis. For instance works using the concept of culture of legality focus mainly on the way in which citizens and political actors live and relate to the law, or disregard in their practices and behaviors what legal norms stipulate (Basabe-Serrano 2014a; Llanos 2014).

Judicial ideology is a concept widely used in the Judicial Politics literature. In most works, however, it remains undertheorized (see Robinson and Swedlow 2018: 265). Despite that fact, when studying judicial ideology the scholarship on judicial behavior in the United States focuses on the political ideas that judges have along a liberal-conservative continuum (Segal and Spaeth 1993). According to the attitudinal model proposed by Segal and Spaeth, we can expect liberal judges to rule favorably in cases involving free speech, women's rights, or minority groups, while conservative judges will do the opposite. Other works on judicial ideology

ground this concept (also without much theorization) in political ideology, arguing instead that courts are divided along the more classical left-right political continuum: judges with left-leaning tendencies favor policies of state intervention, while right-leaning ones vote for market-oriented policies (Sánchez, Magaloni, and Magar 2011; Basabe 2014b).

The concept of legal ideology has been discussed in Socio-Legal Studies as an alternative to that of legal culture (Cotterrell 1997). According to Roger Cotterrell, legal ideology "can be regarded as made up of value elements and cognitive ideas presupposed in, expressed through and shaped by the practices of developing, interpreting and applying legal doctrine within a legal system. [Legal ideology] is generated and sustained by the professional practices of law" (1997: 21–22). Thus the professionals of law (judges, lawyers, prosecutors, law professors) are the original source in the production of ideas, values, attitudes, and beliefs (legal ideology); the daily practice of law (trials, case files, depositions, interrogations, pleadings) is conversely the mechanism through which it is experienced, reproduced, and transformed.

Important emphasis is placed on the relationship between legal ideology and legal doctrine. For Cotterrell, legal doctrines shape legal ideology (but also vice versa); both "help to constitute social understandings and structures, beliefs, attitudes and values" (1997: 22) meanwhile. Cotterrell's concept of legal ideology is similar to that of internal legal culture proposed by Friedman. Both have as the unit of analysis the professionals of law. Cotterrell's is different, however, in that it regards legal doctrine as a core aspect that models the practice of law: that is, legal doctrine nurture law's operation, interpretation, and transmission among legal professionals. I will thus use the ideas put forward by these two concepts (legal ideology and internal legal culture) to operationalize legal culture.

Indeed, the concept of legal culture can profit from the discussion that prominent philosophers of law have advanced on legal theories and doctrines. Over the past few decades, several schools of thought have developed legal paradigms guiding and shaping the practice of law: "positivism," "guarantee-based constitutionalism" (also termed "normative constitutionalism"), "principled constitutionalism" (known also as "post-positivism," "legal interpretivism," or "argumentative constitutionalism"), and "neoconstitutionalism." These paradigms have made their way from law faculties to the legal profession, particularly to the courts, and have shaped the ideas, values, attitudes, and beliefs of judges. Here I briefly discuss three of these paradigms, since they have heavily informed the legal culture of judges in recent decades: positivism, guarantee-based constitutionalism, and principled constitutionalism.[2]

Positivism emerged as a rebellion against conservative-natural law philosophers and legal scholars who claimed that there was a natural and moral order to things in society, and who

2 Among some Law and Judicial Politics scholars in Latin America there has been extensive discussion on neoconstitutionalism (Carbonell 2007; Couso 2010; González Ocantos 2016). This legal paradigm has been attributed to, among others, Luigi Ferrajoli. However, he has denied sharing the postulates of neoconstitutionalism and has urged the legal community to embrace the guarantee-based constitutionalism that he himself proposes (Ferrajoli 2011).

used the law to justify atrocities perpetrated by autocratic or totalitarian regimes on several occasions (Atienza and Ruiz Manero 2007). Positivist philosophers consider that positive law is just and right due to its formalized nature (Bobbio 1992, cited in Atienza and Ruiz Manero 2007: 11). Positivist theories posit that morality and law are separate; in other words judges' values or beliefs ought not influence their decision-making, so that the legality principle prevails. Positivist philosophers argue that authoritative norms (those made by representatives) should be the sole source in the practicing of law: namely judges should consider only what is written in legal texts when writing down their rulings, and avoid their own values and ideas featuring through interpretation. Given these beliefs, a judge that holds a positivist culture will tend to rule against policies and social values that have not been enacted and that represent a radical change to the legal status quo—like for instance same-sex marriage or the decriminalization of drugs.

A "stronger" version of positivism is proposed by Ferrajoli (2011: 24) meanwhile: guarantee-based constitutionalism. As with positivism, guarantee-based constitutionalism also contends that law and morality are separate. It claims that the constitutionalizing of fundamental rights would ensure that institutions and citizens' rights are both preserved. The central argument of this legal paradigm is that the "existence and validity of a norm does not imply its fairness" (Ferrajoli 2011: 31); it follows, then, that we can have unfair constitutional laws, but they are still valid and must be applied by judges because judicial decisions "that are no based on positive norms, but in moral principles, are not legally valid decisions" (Ibid.: 32). According to Ferrajoli, judges need no more than the power wielded by well-designed fundamental rights in democratic constitutions. Judges should not overstep the mark: in constitutional democracies antinomies and constitutional loopholes cannot be fixed by judicial activism, weighing and balancing, or by the interpretation of judges, but by political representatives (Ferrajoli 2011: 34). Within this legal paradigm, representatives are the only ones entitled to produce norms and correct normative loopholes, while judges are bound to apply those norms guaranteeing the fundamental rights of citizens. In this way, the distinction between rule of law and rule of man is preserved.

Critics of guarantee-based constitutionalism maintain that it is misleading to claim that judges should decide all cases, particularly hard ones,[3] on the basis of only considering what is written in the law or in the constitution. Even when constitutions are well-designed and uphold democratic values, we can nevertheless still find instances where there is no definite rule that can be applied to a given case. As such, judges must interpret, weigh, and balance a norm in order to ensure handing down a fair decision.

One implication of this new version of positivism is that legal formalism assumes an important place in judicial decision-making and consequently the activism of judges is highly

3 Hard cases are typically those in which liberties and human rights are at stake, and where there is either no clearly defined norm to adjudicate with or there is a contradiction between norms. By contrast, easy cases are all those that find a well-defined solution in the constitution or other laws.

constrained. Where judges uphold a positivist or guarantee-based constitutionalist's legal culture, we find ones who consider the law not to be subject to interpretation or liable to be created by judges themselves. Rights also cannot actively or creatively be defended or institutions protected, because in so doing judges might lose their legitimacy. Judges might embrace new rights, but if they have not been enacted they cannot be enforced.

For its part, principled constitutional theories state that "the law is not only constituted by norms, but also by principles [...]. It is an activity, an interpretive practice in which ends and values play a determining role" (Atienza and Ruiz Manero 2009: 135). Related legal philosophers such as Ronald Dworkin, Robert Alexi, or Manuel Atienza posit that the law has a clear connection to morality, a *fair* morality (Alexi 1994). In other words, an ethical morality that guides judges to choose the correct principle in deciding on a case.

Principled constitutionalism contends that, in hard cases, norms must be weighed by judges to reach fair and correct rulings: "In hard cases, judges have to interpret constitutional principles and values (where terms such as liberty, equality, human dignity appear); in other words, they have to choose among their possible meanings (and) inevitably they have to resort to some moral theory (or moral-political theory) to justify, for example, that womb rental does not imply any attempt against human dignity and does not affect the public order [in a given democratic constitutional framework]" (Atienza 2011: 81–82). Argumentation and interpretation of law are at the core of principled constitutional theories, because norms are principles subject to weighing and balancing by judges: "Law cannot be understood exclusively as a system of norms, but also as a social practice" (Atienza 2009; see also, Dworkin 1986).

That is, the law is not only statutes and constitutions enacted by representatives but also a complex practice produced and transformed by the subsequent use that judges and lawyers make of the law: norms are both authoritative and axiological; thus "to interpret the law implies in some sense to develop it" (Atienza 2011: 82). If norms are subject to weighing and interpretation, then we can conclude that morality and judges' own values play a role in adjudication. Since judges are bound by the law, but they can nonetheless still let their ideas and beliefs inform judicial decision-making, then we can expect to have judges who favor social values or liberties that represent a challenge to the constitutional status quo—for instance womb rental or abortion. One empirical implication of principled constitutionalism is that when judges face hard cases, weighing, balancing, and argumentation take place; thus, we can expect to observe in such situations creative judges or judicial activist behavior,[4] occurring in order to defend or expand fundamental rights.

4 It is important to clarify that judicial activism has a pejorative meaning among legal philosophers such as Atienza and Ferrajoli. Both strongly argue against it, even when principled constitutionalism (by way of interpretation, weighing and balancing) sows the seeds for its development. Judicial Politics scholars such as Martin Shapiro (1963) instead urge us to recognize that judges must be taken to be the same as any other political actor who has preferences but also the constitutional power to shape law and politics.

One of the main critiques of principled constitutionalism is that put forward by Ferrajoli. He argues that the idea of there being no separation between law and morality takes us back to natural law, where it is truth—not authority—that makes the law (*veritas non auctoritas facit legem*). The key principle of constitutional democracies is that the inverse is the case however (*auctoritas non veritas facit legem*) (Ferrajoli 2011: 30). Judges' active argumentation, weighing, and balancing compromise their legal subjection to the law, and jeopardize values such as the certainty of law and equality before it (Guastini 1996, cited by Ferrajoli 2011: 47).

With these ideas in mind, in Table 1 below I unpack the concept of legal culture to be used throughout this work. To operationalize legal culture, I move further down the ladder of abstraction to the concepts of internal legal culture and legal ideology as discussed above—that is, to the legal culture of judicial elites. Internal legal culture contains indicators related to the ideas, values, attitudes, and beliefs that judges possess about their own role and that of law in politics and society; legal ideology addressed the ideas, values, attitudes, and beliefs that judges uphold when applying the law meanwhile.

Table 1. Legal Culture of Judicial Elites

Concept	Indicators
Internal legal culture	Judges' beliefs about their political role
	Judges' beliefs on their role in contributing to equality in society
	Judges' attitudes toward abortion
	Judges' attitudes toward same-sex marriage
	Judges' attitudes toward marihuana legalization
	Judges' attitudes toward the decriminalizing of drugs
Legal ideology	Judges' ideas on the creation and not only application of law
	Judges' ideas on the use of creative powers to establish the applicable norm for a case
	Judges' attitudes toward weighing and balancing between different principles when dealing with hard cases
	Judges' beliefs on the fairness of all constitutional norms
	Judges' attitudes toward the use value-based criteria when writing decisions
	Judges' beliefs on the idea that conventional norms are as important as constitutional norms when handing down a decision
	Judges' ideas on the importance of community values when writing a decision
	Judges' ideas on the importance of society's needs when writing a decision

Sources: With information from Cotterrell (1997); Hunneus, Couso, and Sieder (2010); Nelken (1997); Atienza and Manero (2009); Atienza (2011); Ferrajoli (2011); Saba (2016).

The indicators presented in Table 1 shape different models of legal culture depending on judges' own preferences. Drawing from the legal theories discussed above, I expect to find a judge with a principled constitutionalist's legal culture if she agrees or shows a preference for the statements listed as indicators in Table 1. Namely, if she believes judges to have a political role, favors human rights (abortion or same-sex marriage) or liberties even when they are not enshrined in the constitution, or she believes that the law can be also created—and not only

applied—in courts. On the contrary, I expect to find a positivist legal culture when a judge disagrees or tends to disagree with these positions.

3 Data Collection

Judges are a population hard to survey. They are difficult to contact, to convince to talk, and their size within the population is only small. Sampling, identifying, contacting, convincing, and interviewing are conventional steps in many surveys; hard-to-survey populations are groups of people among whom these attributes or a combination of them usually concentrate (Smith 2014; Tourangeau 2014: 3). We can think of groups of undocumented migrants, homeless people, drug users, jazz musicians, and elites as just some of the world's hard-to-survey populations (Tourangeau 2014; Atkinson and Flint 2001).

In this project we were able to accomplish the identifying and conducting of interviews with ease.[5] The federal judiciary website provides a complete list of federal judges across all Mexican judicial circuits.[6] The first problem came, however, with conventional probability sampling. We identified a list of federal judges, conducted a random sample, but received only a handful of responses from the selected sampled population. Contacting and then persuading judges to take part in the survey was problematic. The only way to contact federal judges in Mexico is by telephone, a letter sent by conventional mail, or by visiting their courts. Their email addresses are not available on the judiciary webpage (except for electoral federal judges, with most of them able to be easily contacted by email) and many times the phone numbers (or extensions) displayed on the judiciary website are wrong.

Judges are difficult to persuade. They refuse, for different reasons, to participate in surveys. Many have severe time constraints, and so are reluctant to spend 45 minutes responding to a questionnaire for an academic project.[7] They are also distrustful of collaborating with an endeavor outside the judiciary. Some scholars argue that "persons who are socially isolated" are populations hard to survey (Groves et al. 2000, in Tourangeau 2014: 13). Because of the dominant civil law tradition in Mexico, but also because of their (mis)understanding of judicial independence, judges are such socially isolated individuals. During the period of data collec-

5 Data was collected by research associates and the author. I especially thank the valuable research assistance provided by Ana Karla González Lobo during fieldwork.

6 There are 32 judicial circuits, with each of them mostly equivalent to one federal state in Mexico. With this information, we prepared a survey-tracking database by state that contained the name of the judge, her bench and law matter, telephone number, contact person (usually her assistant or clerk), court address, and tracking status.

7 It is only fair to point out, however, that some judges who agreed to be interviewed were very generous with their time. Even though our questionnaire contained only closed questions, they also elaborated on their answers and provided detailed information about the why of their response. Some interviews lasted three hours. We registered this information in field notes, which are also partly drawn on in this work.

tion, one of them told us that they usually do not interact with the media, civil society organizations, or other institutions and persons outside the judiciary because people might consequently call into question their independence.

We first sent each judge a letter of invitation,[8] and subsequently made a follow-up call to ask whether they were willing to collaborate with the project. Using these communication strategies, however, did not work out very well either. We obtained a few responses from the originally selected sample. Eventually, we gained access to the judiciary through what I call "friendly judges": namely those that received the letter of invitation, agreed to respond to the questionnaire, and who suggested to colleagues collaborating with this "nonmedia and nonpolitical" project, as one of the interviewed judges called it. This procedure resembles snowballing sampling, chain-referral sampling, or respondent-driven sampling (Lars Lyberg et al. 2014: 87; Tourangeau 2014: 9); that is, a way of reaching hard-to-survey populations—in this case judicial elites—through their social network, by asking respondents for further contacts among their colleagues (Atkinson and Flint 2001; Thomson 2014).

One key way of gaining access to judges was by getting in contact—always through a friendly judge—with the coordinator of judges and magistrates in each of the circuits we visited. This bolstered our opportunities to catch and interview judges. Through the coordinator of judges and magistrates in the circuit, we could deliver the official letter of invitation and schedule appointments. Once we had the latter, a face-to-face interview was conducted in person or online (via Skype video call) by the lead or the associate researcher of the project. Between December 2018 and July 2019, we visited eight judicial circuits and collected 71 interviews with district judges, magistrates of circuit courts (collegial and unitary), and electoral magistrates, all of them belonging to the federal judiciary in Mexico. Our sample benefited from the fact that federal judges are transferred to different judicial circuits during their careers, so we managed to interview ones with experience in 25 out of 32 judicial circuits across Mexico (see Appendix).

One of the problems with this way of interviewing judges is self-selection, which leads to biased data collection. This undermines randomization (and external validity), and is present not only in surveys but also in other data-collection techniques such as field experimentation (Baldassarri and Abascal 2017: 43–44). The voluntary participation of subjects affects generalizability. The analysis presented here, however, yields novel and valuable descriptive information about judicial elites in Mexico. Additionally, since judges are an elite hard to access, it provides more reliable evidence than other forms of data collection such as via email or mobile survey, in which the number of respondents might increase but only at the risk of not knowing for certain that it was the judge herself—and not her clerk or assistant —who actually responded. Furthermore, with face-to-face interviews we had the additional benefit of judges

8 This letter explained the aim of the project, its financing, participants, and the strict confidentiality of responses. In some cases, it was mailed to each court; in others, letters were sent to the coordinator of judges in each circuit, who kindly distributed the letters among her/his colleagues.

being afforded the opportunity to give precise details in their responses, explaining or clarifying a question when they did not fully understand it, and thus of better capturing their behaviors and reactions.

Different to other political elites (i.e. representatives), judges are easy to interview once they have actually agreed to take part. They rarely cancel appointments; they are on time and ready for the interview, and barely any interruption occurs during the session. All interviews were completed in one session. This is very different from interviewing representatives (see Montaño 2017), who most of the time cancel appointments without informing the host or alternatively interrupt the conversation to attend meetings or take calls.

The questionnaire contains 167 variables, and is organized into five sections: 1) family and background; 2) judicial career; 3) judicial ideas, legal culture, and thought; 4) opinions on indigenous rights; and, 5) opinions on judicial independence. For this paper, I use the data specifically of the third category.[9] I conducted the analysis in R (Wickham 2016; R Core Team 2019; Valle-Jones 2020).

4 The Legal Culture of Judicial Elites in Mexico

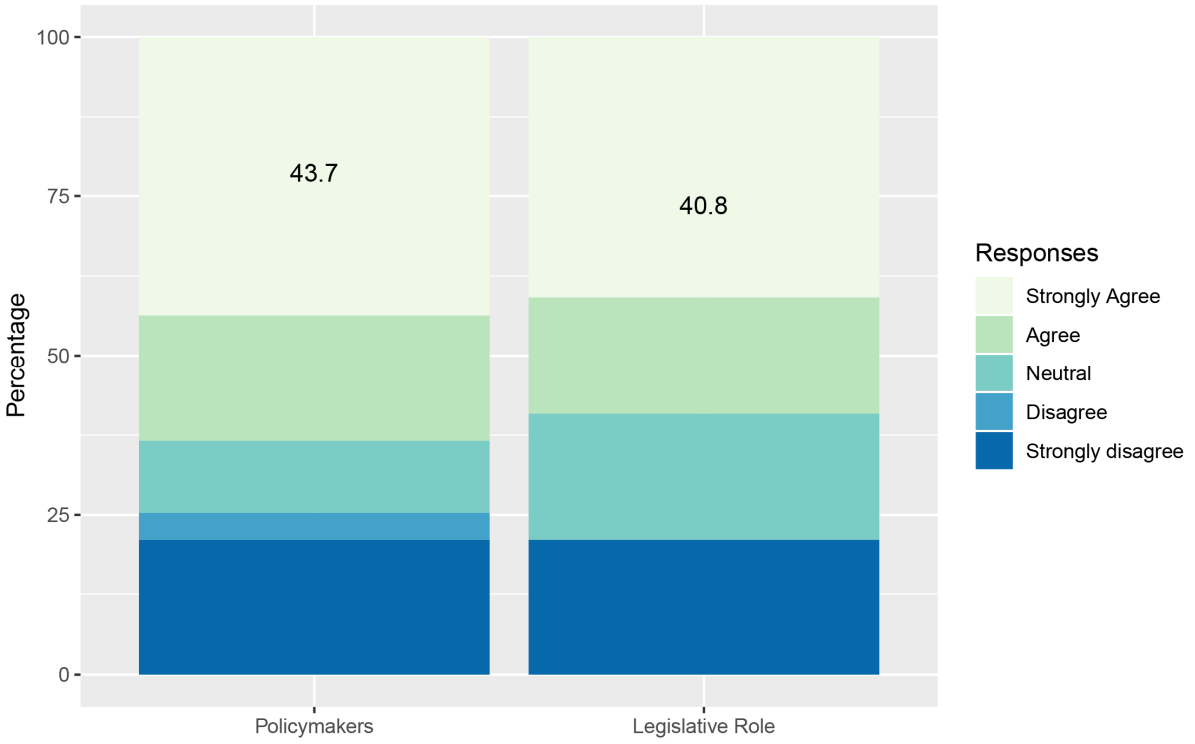
The idea that judges are political actors is well known within the Judicial Politics scholarship, at least since 1964—when Shapiro urged the Law and Political Science communities to recognize this fact in his seminal paper "Political Jurisprudence." Judges—but also lawyers and legal scholars—in Latin American countries will think this idea controversial, since it is widely believed that they must be isolated from politics in order to uphold impartial, independent, and objective adjudication (Pásara 2010), but also to avoid violating the majoritarian principle of democracy. An important implication of judges considering themselves political actors is the role that they assign to their decisions when regulating the government, or shaping rights, politics, and/or social change: they acknowledge the influence they can wield in the political system because they are "participants of the political process" (Shapiro 1964: 296–297). We can expect judges who believe themselves to have a legislative role or who are actors in the political arena to push forward their ideas and values through judicial decision-making.

The data collected in Mexico shows that judges there fall into two groups: those considering themselves to have a clear political role and those who believe that judges should be apolitical. It can be said, however, that a majority of the sample believes judges to be participants

9 The questionnaire was originally inspired by the Latin American Parliamentary Elites (PELA) project, which studies the attitudes and opinions of Latin American political elites (representatives). Many questions from the PELA questionnaire were adapted to the judicial elites project in Mexico. Others related to judicial career and independence were taken from the Questionnaire to Judges in Bolivia of the University of Pittsburgh and USAID. Other sections in the questionnaire were crafted after a careful reading of the appropriate literatures: philosophy of law in the case of section three and judicialization of indigenous rights and legal pluralism in that of section four.

in the political process. As shown in Graph 1 below, almost half (43 percent) of those surveyed "strongly agree" with the statement "Judges are political actors, that is, they are indirectly policymakers." If we add those who "agree" with this idea, we have around 60 percent of the sample considering themselves political actors. The remaining responses fall in the categories "strongly disagree" and "disagree": namely around 25 percent of judges in Mexico deny the idea of indirectly being policymakers, while 15 percent are undecided.

Graph 1. Judges as Political Actors

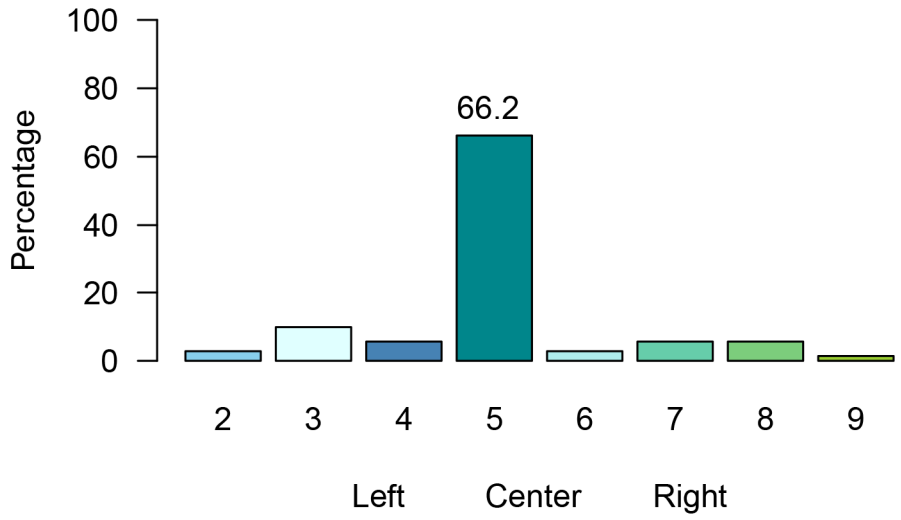


Source: Judicial Power in Mexico Questionnaire (2019).

When judges were asked to articulate their preferences regarding the statement "In current democracies, judges have a legislative role," the term "legislative" made some of them slightly scale back their inclination toward the response "strongly agree" (as Graph 1 shows). Despite that fact, a significant proportion of judges (60 percent) in the sample hold beliefs that come closer to a principled constitutionalist legal culture and would be willing to be less deferential to representatives and the president, interpreting legislation in a way designed to advance their own ideas. Around 40 percent of the judges in the sample, however, "strongly disagree" or have a neutral position regarding the idea of them having a legislative role; that is, we can witness here the persistence of a legal culture that claims a separation between politics and law or judges' own ideas or values and the law—as positivism postulates.

Judges in Mexico do not feel comfortable with expressing their political ideology. As shown by Graph 2 below, 66 percent of them prefer to be positioned at the center of the political spectrum or to take a neutral stance or demonstrate no political preference between left and right. This is consistent with a positivist legal culture that aims to strictly separate politics and law. Federal judges in Mexico have been always highly concerned about being identified with a political label, party, or position (Ingram 2019), and publicly deny having any related preferences. Around 18 percent of judges, however, positioned themselves to the left of the political spectrum, while 15 percent did so to the right.

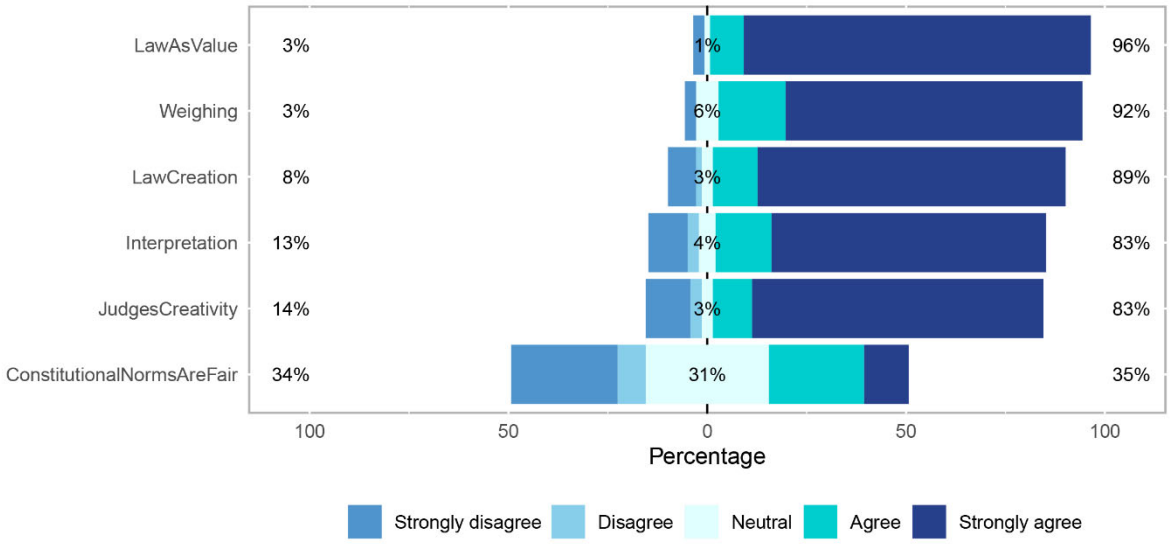
Graph 2. Judges' Political Preferences



Source: Judicial Power in Mexico Questionnaire (2019).

When referring to legal ideology (see Table 1 above), the sampled judges show strong support for statements that are part of a principled constitutional legal culture. Graph 3 below shows that around 83 percent of judges "strongly agree" or "agree" with the idea that "Judges do not simply apply the law, they use their creative powers to establish the applicable norm for a case" (JudgesCreativity). Some 89 percent "strongly agree" or "agree" meanwhile with the notion that "Judges should not constrain their rulings to the straight interpretation of positive law, since they have the power to create law through weighing different principles" (LawCreation). They also "strongly agree" or "agree" with principled constitutionalist concepts such as "Constitutional norms are principles that can be more or less respected because they can be weighed by judges when there is a conflict between them" (Weighing) and "The Law has both an authoritative and axiological dimension" (LawAsValue). What this tells us is that most judges are eager to use their ideas—but also their power—to shape the law when they believe it necessary. Thus the law is important, but judges are aware and comfortable with the idea that their interpretation of it can create new rules—in other words, that they can legislate from the bench.

Graph 3. Judges' Legal Ideology

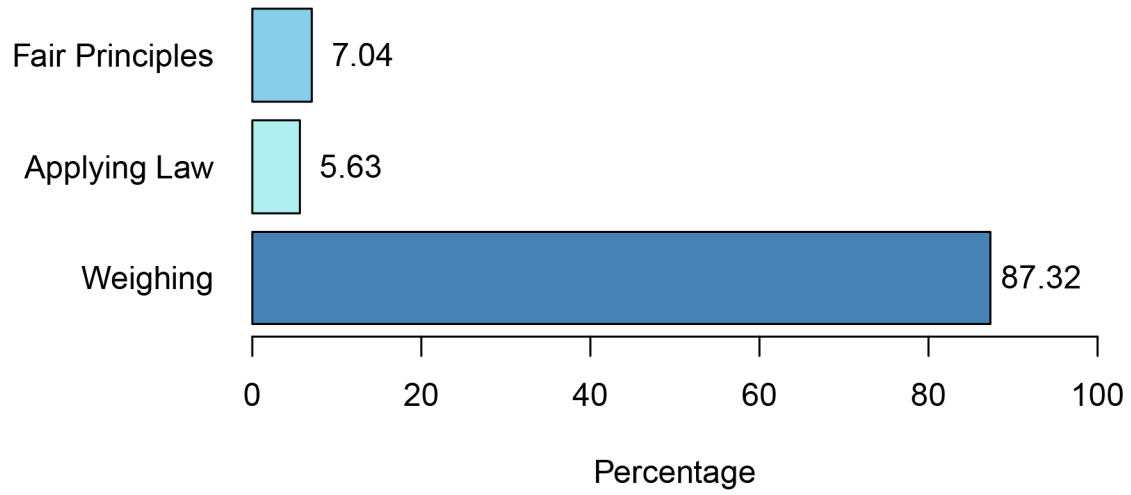


Source: Judicial Power in Mexico Questionnaire (2019).

Even if they are willing to use their ideas and power to shape the law, only around 34 percent of judges "strongly disagree" or "disagree" with the idea that "All constitutional norms are fair" (ConstitutionalNormsAreFair), 35 percent "strongly agree" or "agree," while a significant proportion (31 percent) are undecided. In this case, these judges align to a positivist legal culture—since they believe that authoritative laws, given their constitutional status, are fair. To qualify as principled constitutionalist, we would expect instead to find most judges strongly disagreeing with the idea that "All constitutional norms are fair"—since the sole authority of the legislative branch is not sufficient to guarantee that norms are fair, not even in current constitutional democracies. Or as Gustavo Zagrebelsky put it, "in the inflated legislative atmosphere of the present time, there is indeed an abundance of defective, ambiguous, generic, contradictory, irrational, and incoherent laws" (2003: 623) that can be potentially corrected by judges.

Within a principled constitutionalist legal culture, interpreting and weighing principles and norms is a key characteristic of adjudication. When judges were asked about their attitudes in adjudicating, around 88 percent responded (Graph 4 below) that in their role as judges they prefer to "deliver a decision after weighing and balancing between valid constitutional norms and principles in hard cases" rather than to "deliver a decision based on fair principles" or "to obey the law and deliver a decision based only on what is written in the constitution."

Graph 4. Attitudes in Judicial Decision-Making



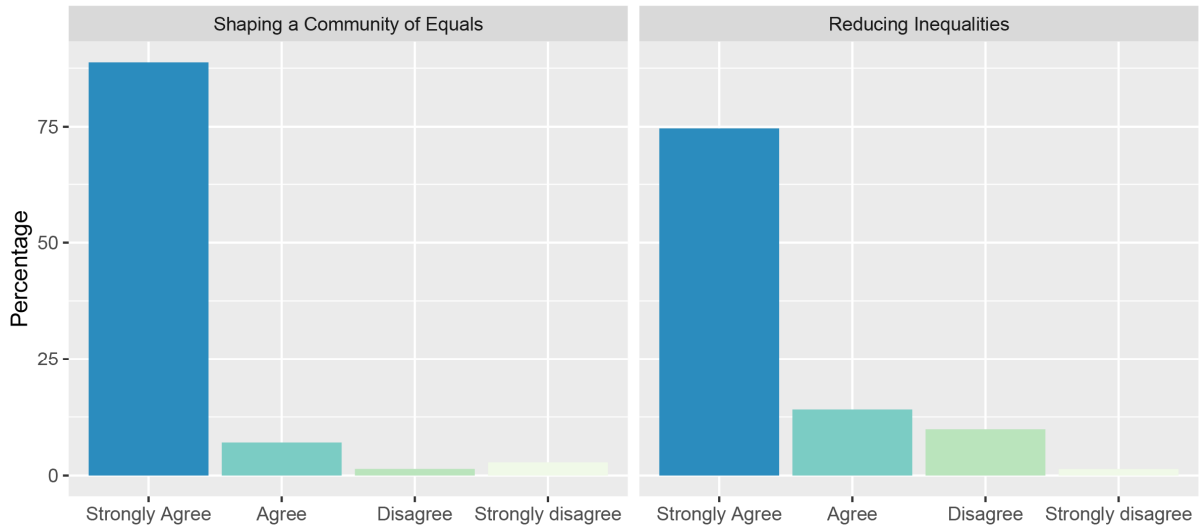
Source: Judicial Power in Mexico Questionnaire (2019).

During fieldwork we noticed, however, that judges were cautious when it came to talking about moral principles and did not like to do so, contrary to how principled constitutional legal theory does. When we asked the judges what they thought about including "moral principles" instead of only "principles" for the option "to deliver a decision after weighing and balancing between valid constitutional norms and (moral) principles in hard cases," many were baffled and said they would not agree with that idea because, as pointed out by one of them, "a judge's own morality should not form part of a ruling." This illustrates that morality continues to be a controversial idea associated not with ethics as a universal principle (as principled constitutionalism proposes) but with subjective moral values or opinions.[10]

When talking about equal rights or the role of judges in social change and progress, those sampled revealed progressive ideas, values, attitudes, and beliefs. Graph 5 below shows that most respondents "strongly agree" with the statements "Judges' role is to contribute to the formation of a community of equals" and "The judiciary should seek to eradicate the structural inequalities that exist in society through the constitutional or conventional review of laws." That around 89 percent and 75 percent of those surveyed strongly agree with those two ideas respectively indicates that judges might be willing to use their position to advance change vis-à-vis social inequalities when such cases appear in their courts. This assertion, however, should be taken with caution, since we need evidence (decisions) that shows that judges indeed rule as they preach.

10 I thank Ilsse Torres for pointing out this observation.

Graph 5. The Role of Judges in Two Domains

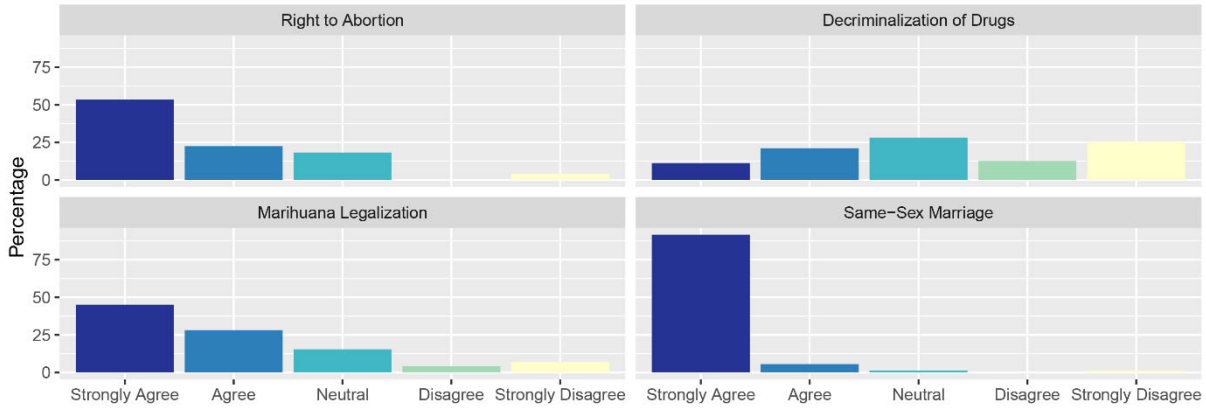


Source: Judicial Power in Mexico Questionnaire (2019).

Regarding human rights and liberties such as same-sex marriage, abortion, marihuana legalization, and drug decriminalization, judges in Mexico demonstrate varied preferences—albeit overall lining up on the progressive side of the spectrum. Graph 6 below shows that around 90 percent of judges in the sample "strongly agree" with the idea of LGBT people having the right to marry, 53 percent "strongly agree" with the right of a woman to have an abortion, while 45 percent "strongly agree" with marihuana legalization. Respondents, however, "strongly disagree" (25 percent), "disagree" (12.5 percent), or have a neutral position (30 percent) regarding the "decriminalization of drugs' consumption in general"; that is, abolishing penalties for drug consumption. If we look at the first three statements, we could argue that judges in general tend to show progressive ideas and values. It is worth noting, however, that legislation and important Supreme Court decisions have been delivered in recent years regarding same-sex marriage, abortion, and the legal consumption of marihuana, while no legislative or judicial precedents exist for the decriminalization of drugs. Thus, this tells us that judges tend to agree more with rights and liberties that have been already settled by the legislative or the Supreme Court—which is typical of a positivist legal culture.

Graph 6 also tells us about the minority groups or liberties that judges would be more inclined to favor. Judges in Mexico tend to agree more with rights of the LGBT community than those of women or regarding personal liberties such as those derived from marihuana legalization.

Graph 6. Judges Ideas on Rights and Liberties

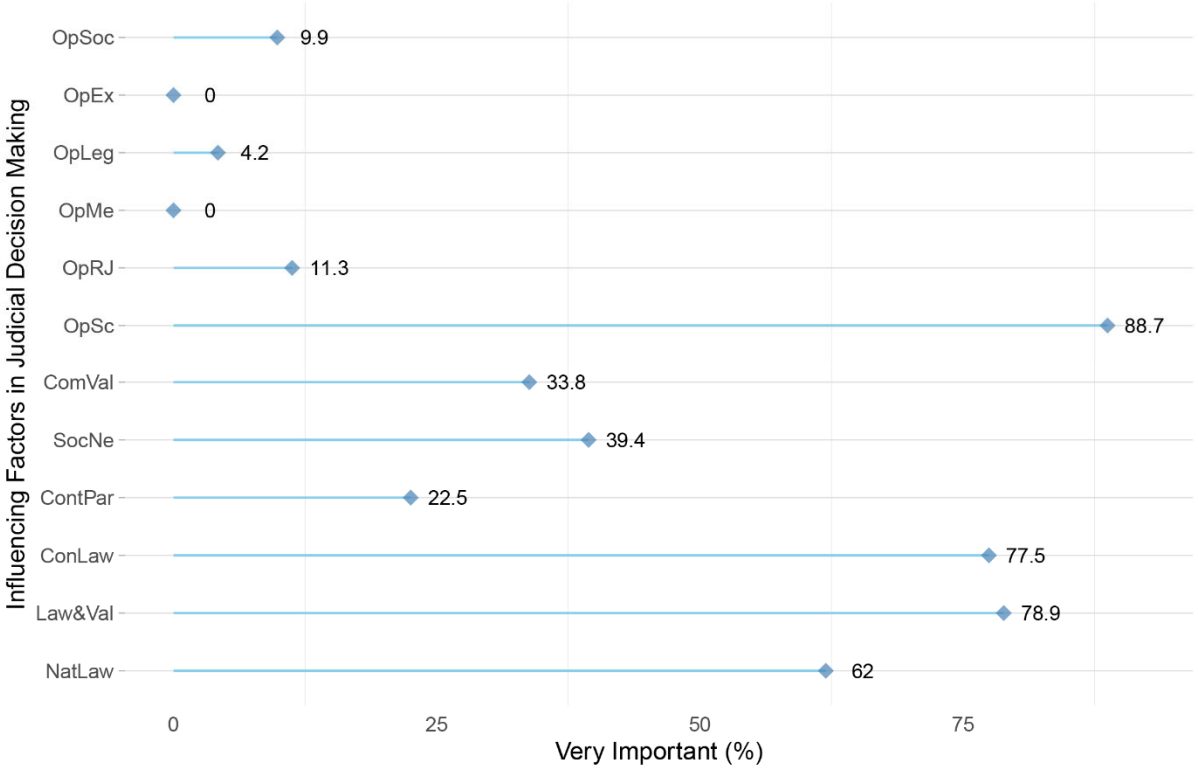


Source: Judicial Power in Mexico Questionnaire (2019).

As stated in Table 1, within a principled constitutionalist legal culture judges should consider principles and rules when writing down decisions. Thus, we can expect judges to weigh their own ideas about specific principles and those acquired from (or shared with) others in their communities when adjudicating on hard cases; that is, we can expect judicial decision makers to accept the fact of them being influenced by their contexts. We asked judges several questions that point to various factors affecting judicial decision-making, such as national law (NatLaw), national law and value-based criteria (Law&Val), conventional law (ConLaw), their contact with the involved parties during the judicial process (ConPar), the needs of society (SocNe), the values of the community (ComVal), and Supreme Court criteria or thesis (OpSC).

We asked also how important for them, when writing down a decision, subjective factors such as the opinions of a respected member of the legal community (OpRJ), the media (OpMe), representatives (OpLeg), the executive (OpEx), and the opinions of society (OpSoc) are. What Graph 7 below shows is that judges have a strong preference (between 60 percent and 90 percent) for mitigating factors related to the law: national law, conventional norms, and Supreme Court criteria. Noteworthy is that following the opinions of the Supreme Court (legal jurisprudence) finds the highest degree of agreement among respondents. This is because the Supreme Court determined that its legal jurisprudence is compulsory for subordinate judges (SCJN 2013), and, as several of them argued during interview, they can be sanctioned if they do not follow it. Some judges, however, also admitted that they can write a decision that justifies well why they are not applying on this occasion a particular criteria they do not agree with, for example when the case that is being decided on has relevant differences with the one in the context of which the Supreme Court's legal jurisprudence was formulated. This idea is supported, however, by around only 10 percent of the judges included in our sample.

Graph 7. When Handing Down Decisions, How Important for You Are the Following?



Source: Judicial Power in Mexico Questionnaire (2019).

Graph 7 also illustrates that judges have less preference (between 0 and 40 percent) for factors that might be related to the ideas, values, and beliefs others in their community hold about a case that is being decided on. Thus it can be argued that, when writing down a decision, a judge considers largely the law and her own value-based criteria, but is less open to accept the opinions, values, and ideas of others in her community—including the parts involved in the case she is adjudicating on. From Graph 7 we can also observe that judges firmly reject the idea of taking into consideration the opinions of the executive (OpEx), the media (OpMe), and of representatives (OpLeg) when writing down a decision.

These ideas are consistent with a positivist legal culture, but above all with the particular conception judges have of judicial independence. In other words, they were educated, trained, and have developed their practice within a legal community that believes judges ought to take objective decisions isolated from politics, from society and its needs, because this fact guarantees reaching an impartial and independent verdict. Their notions of independence and impartiality are equated with apoliticism. Additionally, when conducting the interviews, one judge told us that he would not take into account the values or opinions that a given community has on a case because people have different ones—so what might be appropriate for some

groups (i.e. child adoption by LGBT couples) might not be for others. He consequently preferred leaving out from his decision the values, ideas, and opinions of others, including of the affected group(s) or individual(s).

As can be seen, the legal culture of judges in Mexico reveals a clear tension between positivist and principle-based constitutionalist ideas. On the one hand, we find judges willing to legislate from the bench (create law); on the other, ones who prefer judicial restraint or to show deference to representatives in order to respect the majoritarian principle of democracy. These results indicate that the Mexican judiciary is in transition from a positivist legal culture to a principle-based constitutional one. This is consistent with trends in other Latin American countries, where the same shift in legal culture has been identified in recent years (González-Ocantos 2016; Couso 2010). Within this context, we can expect to find judicial rulings that in some cases transform and advance rights—but also ones that (as in previous decades) have contrariwise preserved the status quo, especially in hard cases. Research that draws on judicial decisions that claim rights for disadvantaged groups such as women, migrants, rural workers, indigenous people, or the LGBT community would help better inform this hypothesis.

5 Final Remarks

In this work I have contributed to the advancement of the theoretical understanding and the empirical observation of the concept of "legal culture" by bringing together three different scholarships: Socio-Legal Studies, Judicial Politics, and Philosophy of Law. The measurable indicators that have been presented can further the study of judicial behavior by giving content to one of its main determinants: the legal culture of judges. That is, their ideas, values, attitudes, and beliefs.

I then engaged in the analysis of one of the least studied political elites: intermediate federal judges. My contribution here is methodological and empirical. Different to other works that center their analysis on Supreme Court justices, I collected data from intermediate and specialized units of the Mexican federal judiciary: judges in circuit (unitary and collegial) courts, district courts, and the electoral court. This has helped provide a more accurate picture of the judiciary in Mexico than looking only at its highest court does. This work also put forward a different type of data (survey data) to portray judges' ideas, values, attitudes, and beliefs, and to draw inferences about judicial behavior. Conventionally judicial decisions and votes have been used to deduce ideology, values, and attitudes among judges (Shapiro 1964: 311; Segal and Spaeth 1993), while other works have used also legal scholarship (Couso 2010).

From the data we learned that the Mexican judiciary struggles between two models of legal culture. Judges there do not widely (or publicly) embrace their political role or their legislative power, thus we can expect not to see an activist judiciary whose judges frequently alter the pathways of the political and social landscapes. More than 20 years after the judicial reform that empowered the judiciary in Mexico, a significant number of judges are still advocates of

judicial restraint—in other words, they refute the idea that they themselves have a role as policymakers. We can expect these judges to continue mechanically applying the law in their rulings then.

The evidence shows that Mexican judicial elites' legal culture is nurtured by both positivism and principle-based constitutionalism, thus we cannot talk about a single legal culture model among them. Mexican intermediate federal judges profess wide support for using their power to eradicate structural inequalities and have preferences that see them endorse liberties and the rights of minority groups. In judicial decision-making they claim to follow what is stipulated in norms, but also principles play their part—as posited in principle-based constitutionalism legal culture. Attitudes, however, are still dominated by a hierarchy wherein we find certain institutions perceived as being the most legitimate sources of decision-making: legislation or Supreme Court precedents are considered extremely important in determining the fairness of a norm, but preferences regarding the liberties and social rights that judges are eager to advance are too.

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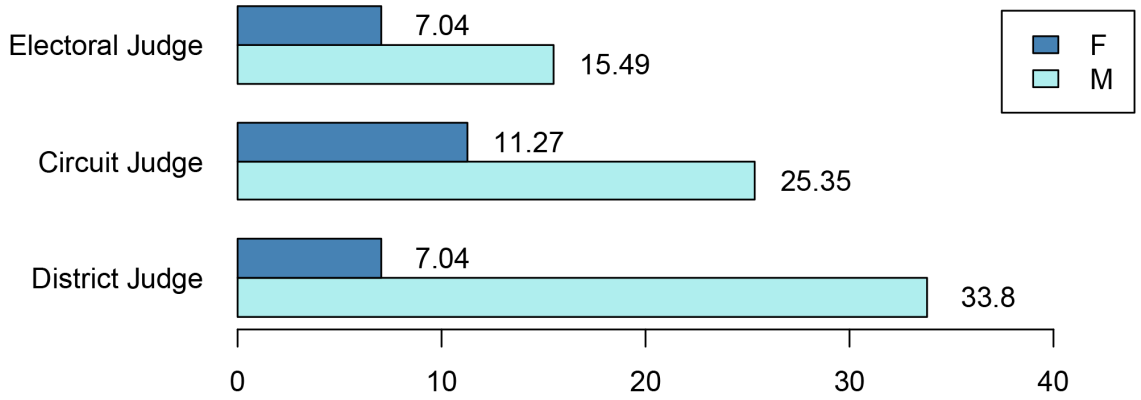
Appendix

The survey was conducted with judges of the federal judiciary in Mexico. At the end of 2018, there were 1,425 federal judges working for the judiciary there (INEGI 2019). In total, 71 judges answered the survey, of which 40 percent were district judges, 36.6 percent circuit court judges, and 22.5 percent electoral judges. Among respondents, 74.6 percent were male and 25.4 percent female. This resembles the overall breakdown of federal judges: 79.9 percent male and 20.1 percent female (INEGI 2019).

Graph A1. Position and Gender of Interviewees

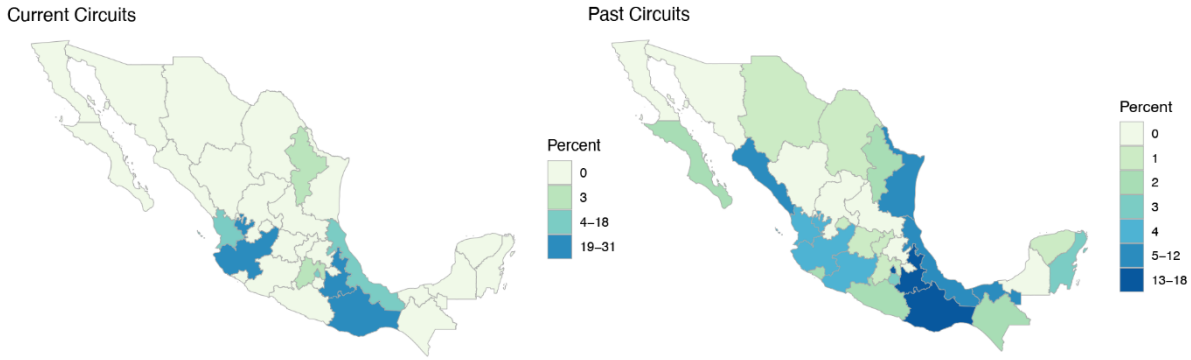


Source: Judicial Power in Mexico Questionnaire (2019).

Figure A1 below illustrates where respondents were serving at the time the data was collected, being distributed as following: Jalisco (30.9 percent), Oaxaca (18.3 percent), Puebla (18.3 percent), Nayarit (14 percent), Mexico City (8.4 percent), and Veracruz (4.2 percent), Nuevo León (2.8 percent), State of Mexico (2.8 percent). Transfers and relocations within the judiciary are high during the first years of one's career and for tenured positions (district and circuit judges).[11] District and circuit court judges in the sample had acquired experience across 25 out of the 32 judicial circuits in Mexico. Most of them had worked in at least two different circuits.

11 Electoral judges are not transferred, since they are appointed for nine years. After completing their time in office, some take up positions as district or circuit judges if they have previously passed the competitive examinations organized by the judicial council.

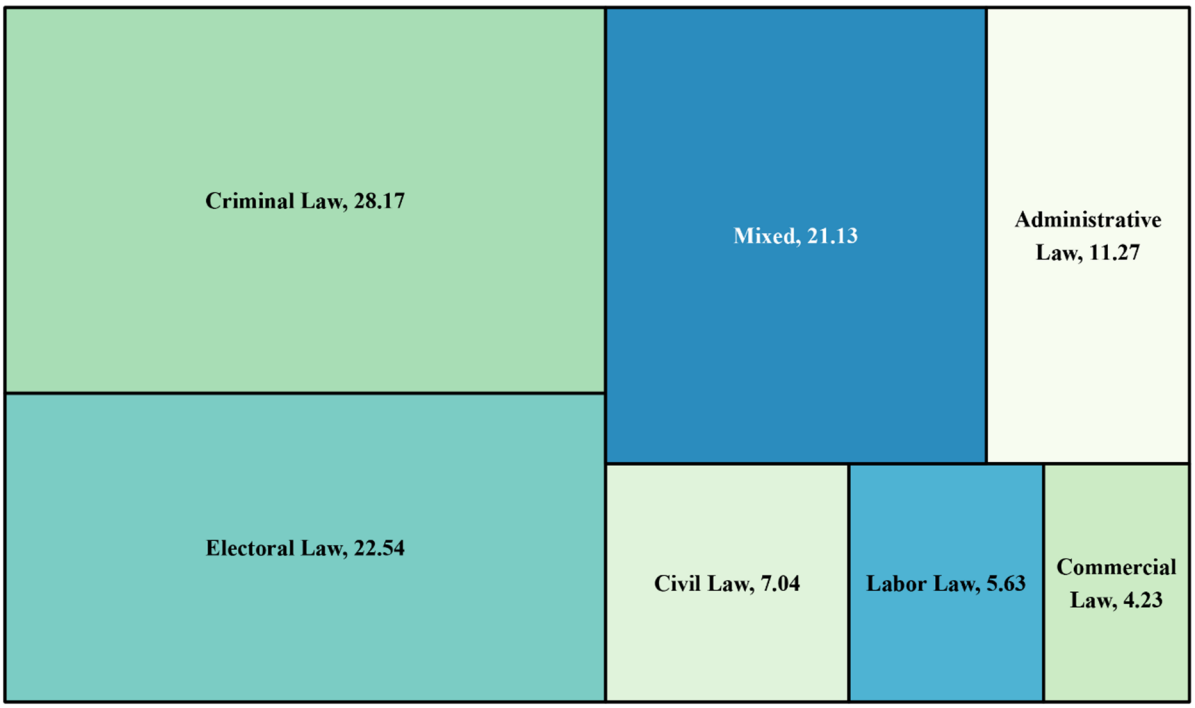
Figure A1. Current and Previous Judges' Circuit Adscription



Source: Judicial Power in Mexico Questionnaire (2019).

The types of law courts that were covered are: criminal, administrative, civil, labor, commercial, electoral, and one called mixed, in which the judge decides all types of cases. The following figure shows the proportions for each type.

Figure A2. Type of Law Matter in the Sample



Source: Judicial Power in Mexico Questionnaire (2019).

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