

ARTICLE

Special Issue: Informal Judicial Institutions—Invisible Determinants of Democratic Decay

# Informality as a Virtue: Exploring Positive Informal Judicial Institutions

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## Abstract

Most scholarly writings focus on the harmful effects of informal institutions. This article explores the positive influence of informal judicial institutions on the fundamental values of judicial systems. It develops a framework for assessing such institutions. The paper argues that the normative evaluation of informal judicial institutions is highly context-specific. Depending on their historical trajectories, different jurisdictions may emphasize different interests. Because of this, when evaluating informal judicial institutions, balancing the same values may yield different results in different jurisdictions. The recent trend towards formalization, supported by supranational institutions, goes hand-in-hand with the spreading narrative of good governance, emphasizing principles such as transparency or inclusion, principles that generally stand in tension with informality. This article cautions against emerging supranational templates insensitive to local practice.

**Keywords:** Informal institutions; informal practices; courts; judiciary; rule of law; democracy; judicial independence

## A. Introduction

Literature largely agrees that informal institutions matter, in some instances probably even more than formal ones. Yet, they remain understudied. This holds true even more for informal judicial institutions. Existing writings on these focus on negative instances, such as corruption,<sup>1</sup> nepotism,<sup>2</sup> or clientelist networks,<sup>3</sup> and on jurisdictions in Latin America, Africa, Asia, or Eastern Europe. Informal judicial institutions with positive influences have been largely overlooked.

The article fills this gap by exploring positive informal judicial institutions, with an emphasis on European jurisdictions. By positive informal judicial institutions, I mean those that positively influence at least one of the fundamental values of judicial systems in liberal democracies, such as procedural fairness, efficiency, accessibility, public confidence in the courts, judicial independence, integrity, propriety, competence, accountability, or transparency.

The general goal is to explore positive informal judicial institutions. I use instances mainly from case studies in this special issue and further enrich them with examples from elsewhere. Identifying and organizing instances of positive informal judicial institutions represent a

<sup>1</sup>See Maria Popova, *Why Doesn't the Bulgarian Judiciary Prosecute Corruption?*, 59 PROBS. POST COMMUNISM 35 (2012).

<sup>2</sup>See Samuel Spáč, *The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia*, 69 PROBS. POST COMMUNISM 528 (2022).

<sup>3</sup>See Alena Ledeneva, *Blat and Guanxi: Informal Practices in Russia and China*, 50 COMPAR. STUD. SOC'Y & HIST. 118 (2008).

contribution in themselves, as this is the first sketch of its kind. Moreover, I propose a framework for assessing informal judicial institutions based on the relationship between formal and informal institutions. The framework specifies circumstances in which informality may be justified. The focus on positive examples enriches the scholarship on informal institutions by exposing the potential of informality for experimenting. When an informal institution succeeds, formalization can follow.

I claim that the normative evaluation of informal judicial institutions is highly dependent on context. Individual jurisdictions follow different historical trajectories, and the balancing exercise between competing interests may result in emphasis being placed on different fundamental values of judicial systems. The same informal judicial institution may benefit those fundamental values in one jurisdiction but harm them in another. The normative assessment largely depends on the criteria we employ. Typically, informal judicial institutions serve one or more competing interests.<sup>4</sup> Preferring some interests at the expense of others creates winners and losers.<sup>5</sup> Therefore, the article advises caution against the current supranationally supported general drive towards one-size-fits-all blueprints.

Spreading the narrative of good governance, associated with principles such as transparency or inclusion, further boosts gradual formalization. Informal networks, gentlemen's pacts, and similar examples of informal institutions defy the new important principles. Continuing explicit proceduralization shrinks the space for informality, including its positive features. Flexibility represents the main draw of informality. Practice can change more smoothly than in the case of formal rules. Informality can encourage experimentation with the most fitting responses to the situation. Informality may also promote trust among actors as they cannot rely on authoritative enforcement by the state.

Attacks on the judiciary and the corresponding rule of law backsliding are among the most debated internal issues in the EU and its member states. Exploring ways in which informal institutions enhance the fundamental values of judicial systems can contribute to understanding what makes judiciaries more resistant to political attacks. Building such judiciaries may, in the long run, enhance their resistance to abuses and increase the quality of decision-making.

The article proceeds with mapping the state of the art on the positive impacts of informal institutions (Section B). It uses legal, political science, sociological, and economic literature to learn about positive informal institutions and gain insights applicable specifically to informal judicial institutions and their impact on the fundamental values of judicial systems. Section B also introduces the framework for the evaluation of informal judicial institutions. Section C systematizes examples of positive informal judicial institutions. Section D elaborates on their ambivalent nature and argues against ordained uniform formalization. Section E concludes and discusses what the inquiry into the positive informal judicial institutions brings to the scholarship on informal institutions.

## B. Informal Institutions and Their Positive Influence

The literature on institutions warns against overreliance on formal institutions when studying social reality.<sup>6</sup> North points out the pervasiveness of informal constraints, stating that “formal rules, in even the most developed economy, make up a small . . . part of the sum of constraints that shape choices.”<sup>7</sup> Informal institutions were of a “crucial nature” in developing inclusive political

<sup>4</sup>Occasionally, we can find examples of entirely negative or positive informal judicial institutions.

<sup>5</sup>See also Bernard Chavance, *Formal and Informal Institutional Change: The Experience of Postsocialist Transformation*, 5 EUR. J. COMPAR. ECON. 57, 67 (2008).

<sup>6</sup>See Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSP. ON POL. 725, 725–26 (2004). See also András Jakab, *Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary*, 68 AM. J. COMPAR. L. 760, 761 (2020).

<sup>7</sup>See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 36 (1990).

institutions,<sup>8</sup> relevant in the establishing and functioning of democracies,<sup>9</sup> judicial independence,<sup>10</sup> decentralization reforms,<sup>11</sup> property rights,<sup>12</sup> and an essential contributor to economic development.<sup>13</sup> In some areas, such as securing international trade, informal institutions can substitute for formal ones.<sup>14</sup>

Even in a highly formalized environment such as the judiciary, “in everyday practice informal rules compete with, and even overshadow, official rules.”<sup>15</sup> The example from the Italian judicial system illustrates the point. The same formal institutions in southern and northern Italy in practice work very differently, despite the legal system and the judicial career path having been the same for more than 150 years.<sup>16</sup> Despite scholarly agreement on the high relevance of informal institutions, the volume of research on informal institutions has not yet matched the relevance attributed to it.

The concept of an informal institution has appeared only recently.<sup>17</sup> As it is a relatively young research topic, a consensus on its exact content has not yet emerged,<sup>18</sup> leading to divergent operationalizations in various studies.<sup>19</sup> The research on informal institutions suffers from the scarcity of data,<sup>20</sup> because informal institutions are often not readily observable.<sup>21</sup>

This paper uses Helmke and Levitsky’s definition of informal institutions as “socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels.”<sup>22</sup> *Ad hoc* informal acts and informal practices are subtler and less settled examples of informality than informal institutions.<sup>23</sup> Institutions comprise rules and enforcement mechanisms that constrain individual actions and structure incentives, hence increasing the

<sup>8</sup>See Daron Acemoglu & James A. Robinson, *Paths to Inclusive Political Institutions*, in *ECONOMIC HISTORY OF WARFARE AND STATE FORMATION* 3, 3 (Jari Eloranta et al. eds., 2016).

<sup>9</sup>See Alberto Alesina & Paola Giuliano, *Culture and Institutions*, 53 *J. ECON. LITERATURE* 898, 921 (2015).

<sup>10</sup>See Lisa Hilbink, *The Origins of Positive Judicial Independence*, 64 *WORLD POL.* 587, 587 (2012).

<sup>11</sup>See Luciano Mauro, Francesco Pigliaru & Gaetano Carmeci, *Decentralization and Growth: Do Informal Institutions and Rule of Law Matter?*, 40 *J. POLY MODELING* 873, 900 (2018).

<sup>12</sup>See Claudia R. Williamson & Carrie B. Kerekes, *Securing Private Property: Formal Versus Informal Institutions*, 54 *J. L. & ECON.* 537, 538–39 (2011).

<sup>13</sup>See Claudia R. Williamson, *Informal Institutions Rule: Institutional Arrangements and Economic Performance*, 139 *PUB. CHOICE* 371, 377 (2009).

<sup>14</sup>See Se Mi Park, *The Interrelation between Formal and Informal Institutions through International Trade*, 29 *REV. INT’L ECON.* 1358, 1361–62 (2012).

<sup>15</sup>Björn Dressel & Tomoo Inoue, *Informal Networks and Judicial Decisions: Insights from the Supreme Court of the Philippines, 1986–2015*, 39 *INT’L POL. SCI. REV.* 616, 621 (2018). See also Krygier, *Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?*, in *GETTING TO THE RULE OF LAW* 87 (James E. Fleming ed. 2011); see also Rachel Ellett, *Rethinking Law and State Building in Sub-Saharan Africa*, 41 *L. & SOC. INQUIRY* 471, 473 (2016) (discussing Kleinfeld’s new insights and dilemmas).

<sup>16</sup>See Guido Tabellini, *Culture and Institutions: Economic Development in the Regions of Europe*, 8 *J. OF THE EUR. ECON. ASS’N* 677, 678 (2010).

<sup>17</sup>See Jack Barbalet, *Conceptualising Informal Institutions: Drawing on the Case of Guanxi*, 74 *BRIT. J. SOCIO.* 70, 72 (2023).

<sup>18</sup>Some might even disagree with the concept of an informal institution as such. See, e.g., Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19 (Mary C. Brinton & Victor Nee eds., 1998). Nee and Ingram define an institution as “a web of interrelated norms—formal and informal—governing social relationships”. I.e., they use the term institution without the adjective informal, as informality imprints itself into some of the norms that govern relationships within an institution.

<sup>19</sup>See Katarzyna Bentkowska, *Response to Governmental COVID-19 Restrictions: The Role of Informal Institutions*, 17 *J. INST. ECON.* 729, 731 (2021).

<sup>20</sup>See Adnan Efendic, Geoff Pugh & Nick Adnett, *Confidence in Formal Institutions and Reliance on Informal Institutions in Bosnia and Herzegovina*, 19 *ECON. TRANSITION* 521, 522 (2011).

<sup>21</sup>See Ledeneva, *supra* note 3, at 119.

<sup>22</sup>Helmke & Levitsky, *supra* note 6, at 727.

<sup>23</sup>Compare Katarina Šipulová & David Kosař, *Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries*, in this issue, and Hans-Joachim Lauth, *Informal Governance and Democratic Theory*, in *INTERNATIONAL HANDBOOK ON INFORMAL GOVERNANCE* 49–50 (Thomas Christiansen & Christine Neuhold eds., 2012) (presenting a slightly different nomenclature with similar content).

predictability of human interactions.<sup>24</sup> While formal laws can rely on enforcement by a central political power, informal norms are not enforced by a third-party political authority but by social mechanisms.<sup>25</sup> Interpersonal networks also play a special role in both generating and enforcing informal norms.<sup>26</sup>

### *1. The Interplay Between Formal and Informal Institutions*

The following section meditates on the interplay between formal and informal institutions in relation to the beneficial influence of informal institutions. It does not include scenarios such as legalism, that is, situations dominated by formal institutions where social networks are irrelevant.<sup>27</sup> Equally, it omits situations where informal institutions exist but do not clearly count as positive. It follows then that three basic scenarios can emerge: (1) Formal institutions remain largely absent while informal institutions dominate and enhance the fundamental values of judicial systems, (2) formal and informal institutions are congruent, and informal institutions further improve the design or functioning of formal institutions, they “fill-in gaps” left by formal institutions, (3) formal and informal institutions conflict, with informal institutions rectifying the poor design or functioning of formal institutions.

Various authors have proposed further fine-tuning of the basic conflict and congruence classification. For example, Helmke and Levitsky consider whether formal institutions are effective or ineffective, and whether outcomes of the formal/informal interplay are convergent or divergent. Complementary informal institutions typically “fill-in gaps” or serve as a foundation for formal institutions, leading to convergent outcomes. Accommodating informal institutions arise by creating incentives to change the substantive effects of formal rules without directly violating their letter.<sup>28</sup> When formal institutions are ineffective, informal institutions can act as competing, that is, followed instead of formal rules, or substitutive, where they help to achieve results that formal rules do not deliver.<sup>29</sup> In all these scenarios, informal judicial institutions may have positive influences.

Considering the sequence of occurrences of institutions brings with it another nuance. Informal institutions can both precede and follow formal institutions. Formal rules often cement pre-existing informal institutions into the form of official law with its own enforcement machinery. Informal institutions also frequently emerge after formal rules, typically when they fill-in existing gaps due to an overly vague legal framework or when inefficient formal rules are procedurally difficult to change. Informal institutions thus provide the opportunity to replace them in practice. If informal institutions perform well, they can trigger a reform of the original unsatisfactorily performing formal institutions.<sup>30</sup> Such gradual formalization of informal patterns may form a cycle, once formal rules are put in place, other informal institutions based on those formal rules will arise.<sup>31</sup>

<sup>24</sup>See Yusheng Peng, *When Formal Laws and Informal Norms Collide: Lineage Networks Versus Birth Control Policy in China*, 116 AM. J. SOCIO. 770, 772 (2010).

<sup>25</sup>See Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. (1986) (noting the limited strength of the law, which in most cases works only as a supplement to, and not a replacement for the informal enforcement).

<sup>26</sup>See Peng, *supra* note 24, at 772–73.

<sup>27</sup>See *id.* at 777.

<sup>28</sup>It is not entirely clear why formal rules are considered effective when their wording is followed but the spirit is not. Legal interpretation does often consider also elements other than strictly the wording of a formal rule.

<sup>29</sup>See Helmke & Levitsky, *supra* note 6, at 728–30. See also Vito Amendolagine & Nadia von Jacobi, *Symbiotic Relationships among Formal and Informal Institutions: Comparing Five Brazilian Cultural Ecosystems*, 47 ECON. SYS. (2023); Justin T. Callais, Israt Jahan & Jamie Bologna Pavlik, *Institutional Quality and Development: On the Role of Informality*, 55 J DEV. AREAS 343, 356 (2021).

<sup>30</sup>See Kellee S. Tsai, *Adaptive Informal Institutions and Endogenous Institutional Change in China*, 59 WORLD POL. 116, 117–18 (2006).

<sup>31</sup>See Philip Selznick, *Foundations of the Theory of Organization*, 13 AM. SOCIO. REV. 25, 27 (1948). See also Chavance, *supra* note 5, at 59–61 (providing an overview of other possible ways of looking at the relationship between formal and informal institutions).

## II. How to Evaluate Informal Judicial Institutions

As already noted, informal institutions are typically studied as negative phenomena occurring mainly in non-democratic or transitional countries.<sup>32</sup> Such informal institutions as corruption and clientelism often occur when formal institutions fail, further worsening the quality of democracy.<sup>33</sup>

Informal institutions also thrive in democracies,<sup>34</sup> with both negative and positive influences. At times, informal institutions can even supersede formal laws, as Ellickson's famous study of cattle ranchers in Shasta County, California, shows.<sup>35</sup> The informal, traditional, live-and-let-live norm benefitted from its straightforwardness. Ranchers relied on the "good neighbors" approach, rather than on a more complicated set of formal legal rules on cattle trespassing.<sup>36</sup> Similarly, informal rules may limit the negative consequences of misguided new formal rules.<sup>37</sup> Culturally derived informal constraints in particular typically show high levels of inertia and slow down the diffusion of the new formal rules.<sup>38</sup> The prevalence of competing informal institutions existing alongside formal institutions alerts the government about the ineffectiveness of formal rules.

One of the main reasons why literature prefers formal institutions is their clarity. Law defines obligations much more clearly and in much greater detail than informal norms.<sup>39</sup> Formal institutions support positive values such as transparency and predictability. Against this perspective, informal institutions offer flexibility. Their very lack of detail and not-so-precisely defined obligations makes them attractive. When formal institutions do not work, the informal ones can step in as a problem-solving device and compensate for formal institutional voids.<sup>40</sup> Informal institutions may also react more flexibly to a change in external conditions than formal institutions.<sup>41</sup> Updating formal institutions requires following often demanding legal procedures, while adjusting informal ones can proceed through sufficiently wide acceptance of the behavioral change. Informal institutions can further complement formal ones by increasing efficiency, easing decision-making, or facilitating negotiation.<sup>42</sup>

Authors often evaluate the relationship between informal institutions and democracy as conflictive. Informal institutions are suspected of a hostile stance towards democratic institutions,

<sup>32</sup>See Alena Ledeneva & Adnan Efendic, *The Rules of the Game in Transition: How Informal Institutions Work in South East Europe*, in THE PALGRAVE HANDBOOK OF COMPARATIVE ECONOMICS 811, 812 (Elodie Douarin & Oleh Havrylyshyn eds., 2021). See also Alena V. Ledeneva, *HOW RUSSIA REALLY WORKS: THE INFORMAL PRACTICES THAT SHAPED POST-SOVIET POLITICS AND BUSINESS* 22 (2006) (showing that some authors associate negative connotations with the adjective "informal": For example, Ledeneva perceived informal practices as "... strategies that infringe on, manipulate, or exploit formal rules ..."); Ledeneva, *supra* note 3, at 141 (showing the same author in a later work noting that informal practices may be a solution to the defects in formal institutions).

<sup>33</sup>See Sinisa Marcic, *Informal Institutions in the Western Balkans: An Obstacle to Democratic Consolidation*, 17 J. BALKAN & NEAR E. STUD. 1, 4 (2015).

<sup>34</sup>See Hans-Joachim Lauth, *Informalität, informelle Institutionen und Praktiken*, 11 ZEITSCHRIFT FÜR VERGLEICHENDE POLITIKWISSENSCHAFT 489, 490 (2017) (stating it remains unclear whether informal institutions play a less important role in established democracies than in young ones).

<sup>35</sup>See Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

<sup>36</sup>See Robert C. Ellickson, *The Aim of Order Without Law*, 150 J. INST. & THEORETICAL ECON/ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 97, 97–98 (1994).

<sup>37</sup>See Chavance, *supra* note 5, at 61.

<sup>38</sup>See NORTH, *supra* note 7, at 45.

<sup>39</sup>See Axelrod, *supra* note 25, at 1106–107.

<sup>40</sup>See Justin W. Webb, Theodore A. Khoury & Michael A. Hitt, *The Influence of Formal and Informal Institutional Voids on Entrepreneurship*, 44 ENTREPRENEURSHIP THEORY & PRAC. 504, 507 (2020).

<sup>41</sup>See Nee & Ingram, *supra* note 18, at 36 (stating informal norms can "bend the bars of the iron cage" of the formal rules).

<sup>42</sup>See Christine Reh, *Informal Politics: The Normative Challenge*, in INTERNATIONAL HANDBOOK ON INFORMAL GOVERNANCE 65, 68–69 (Thomas Christiansen & Christine Neuhold eds., 2012).

which they supposedly intend to eliminate or use for their own purposes.<sup>43</sup> Such preconceptions typically arise from the studies of a special type of relatively closed informal institution, such as mafia,<sup>44</sup> blat, guanxi,<sup>45</sup> etc., which can to a large extent, substitute for the operation of formal institutions. In order to evaluate the influence of informal institutions on the fundamental values of judicial systems in liberal democracies as positive or negative, we need to identify criteria for evaluation. In other words, when we say that something is good or bad, we should also articulate the reasons for which we conclude that it is good or bad.

Lauth proposed two classical criteria for assessing informal institutions which can also help to identify instances of positive informal judicial institutions: First, effectiveness and efficiency, an output-oriented criterion, and second, democratic procedure and legitimacy, an input-oriented criterion.<sup>46</sup>

The output-oriented criterion focuses on effective goal attainment, meaning prompt delivery and facilitating acceptability. In other words, we ask whether an informal institution contributes to successful problem-solving and compliance.<sup>47</sup> The closed nature of informal networks and some shared characteristics between their participants—alma mater, gender, ethnicity, etc.—may facilitate agreements and problem-solving. The output-oriented criterion is not free from controversies. Chavance has pointed out that informal rules and their interaction with formal ones may create beneficial and detrimental consequences for different groups.<sup>48</sup>

The second, input-oriented, criterion focuses on procedural aspects which enhance legitimacy. These procedural aspects include values such as inclusive participation, deliberation based on the use of arguments, or accountability.<sup>49</sup> Informality, as such, has an uneasy relationship with input legitimacy standards. Its closed, secluded nature typically contradicts inclusion, deliberation, transparency, and accountability.<sup>50</sup>

Democracy and the rule of law are concepts which are too broad and fuzzy<sup>51</sup> to serve as yardsticks for assessing informal institutions. This paper instead chooses a narrower phenomenon and suggests evaluating whether a given informal judicial institution promotes one –or more– of the fundamental values of the justice system in liberal democracies. These values include procedural fairness, efficiency, accessibility, public confidence in the courts, judicial independence,<sup>52</sup> integrity, propriety, competence, accountability,<sup>53</sup> and transparency. Arguably, through enhancing the fundamental values of the justice system, positive informal judicial institutions also contribute to improving the quality of democracy and the rule of law.<sup>54</sup>

<sup>43</sup>See Hans-Joachim Lauth, *Formal and Informal Institutions: On Structuring Their Mutual Co-Existence*, 4 ROM. J. POL. SCI. 66, 67–68 (2004).

<sup>44</sup>See Anna Sergi & Alberto Vannucci, *Protection and Obedience. Deviant Masonry, Corruption, and Mafia in Italy*, 44 DEVIANT BEHAVIOR 1 (2023); James E. Anderson, *Trade and Informal Institutions*, in 2 HANDBOOK OF INTERNATIONAL TRADE: ECONOMIC AND LEGAL ANALYSES OF TRADE POLICY AND INSTITUTIONS 279 (E. Kwan Choi & James C. Hartigan eds., 2008); Hans-Joachim Lauth, *Informal Institutions and Democracy*, 7 DEMOCRATIZATION 21, 31–32 (2000).

<sup>45</sup>See Ledeneva, *supra* note 3 (showing cases that usually offer a much richer view of the ecosystems without simplifying binary views of good and bad).

<sup>46</sup>See Lauth, *supra* note 43, at 81.

<sup>47</sup>See Reh, *supra* note 42, at 71–72.

<sup>48</sup>See Chavance, *supra* note 5, at 67.

<sup>49</sup>See Reh, *supra* note 42, at 72–73.

<sup>50</sup>See *id.* at 79–80.

<sup>51</sup>See Stefan Voigt, *How (Not) to Measure Institutions*, 9 J. INST. ECON. 1, 2 (2013).

<sup>52</sup>See Shimon Shetreet, *Fundamental Values of the Justice System*, 23 EURO. BUS. L. REV. 61, 61 (2012).

<sup>53</sup>See ECOSOC Res. 2006/23, U.N. Doc. E/RES/2006/23 (July 27, 2006) (describing other four principles that were distilled from the Bangalore Principles of Judicial Conduct, or ECOSOC Resolution 2006/23), <http://www.refworld.org/docid/46c455ab0.html>.

<sup>54</sup>See Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001) (describing the heated debate about the relationship between the concepts of democracy and the rule of law); Jeremy Waldron, *The Rule of Law and the Role of Courts*, 10 GLOB. CONST. 91, 94 (2021); Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. OF POL. SCI. 345, 346 (2009). I do not have



Admittedly, these ideals predominantly represent the “Western” perspective.<sup>55</sup> Nevertheless, the jurisdictions examined here are predominantly European liberal democracies, with other jurisdictions serving more as illustrations of different approaches. Non-democracies typically lack one of the fundamental values—judicial independence. The distinction between liberal democracies and the rest is important here because the quality of democratic procedures matters for normative assessment.<sup>56</sup> In liberal democracies, informal institutions are typically complementary to formal ones and provide them with flexibility and social underpinning. In contrast, in defective democracies, informal institutions undermine formal ones and fill them with their own functional logic.<sup>57</sup>

As noted above, informal institutions usually require the balancing of competing interests. While they may score well in terms of output, informal institutions, almost by definition, face trouble dealing with standards of input legitimacy. In order to be considered a positive informal judicial institution, the benefits of its contribution to the fundamental values of the justice system have to outweigh the costs. In practice, the question will be whether the positive results of informal institutions can justify their inherent procedural drawbacks. The result of the particular evaluation of informal judicial institutions depends on the given circumstances in each jurisdiction. Because the balancing of interests takes place, the same institution can be perceived very differently at a different time, in a different place, or under changed conditions.

The relationship between informal institutions and transparency deserves special consideration. Informality generally implies a lack of transparency. The information is hidden from the public, and access to informal networks is restricted, which makes informality normatively problematic.<sup>58</sup> Anyways, transparency is only one of many values pursued by liberal democracies, neither the only one nor a hierarchically superior one. Therefore, the lack of transparency might be offset by an overriding benefit brought about by a different competing value. Moreover, informal institutions may increase transparency, for example, as an informal practice of broadcasting judicial proceedings, without a law approving such a possibility.

### III. The Framework for the Evaluation of Informal Judicial Institutions

Based on the conviction in the literature that in liberal democracies informal institutions should complement formal ones, I propose a framework for evaluating informal institutions. Informality provokes suspicions. Modern liberal democracies aspire to bring formal rules into conformity with social “reality,” which applies even more strongly in the case of highly formalized hierarchical judiciaries. Formal rules acquire their legitimacy from the legislative process through which elected representatives of the people, after proper deliberation, adopt laws. Informal institutions do not undergo this deliberative process, yet they sometimes become the “rules of the game.”

The whole framework builds on the level of (dis)agreement between informal and formal institutions. The greater the discord between the informal and the formal, the greater the benefits to the fundamental values of judicial systems the informal institution has to bring to be evaluated as positive.

The least controversial scenario for informal institutions is “filling in gaps” when formal rules are completely missing or are too general. When informal institutions follow the purpose and spirit of formal rules no controversies should arise, except the usual trouble informal institutions

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any ambition to participate in this debate at the moment. My general assumption, that improving fundamental values of judicial systems beneficially contributes to the quality of democracy and the rule of law, will be quite uncontroversial. At the same time, I am aware of potential conflict between the ideals, which may require occasional trade-offs.

<sup>55</sup>See Nick Cheesman, *Rule-of-Law Ethnography*, 14 ANN. REV. L. & SOC. SCI. 167, 169 (2018).

<sup>56</sup>See Thomas Christiansen & Christine Neuhold, *Informal Politics in the EU*, 51 J. COMMON MKT. STUD. 1196, 1202 (2013).

<sup>57</sup>See Wolfgang Merkel & Aurel Croissant, *Formale und informale Institutionen in defekten Demokratien*, 41 POLITISCHE VIERTELJAHRESSCHRIFT 3, 19 (2000).

<sup>58</sup>See Christiansen & Neuhold, *supra* note 56, at 1202.

have with input legitimacy. With the general trend of increasing formalization, the space for informal institutions to act in their filling-in-gaps capacity shrinks.

What I call “tightening” represents a more problematic scenario. Tightening arises when a formal rule sets a certain norm, but informal practice institutionalizes a stricter version of that formal rule, for example, when candidates for constitutional justice positions formally have to be over 40 years of age, yet in practice the appointing body will only seriously consider candidates who are over 50. Tightening narrows down the set of possible outcomes.

“Loosening” would be a further step up on the controversiality ladder. An informal institution in this scenario directly contravenes a formal rule, hence making it a special subset of the following category, “directly contradicting.” If a law requires that candidates for constitutional justice posts formally have to be over 40 years old, but in practice the appointing body will seriously consider also candidates who have reached 35, that is loosening. It informally expands the set of possible outcomes by practicing looser standards than the law requires.

Informal institutions “directly contradicting” formal rules represent the most problematic scenario, which raises the highest hurdle for justification of such informal institutions. Formal rules enjoy democratic legitimacy, and directly contradicting informal institutions thus grossly violates democratic standards.<sup>59</sup> It can be legitimized only rarely, by providing an exceptional overriding good.

### C. Positive Informal Judicial Institutions in Action

European liberal democracies vary in the extent of their formalization of the judiciary. Some countries, such as the UK or Ireland, have long relied on informality in judicial governance and the organization of judicial decision-making, while others, such as Spain, have produced very detailed rules. These fundamental built-in differences in reliance on informal institutions have crucial repercussions for evaluating individual informal judicial institutions. Informal judicial institutions do not exist in vacuums and therefore cannot easily be transplanted elsewhere.<sup>60</sup> Informal judicial institutions are deeply embedded in their wider judicial institutional framework, which includes formal norms, and a given set of actors typical for a given jurisdiction.<sup>61</sup> Jurisdictions differ in the type of networks among groups of actors and their power configurations. Informal judicial institutions may work differently even in courts in the same jurisdiction, depending on their level in the judicial hierarchy, such as local versus apex courts, or the area of law they deal with, like private versus public law. These remarks aim to signal that general decontextualized labeling of informal judicial institutions as positive or negative does not work so easily in practice.

All local developments happen in wider European and international contexts. Specifically in relation to the judiciary, the European Union (EU) and the Council of Europe (COE) promote the adoption of the formalized “Euro-model” of governance of the judiciary,<sup>62</sup> with the judges position being strengthened at the expense of politicians. Globally, the concept of good governance has influenced public decision-making since the mid-1990s.<sup>63</sup> Good governance stresses principles such as responsiveness, the rule of law, efficiency and effectiveness, transparency, ethical conduct,

<sup>59</sup>See *id.*

<sup>60</sup>See Stephan Haggard, Andrew MacIntyre & Lydia Tiede, *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205, 221 (2008); Sally Engle Merry, *The Rule of Law and Authoritarian Rule: Legal Politics in Sudan*, 41 L. & SOC. INQUIRY 465, 470 (2016).

<sup>61</sup>See Nee & Ingram, *supra* note 18, at 31 (showing a simplified model).

<sup>62</sup>See Michal Bobek & David Kosar, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GER. L.J. 1257 (2014).

<sup>63</sup>See Bo Rothstein, *Good Governance*, in THE OXFORD HANDBOOK OF GOVERNANCE 143, 143 (David Levi-Faur ed. 2012).



diversity, accountability,<sup>64</sup> and impartiality,<sup>65</sup> or non-arbitrariness. Some of these principles, namely transparency and diversity, stand in tension with informal institutions, which tend to be non-transparent and non-inclusive.

This section discusses examples of positive informal judicial institutions structured according to their sites of occurrence. Specifically, they manifest themselves in the governance of the judiciary, in the organization of judicial decision-making, and in off-bench judicial activities.

### I. Positive Informal Judicial Institutions in the Governance of the Judiciary

Governance of the judiciary covers mainly the organization of the justice system and judicial careers, especially judicial appointments, promotion, and disciplining.

In contrast to highly formalized systems of judicial governance and judicial decision-making, common-law countries do not perceive informality as *per se* threatening. The judiciaries in England and Wales and in Ireland build on judges who join the profession only at a later stage in their successful legal careers and do not necessarily want to progress in the judicial hierarchy. By focusing on entry to the judiciary, which traditionally invites people with a strong sense of independence, the systems de-emphasize the disciplining of judges, which occurs largely informally. They rely on senior judges to set general values and role orientations. Lived experiences help the judicial community to determine what works well.<sup>66</sup> Even though both England and Wales and Ireland have moved towards higher formalization in recent years, a comparatively high level of informality persists. Despite that, Ireland and the UK score very highly in the rule-of-law and democracy rankings.<sup>67</sup>

As a common law country with a rather small population and a very small number of judges who belong to a well-connected elite, Ireland counts as a clear candidate for a highly informal jurisdiction. This was the case until the mid-1990s. Judges would typically leave a successful career as a barrister or a solicitor, and would sit on the bench thanks to their network of political contacts. Despite the high level of informality and political involvement in the appointment process, judicial independence remained uncontested.<sup>68</sup> The culture of judicial independence was backed by the peer pressure and self-awareness of judges about their expected roles as impartial arbiters of disputes. Nevertheless, several judicial excesses occurred and the lack of a procedure for dealing with disciplinary misconduct appeared problematic. The usual chat between the offender and senior judges over a cup of tea proved too lenient for more serious misconduct which, nevertheless, fell short of the “nuclear option” of judicial impeachment.<sup>69</sup>

The occasional judicial scandals opened the domestic window of opportunity which met with supranational pressure towards formalization. The reforms introduced more explicit limits on the Government’s discretion in judicial careers which sought to strengthen formal independence and meritocracy. Moreover, after Supreme Court Judge Woulfe attended a dinner with many people connected to Irish politics, which was questionable in terms of anti-COVID rules,<sup>70</sup> new judicial

<sup>64</sup>See *12 Principles of Good Governance*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/good-governance/12-principles#%7B%2225565951%22:%5B2%5D%7D>.

<sup>65</sup>See Rothstein, *supra* note 63, at 151.

<sup>66</sup>See Sophie Turenne, *Informal Judicial Institutions—The Case of the English Judiciary*, in this issue.

<sup>67</sup>See *Democracy Index 2022*, ECONOMIST INTELLIGENCE, <https://www.eiu.com/n/campaigns/democracy-index-2022/>; see also WJP Rule of Law Index, WORLD JUSTICE PROJECT (2022), <https://worldjusticeproject.org/rule-of-law-index/global/2022>.

<sup>68</sup>See Patrick O’Brien, *Never Let a Crisis Go to Waste: Politics, Personality and Judicial Self-Government in Ireland*, 19 GER. L.J. 1871, 1871 (2018).

<sup>69</sup>Patrick O’Brien, *Informal Judicial Institutions in Ireland*, in this issue. Also in Israel, court presidents enjoy wide discretion in disciplining judges. A slow or improperly behaving judge may face an informal reprimand agreed upon by the court president and the Supreme Court president. See Guy Lurie, *The Invisible Safeguards of Judicial Independence in the Israeli Judiciary*, in this issue.

<sup>70</sup>See Laura Cahillane & David Kenny, *Lessons from Ireland’s 2020 Judicial Conduct Controversy*, 51 COMMON L. WORLD REV. 24, 25 (2022).

conduct rules were adopted in October 2022.<sup>71</sup> The Irish population seemed not to mind the comparatively informal character of judicial governance, as they believe in the independence of its courts and judges both in EU-wide comparison<sup>72</sup> and also compared to other domestic actors.<sup>73</sup>

Notwithstanding the recent formalization steps, various examples of positive informal judicial institutions in Ireland prevail. It has been a long-standing convention that at least one judge on the Supreme Court is a non-Catholic. More recently, judicial appointments should also consider gender balance in the Court.<sup>74</sup> Such an informal institution contributes to higher diversity and inclusion and, subsequently, more legitimate judicial decision-making.<sup>75</sup>

England and Wales also represents a largely informal jurisdiction. Until the 2005 Constitutional Reform Act, “a tap on the shoulder” from the Lord Chancellor’s Department served as a signal to apply for senior appointments. The Department received tapping tips from senior judges, who saw the candidates performing, for example, as barristers in their courtrooms. While this informal practice arguably selected candidates with an excellent skill set, it also perpetuated the old boys, private schools, Oxbridge networks. These networks held control over the meaning of a suitable profile of a judge. The 2005 reform increased transparency in judicial appointments and paved the way for greater diversity.<sup>76</sup>

The relatively closed nature of the elite judicial networks facilitates membership only for candidates who have earned the trust of the existing members. The strong sense of professionalism among judges translated into their authority to identify the boundaries of legitimate judicial behavior. Although ethical standards became formalized in England and Wales, primarily due to international triggers and the domestic push to increase public trust, the Guide to Judicial Conduct contains only a set of core principles.<sup>77</sup> It remains largely the task of judges to give meaning to general rules. Disciplinary issues are resolved mainly informally, so that formal actions do not spoil personal relationships.

Until recently, common law judiciaries relied on largely informally governed judicial careers. Appointing by tapping on shoulders and disciplining through chats over tea cemented the highly cohesive judiciary built around shared values and perceptions of the judicial role. The judiciary attracted highly qualified legal professionals, ensuring effective decision-making, and courts generally enjoyed solid public trust and the perception of their independence. Nevertheless, with the gradually increasing significance of good governance principles, highly informal systems started facing challenges in terms of transparency and diversity. Cohesive interpersonal networks tend to include members with shared characteristics—elite universities’ alumni, older men, etc.—and basic worldviews. A greater emphasis on overall openness, resulting in a considerably more diverse judiciary, may jeopardize the judiciary’s cohesion, especially if accomplished exclusively by the adoption of formal rules.

Even jurisdictions with largely informal decision-making influence on judicial appointments and disciplining may promote diversity and transparency. These require an environment of trust which manifests itself on several levels. First, the decision-makers, the judiciary, and the public should believe that diversity and transparency are values worth pursuing. Second, the public and the judiciary should trust that the decision-makers will adopt non-arbitrary decisions, even without formal rules. The informal option, in contrast to formalization, provides the

<sup>71</sup>See Patrick O’Brien, *Informal Judicial Institutions in Ireland*, in this issue.

<sup>72</sup>See EU Justice Scoreboard 2022, EUROPEAN COMMISSION, Figure 40, [https://commission.europa.eu/system/files/2022-05/eu\\_justice\\_scoreboard\\_2022.pdf](https://commission.europa.eu/system/files/2022-05/eu_justice_scoreboard_2022.pdf) (last visited Oct. 8, 2023) (showing that Ireland scored eight).

<sup>73</sup>See AN PHRÍOMH-OIFIG STAIDRIMH CENTRAL STATISTICS OFFICE, TRUST SURVEY DECEMBER 2021, (Mar. 4, 2022), <https://www.cso.ie/en/releasesandpublications/fp/fp-trus/trustsurveydecember2021/>.

<sup>74</sup>See Patrick O’Brien, *Informal Judicial Institutions in Ireland*, in this issue.

<sup>75</sup>See Rosemary Hunter, *More than Just a Different Face? Judicial Diversity and Decision-Making*, 68 CURRENT LEGAL PROBS. 119 (2015).

<sup>76</sup>See Sophie Turenne, *Informal Judicial Institutions—The Case of the English Judiciary*, in this issue.

<sup>77</sup>See Sophie Turenne, *Informal Judicial Institutions—The Case of the English Judiciary*, in this issue.

decision-makers with the flexibility to devise solutions best fitted to the situation. Nevertheless, such a system requires general trust that decision-makers will be able to do so and will not misuse their flexibility. These conditions in practice appear only in certain types of regimes. Endowing individuals with great powers in fragile regimes could lead to a dramatic deterioration in the fundamental values of judicial systems.

Formalization in contemporary jurisdictions is not binary (formalized or not); instead, we observe degrees of formalization. Some countries set only basic parameters using formal rules—typically, Ireland and England and Wales—while others adopt detailed laws, typically civil law jurisdictions.

Informal institutions emerge also in generally more formalized jurisdictions. They usually fill in the gaps left by formal rules, while in highly informal jurisdictions formal rules were missing or only rudimentary. The following paragraphs give examples of informality in judicial appointments and promotions. Informal practices manifest themselves, for instance, in considering certain traits, such as sex or ethnicity, to be represented in the judicial body, in giving various political actors a voice in the appointments, in procedural innovations, or in more demanding criteria on judicial candidates than are set by law.

Positive examples of informal judicial institutions from highly formalized jurisdictions include judicial appointments in the Constitutional Court of Belgium, where the Court's composition should respect the ideological composition of society.<sup>78</sup> Such an approach to filling vacancies on the Constitutional Court arguably enhances the legitimacy of the Court without compromising its output in terms of effectiveness, efficiency, and quality. In Germany, informality serves as a tool of coordination among elites, which helps to prevent the politicization of the judiciary and thus preserve its independence. The political desire to create and maintain a non-partisan Constitutional Court is reflected in the appointment process based on an informal system of alternating nominations of candidates by major mainstream political parties. This system will guarantee a democratically balanced, stable Court.<sup>79</sup>

Between 1992 and 2015, a judicial informal institution in Israel contributed to safeguarding political diversity in judicial appointments.<sup>80</sup> The opposition had a say in judicial appointments by reserving at least one seat from the two available seats, which on the Knesset held in the Selection Committee. This informal practice contributed to the depoliticization of the selection process, and the related preference for merit over ideology, promoting independence and efficiency.<sup>81</sup>

Until the 2022 reform, Czech laws on the governance of the judiciary—especially concerning decision-making on the crucial moments in judicial careers—such as appointments and disciplining, have left ample space for informal filling-in practices due to a lack of regulation of important details. The space, which provided court presidents with significant leeway when choosing judges for their courts, led both to a competitive merit-based system of appointments at some courts, and to non-transparent appointments at others.<sup>82</sup> Such a system depended to a large extent on the person in charge. The 2022 reform incorporated into law many elements that developed informally as good practices, such as the written test, interview before a five-member

<sup>78</sup>See Mathieu Leloup, *Informal Judicial Practices in the Belgian Legal Order: A Story of Incremental Reactive Development*, in this issue.

<sup>79</sup>See Silvia Steininger, *Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the Bundesverfassungsgericht*, in this issue.

<sup>80</sup>See Eliezer Rivlin, *Israel as a Mixed Jurisdiction*, 57 MCGILL L. J. 781 (2012) (characterizing Israel as a mixed system, where some common-law influences remain, but which becomes increasingly formalized).

<sup>81</sup>See Guy Lurie, *The Invisible Safeguards of Judicial Independence in the Israeli Judiciary*, in this issue.

<sup>82</sup>See, e.g., Vojtěch Blažek, *Manželka šéfa soudu se stala soudkyní. Proč právě ona, je záhadou*, SEZNAM ZPRÁVY, (Jul. 8, 2023), <https://www.seznamzpravy.cz/clanek/domaci-kauzy-manzelka-sefa-soudu-se-stala-soudkyni-vyhrala-konkurz-dukazy-o-tomchybi-233576> (describing the case of the wife of the vice-president at a Czech regional court who became a judge on the same court, no written documents exist affirming that she was the best out of the total of seven candidates).

panel, and optional probationary period.<sup>83</sup> Vague laws provide opportunities for informal experimentation. When more solutions develop, the most promising one can subsequently be formalized.

The Israeli judiciary developed an informal procedure to safeguard the quality of judges wishing to be promoted to the District Court. In 2007 the Supreme Court President established a two-member committee to assess the rulings of Magistrates' Court judges looking for promotion. Twelve years after creating the committee, the Supreme Court President issued a directive that formalized the successful informal institution helping to guarantee the professional credentials of the promoted judges.<sup>84</sup>

Some positive informal institutions emerged in judicial appointments to the apex courts. Vague legislation provides for flexibility, which in Canada led to the introduction of the informal system of consultation in Supreme Court appointments, arguably preferable to a less flexible, formalized nomination system.<sup>85</sup> The vague legal underpinning for the appointment of Czech Constitutional Court's judges facilitated a noteworthy informal innovation. The President of the Republic has the exclusive power to nominate constitutional justices. After some problematic—arguably, clientelist—nominations in the past, the new President in 2023 introduced an expert panel to perform a preselection for him. This practice of consulting experts when choosing candidates signifies a move towards a more structured system, which reduces personal arbitrariness and bolsters merit. The preselection practice conforms to the law and has the potential to bring benefits, without creating overriding costs.

Sometimes, informal institutions tighten formal rules to deliver better results, what we earlier described as a “tightening” scenario. India's Constitution prescribes three clear formal criteria to be fulfilled by candidates for a vacancy on the Supreme Court. Yet, informal practice has set the thresholds for eligibility much higher.<sup>86</sup> The informal eligibility criteria include expectations of a greater age than formally required to guarantee the candidate's maturity, greater seniority which promises experience, and making allowances for diversity to increase legitimacy.<sup>87</sup> Chandrachud problematizes this informal practice because it is not clearly defined, and hence, susceptible to arbitrary application. Moreover, informal institutions suffer from a democratic deficit because they do not undergo traditional democratic deliberation, including public debate.<sup>88</sup> While conforming to the law, the informal practice means that some eligible candidates will not be considered. To be evaluated as a positive example of informality, such a solution must have clear benefits for the fundamental values of judicial systems, in this case manifested especially in the efficiency and quality of judging.

## II. Positive Informal Judicial Institutions in the Organization of Judicial Decision-Making

This subsection deals with informality in judicial decision-making and its organization. Jurisdictions differ in the level of detail in rules on who should judge the cases and how. Case assignment provides particularly interesting material for studying informal practices.

Case assignment in England and Wales exhibits the filling-in-gaps type of informal practices in the parts of the process that in some continental jurisdictions are covered by detailed laws. For example, case assignment in the Court of Appeal remains largely informal and pragmatic. The practice shows that legal specialization serves as the first consideration when case allocation is

<sup>83</sup>See Ondrej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.

<sup>84</sup>See Guy Lurie, *The Invisible Safeguards of Judicial Independence in the Israeli Judiciary*, in this issue.

<sup>85</sup>See PAUL HOWE & PETER H. RUSSELL, *JUDICIAL POWER AND CANADIAN DEMOCRACY* 141 (2000).

<sup>86</sup>See ABHINAV CHANDRACHUD, *THE INFORMAL CONSTITUTION: UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA* 263 (2014).

<sup>87</sup>See *id.* at 275.

<sup>88</sup>See CHANDRACHUD, *supra* note 86, at 265.

being decided on. Judges overwhelmingly do not dispute the decision on case allocation.<sup>89</sup> While legal specialization should ensure expert treatment of the case, the following open exchange of opinions on the assigned judge's draft prevents the danger of the professional blindness of a narrow specialist's perspective. Such a practice arguably improves the quality of decisions. The practice relies on mutual trust. The court president assigns a case to the judge, who the president believes is best positioned to decide the dispute. And the legal ecosystem trusts the court presidents to manage case allocation well, in a non-arbitrary fashion.

Similarly, Israeli court presidents enjoy wide discretion in court management, including the allocation of cases. Seniority plays an important role in the Supreme Court's case allocation as the longest-serving judges decide the most significant cases.<sup>90</sup> In contrast, continental jurisdictions tend to limit the autonomy of court presidents for fear of misuse of their powers resulting in rigged case allocations.

Separate opinions provide fertile ground for informal judicial institutions. The Criminal Division of the Court of Appeal of England and Wales, in contrast to its Civil Division, developed an interesting informal practice of not issuing dissenting opinions, possibly so as not to give the impression that a switch of just one judge's opinion might completely change the convict's fate. Given the context, such an informal institution may be regarded as a positive example.<sup>91</sup>

The German Constitutional Court judges can formally issue separate opinions. Yet in practice, informally, justices refrain from pushing forward their dissenting opinions. Once they announce the intention to draft a separate opinion, the Senate plenary discusses the issue and seeks to find a consensus. Deliberation remains strictly confidential, hence, a change in the judge's position does not create any reputation costs. The pressure on consensus suppresses the individual visibility of judges. The deliberative culture promotes intense yet respectful discussions behind closed doors. When a judge loses an argument, the public will not know. The lack of transparency protects judges from undue influence. In particular it prevents judges from pushing partisan positions. Informality here serves as a shield against politicization and protects judicial independence. Informality cultivates loyalty, reciprocity, consensus-seeking, trust, and continuity. The Constitutional Court has managed to promote a communitarian spirit based on many informal practices, for example, respecting the seniority principle when assigning issue areas, allocating offices, or in the sitting order. Nevertheless, this comes at the cost of limiting access and reducing transparency. Public and non-mainstream political opinions are excluded. In response to the non-inclusivity critique, the practices gradually change.<sup>92</sup>

The Netherlands Supreme Court enabled members of multi-judge chambers to sit in deliberations on cases assigned to formations they were not part of within the chamber. This practice was aimed at ensuring legal uniformity within the chamber concerned.<sup>93</sup>

Interestingly, judiciaries in non-democratic or non-liberal jurisdictions also develop positive informal judicial institutions which impact fundamental values of liberal democratic judicial systems. Informal institutions can protect against attacks on the judiciary or help to improve the quality of judicial decision-making. Justices of the Supreme Constitutional Court of Egypt tended to leave some highly sensitive political cases on the docket as a counter-threat against the intrusion

<sup>89</sup>See Sophie Turenne, *Informal Judicial Institutions—The Case of the English Judiciary*, in this issue.

<sup>90</sup>See Guy Lurie, *The Invisible Safeguards of Judicial Independence in the Israeli Judiciary*, in this issue.

<sup>91</sup>See David Vitale, *The Value of Dissent in Constitutional Adjudication: A Context-Specific Analysis*, 19 REV. CONST. STUD. 83, 83–108 (2015) (discussing the general debate on the (non-)desirability of dissenting opinions which has been pending for a long time. As in the case of informal judicial institutions, one might want not to make sweeping conclusions but rather consider the specific context of an individual jurisdiction).

<sup>92</sup>See Silvia Steininger, *Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the Bundesverfassungsgericht*, in this issue.

<sup>93</sup>See Application no. 19365/19 Johanna KUIJT against the Netherlands, lodged on April 4, 2019. This practice is now being reviewed by the European Court of Human Rights because more judges than as statutorily defined hear cases.



by politicians. They warned the regime that if the Court's independence was curtailed, they would retaliate by delivering adverse rulings in those sensitive cases.<sup>94</sup>

A recent court reform in China abolished the approval process, whereby court superiors co-signed judicial opinions. It also sidelined the adjudication committees, which were comprised of panels of court leaders deciding high-stakes cases. In reaction to these developments, many courts informally established “conferences of professional judges” on various areas of law to provide judges with advice. When a case is too complex or the judicial panel disagrees, then the judges can submit it to the judicial conference for non-binding opinions.<sup>95</sup> Such an informal solution supports the uniformity, quality, and persuasiveness of judicial decisions.

### III. Positive Informal Judicial Institutions in Judicial Off-Bench Activities

Literature has only recently started paying attention to the off-bench activities of judges.<sup>96</sup> The recent wave of rule of law backsliding spread attention from non-democratic/illiberal jurisdictions also to EU countries. The off-bench activities discussed here include those in three main areas: (1) Off-bench resistance to political overreach, (2) domestic political networking, and (3) judicial networking and awareness-raising.<sup>97</sup> Some informal judicial institutions employed as a defense against attacks on the judiciary may be evaluated positively in the given situation but be deemed unacceptable in the absence of such attacks.

#### 1. Off-Bench Resistance

The overreach of other branches prompted judges to pursue some innovative strategies to protect themselves against intrusions into their independence. For example, Polish judges not only engaged in a traditional legal instrument—litigation—but also employed international lobbying and even public protest as complementary tools. Under the coordination of two Polish judicial associations, a sizeable portion of the Polish judiciary participated in street protests, reached out to the wider public through social media and judicial associations' websites, and made contacts with the European Commission and the European Parliament to communicate their legal opinions on Polish legislative changes. Judicial associations networked with independent journalists, non-governmental organizations, and European judges' associations, and organized simulated court proceedings at schools and nurseries or mock courts at rock festivals.<sup>98</sup> Polish judges expressed considerable unease because the contemporary legal and professional culture in liberal democracies requires judges to refrain from seeking public attention and political involvement, as judges typically lack expertise, and also money and time, in organizing public activities. Moreover, some activities might have contradicted judicial codes of conduct.<sup>99</sup>

Similarly, Romanian judicial associations engaged in off-bench communication activities when they felt endangered by the exercise of political power. They published memoranda, position papers, and calls for action and made themselves available for interviews. To catch the EU audience more

<sup>94</sup>See TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* 181 (2007).

<sup>95</sup>Yueduan Wang, *Overcoming Embeddedness: How China's Judicial Accountability Reforms Make Its Judges More Autonomous*, 43 *FORDHAM INT'L L.J.* 737, 752–53 (2020); see also Xin He, *From Hierarchical to Panoptic Control: The Chinese Solution in Monitoring Judges*, 21 *INT'L J. CONST. L.* 488, 495 (2023) (providing other examples of informal judicial institutions in China); Xin He, *Pressures on Chinese Judges under Xi*, 85 *CHINA J.* 49, 66 (2021).

<sup>96</sup>Alexei Trochev & Rachel Ellett, *Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance*, 2 *J. L. & CT.* 67, 68–69 (2014).

<sup>97</sup>See Katarína Šipulová, *Under Pressure: Building Judicial Resistance to Political Inference*, in *THE COURTS AND THE PEOPLE: FRIEND OR FOE?* 153 (DJ Galligan ed. 2021) (providing a fine-grained categorization of judicial resistance).

<sup>98</sup>See Claudia-Y. Matthes, *Judges as Activists: How Polish Judges Mobilise to Defend the Rule of Law*, 38 *E. EURO. POL.* 468, 473–480 (2022).

<sup>99</sup>See *id.* at 468–69, 478–80.



efficiently, judicial associations translated their outputs into English. This way, they tried to mobilize international networks, the Consultative Council of European Judges, the Venice Commission, The Group of States against Corruption (GRECO), and the European Commission, to put pressure on domestic politicians.<sup>100</sup>

The behavior expected of a judge in modern liberal democracies includes restraint as regards close ties with political elites. Even in the tricky situation in which the Polish judiciary finds itself, Polish judges have refused to cooperate with opposition parties, just to demonstrate their wish to maintain political neutrality.<sup>101</sup> International networking seems to be a viable informal practice to be chosen by judges in liberal democracies who fear the dire consequences of formal rules and practices. Similarly, publishing threats against the judiciary or judges, or partnering with media to expose such practices, can occasionally happen. Engaging in collective protests can be justified only in serious cases when fundamental values of judicial systems are at stake.

## 2. Political Networking

Informality spreads thanks to interpersonal networks arising from repetitive interactions and guided by informal norms, such as loyalty, authority, reciprocity, and personal benefit. Informal personal networks provide a basis for power and influence.<sup>102</sup> Unfortunately, in most of the cases studied, such informality does not contribute to the flourishing of the fundamental values of the justice system. When informal political links serve to transmit pressure from the political branch or judicial hierarchical superiors on to judges, then this raises critical concerns about judicial independence.<sup>103</sup>

Continuously developing close ties with politicians may be justified only by compelling reasons. One can be more lenient towards such practices in fragile polities with a non-democratic illiberal legacy where judges, through networking with politicians, prevent future attacks on the judiciary. Moreover, judges may legitimately keep open communications channels with politicians in such jurisdictions in the case of the modernization of outdated and illiberal legislation. Judicial know-how is indispensable in such instances.<sup>104</sup>

## 3. Judicial Networking and Awareness-Raising

Many examples of relatively non-controversial positive informal judicial institutions have emerged. Judges encourage improvement in the domestic legal environment by internal judicial networking and by networking with international partners. They can also raise legal awareness and increase support for the judiciary by communicating the advantages of an independent, well-functioning justice system to a broader public, thus increasing public confidence in the courts as one of the fundamental values of judicial systems.

The French *Syndicat de la Magistrature* has been a public and active union of judges for decades. It has published books and even its own widely-read journal.<sup>105</sup> Woods described the judicial community in Israel as engaged in lively contests and debates, which may have culminated in the development of new legal norms. Such an informal community emboldened public interest lawyers to take cases to the Israeli High Court of Justice. Woods pointed out that in the

<sup>100</sup>See Sorina Doroga & Raluca Bercea, *The Role of Judicial Associations in Preventing Rule of Law Decay in Romania: Informal Communication and Strategic Use of Preliminary References*, in this issue.

<sup>101</sup>See Matthes, *supra* note 98, at 478–80.

<sup>102</sup>See Peter VonDoepp & Rachel Ellett, *Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies*, 43 *COMPAR. POL.* 147, 153 (2011).

<sup>103</sup>See Dressel & Inoue, *supra* note 15, at 622–27.

<sup>104</sup>See H. Kwasi Premph, *African Judges, in Their Own Cause: Reconstituting Independent Courts in Contemporary Africa Review Essay*, 4 *INT'L J. CONST. L.* 592, 597–600 (2006).

<sup>105</sup>See Willem de Haan, Jos Silvis & Philip A. Thomas, *Radical French Judges: Syndicat de La Magistrature*, 16 *J.L. & SOC'Y* 477, 478–81 (1989).

competition between two informal institutions—backroom deals and a vibrant legal community engaged in discursive practices—the second one gained more traction.<sup>106</sup> The African experience only confirms the importance of the informal judicial community. In Tanzania, judges made concerted efforts to defend the rule of law by participating in programs to increase public legal literacy. They partnered with the media to promote educational initiatives on radio and TV and wrote columns on legal issues in order to raise public legal awareness.<sup>107</sup>

Networking and awareness-raising can help to protect the judiciary from attacks or to promote democratic transition. For example, Russian courts published requests from government officials on their websites, and Guatemalan, Ugandan, and Kenyan judges published reports or went to the media when they received threats.<sup>108</sup> In the later years of the Franco regime, a group of Spanish judges and prosecutors, called Democratic Justice, organized to promote judicial independence, greater autonomy for civil society, and guarantees of basic civil rights. They relied on ties to, and support from, clandestine political parties, progressive clergy, media, and the COE.<sup>109</sup>

The informal flow of information between national judges, international judicial networks, and supranational judiciaries has helped to activate supranational judicial efforts to counter the rule-of-law backsliding in some European states. The European Court of Human Rights and the Court of Justice of the EU, through the broad reading of the European Convention on Human Rights and EU Treaties, marshaled the courageous legal endeavor to tackle the capture of courts in some Central and Eastern European countries.<sup>110</sup> In a different context, alliances between national judges and international donors may help to shield the judiciary from governmental assaults because the government fears that the dissatisfaction of international donors will backfire.<sup>111</sup>

The evaluation of internal judicial networking depends on the specific circumstances of a given jurisdiction. Czech Court presidents cemented their positions by establishing informal platforms for exchanging information and networking, such as the College of Presidents of Regional Courts or the trio of top court presidents. The ensuing information asymmetry between the long-serving court presidents and short-lived ministers of justice, leading to the shifting of the balance of power towards judges even in the ministerial system of governance of the judiciary,<sup>112</sup> confirms the importance of informality. If good people hold important positions in the system, then informality provides the flexibility to improve the functioning of the judiciary, which a highly formalized model would make too cumbersome to implement. Unfortunately, informality can also work in the opposite direction and contribute to deterioration in the quality of the judiciary.<sup>113</sup>

<sup>106</sup>See PATRICIA J. WOODS, *JUDICIAL POWER AND NATIONAL POLITICS. COURTS AND GENDER IN THE RELIGIOUS-SECULAR CONFLICT IN ISRAEL* 83–91 (2nd ed. 2017) (stating some critics spoil the rosy picture, noting the lack of access to the community for lawyers representing Bedouins and Palestinians). See also *id.* at 84.

<sup>107</sup>See Prempeh, *supra* note 104, at 597.

<sup>108</sup>See Trochev & Ellett, *supra* note 96, at 74–76.

<sup>109</sup>See Lisa Hilbink, *Politicising Law to Liberalise Politics: Anti-Francoist Judges and Prosecutors in Spain's Democratic Transition*, in *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* 403, 404–06 (Terence C. Halliday, Lucien Karpik, & Malcolm M. Feeley eds., 2007).

<sup>110</sup>See Michal Ovádek, *The Making of Landmark Rulings in the European Union: The Case of National Judicial Independence*, 30 *J. EURO. PUB. POL'Y* 1119, 1134 (2023) (noting that the CJEU “was likely to have additional information through informal networks between judges and political elites but even on the basis of publicly available statements, the ECJ could have credibly anticipated the majority of Member States to not oppose a landmark ruling on judicial independence [HS: ASJP]”).

<sup>111</sup>See Prempeh, *supra* note 104, at 596.

<sup>112</sup>See Adam Blisa, Tereza Papoušková & Marína Urbániková, *Judicial Self-Government in Czechia: Europe's Black Sheep?*, 19 *GERMAN L.J.* 1951, 1953–1955 (2018). See also Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.

<sup>113</sup>See e.g., DAVID KOSAŘ, *PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES* (2017) (describing the case of Slovakia).

To conclude this section, intense off-bench activities of judges may indicate that the judiciary<sup>114</sup> strives to strengthen its position, possibly in defense against actual or potential outside interference. Assuming the general propensity of judges in liberal democracies to focus on deciding cases in the courtrooms and restraining themselves from public political activities, then, from the definition, liberal democracies should see no or only rare displays of judicial political off-bench activities. In contrast, in countries not characterized as liberal democracies we can observe judicial organizations with a long history of political activism. For example, the Judges' Club in Egypt—an informal organization comprising a majority of national judges—clashed with ex-President Hosni Mubarak several times, and later organized a series of sit-ins and protests against the Mohamed Morsi government's attempts to restructure the judiciary.<sup>115</sup> More frequent judicial involvement in public protests outside liberal democracies can suggest a different self-perception of judges and their role in society.

#### D. Discussion: On the Ambivalence of Informal Institutions and the Pitfalls of Templates

Literature sometimes treats formal and informal institutions as substitutes, the success or failure of one correlates with the decreasing or increasing role of the other.<sup>116</sup> This straightforward inverse relationship was problematized, for example, by Tsai's adaptive informal institutions. Tsai showed how informal practices superseded overly restrictive formal institutions, only to be later confirmed by ruling elites and turned into a form of law.<sup>117</sup> This very case of formalization of successful informal rules can hardly be considered a failure of informal rules, especially when the informal sanctioning regime might be even more deterrent than the formal one. The perception of a formal/informal inverse relationship does not well depict situations where formal and informal rules exist in relatively symbiotic relationships, typically when informal institutions fill in gaps left in formal rules.

This paper stresses the context specificity of informal judicial institutions, which makes it difficult to make clear sweeping evaluative statements. Informal judicial institutions are often of an ambivalent normative nature. When studying instances of positive informal judicial institutions, we encounter many informal institutions that would be positively evaluated in some jurisdictions but raise doubts in others. That said, we can still identify instances of informal institutions that would be assessed as positive—when applying lenses of liberal democratic fundamental values of judicial systems—in most cases.

The networking of members of groups underrepresented in the judiciary and especially in the judiciary's power structure which helps in increasing judicial diversity, informal innovations safeguarding the quality of candidates for apex courts, and various informal public awareness-raising activities serve as examples of generally positive informal judicial institutions. The same applies to some clearly detrimental informal judicial institutions, which imperil the fundamental values of judicial systems. For example, the phenomenon of "telephone justice"<sup>118</sup> or pressures

<sup>114</sup>See Matthes, *supra* note 98, at 473–74 (describing how the judiciary here means also only parts of the whole body of judges in a given jurisdiction. The judiciary often remains split in opinions on the proper course of action or, more fundamentally, on the overall evaluation of the situation and subsequent choice of a position. For example, a group of Polish judges sympathetic to the PiS-led government did not participate in protests and left the judicial association Justitia). See also Onur Bakiner, *Sources of Judges' Off-Bench Mobilization in Turkey*, 4 J. OF L. & CTS. 131, 137–38, 152 (2016) (describing how Turkish judges showed different understandings of the meaning of judicial independence, which translated into cooperation with different political, military, and civil society actors).

<sup>115</sup>See *id.* at 133.

<sup>116</sup>See Efendic et al., *supra* note 20, at 532–34.

<sup>117</sup>See Tsai, *supra* note 30.

<sup>118</sup>See Alena Ledeneva, *Telephone Justice in Russia*, 24 POST-SOVIET AFF. 324 (2008).

from court presidents on judges as regards the result of a case<sup>119</sup> represent a direct assault on fundamental judicial values, especially independence. The informal practice of judges frequently transitioning to and from political careers that made the judiciary in the Mexican state of Hidalgo subordinate and highly politicized,<sup>120</sup> the patronage system in judicial appointments in North Macedonia that undermined transparency, the rule of law, and the democratic process;<sup>121</sup> and the Egyptian chief justice who has to sign the ruling such that it is futile to vote against him;<sup>122</sup> are all examples of informal institutions which are arguably detrimental to liberal democratic fundamental judicial values, regardless of the place where they happened.

Seniority as a decisive criterion for the appointment of the court president<sup>123</sup> is a good example of an ambivalent informal institution. On the one hand, in some jurisdictions, automatically picking the longest serving judge on the bench of a given court has positive results, it prevents political considerations arising during the selection process or unwelcome competition among justices. On the other hand, in other jurisdictions merit might be perceived as the most important criterion, and the longest serving judges are not necessarily the best managers. Moreover, in jurisdictions inviting openness and new ideas the quasi-automatic promotion of the most senior judge into the position of a court president could be seen as detrimental. The result of balancing different values depends on the prevailing, historically determined, mindset in a given jurisdiction.

After the Euromaidan Uprising in 2014, Ukraine became remarkable for the attention paid to the judiciary by civil society.<sup>124</sup> Civil society organizations monitored developments in the justice system, provided expert commentary, and participated in discussions on judicial reform with international partners. On the one hand, civil society organizations played an important role in shaping the public discourse and brought greater transparency and accountability into the judicial system. On the other hand, dragging the judiciary into everyday media coverage and public attention contributed to perpetuating its politicized image, and hence, threatened to undermine the development of judicial professional norms, such as independence and staying out of politics. An established judiciary would probably handle civil society's attention more confidently, appreciating outside insights into its functioning.

Further dilemmas, whose normative evaluation depends on the specific context of a given jurisdiction, including for example, the court presidents' leeway in allocating cases or dealing with low-intensity disciplinary issues. Systems that place trust in people in decision-making positions may perceive that to be conducive to the smooth running of the justice system, while elsewhere it would invite criticism for lack of transparency and ease of misuse of excessive powers.

When evaluating informal institutions, we confront the benefits they bring with the costs. This balancing exercise may result in varying outcomes in different jurisdictions.<sup>125</sup> I proposed a framework for the normative assessment of informal judicial institutions based on the extent of agreement between formal and informal institutions. Judiciaries in current liberal European democracies are typically highly formalized, with informal institutions appearing mainly to fill in when the formal rules are too vague. Filling in provides space for experimenting has been an

<sup>119</sup>See He, *supra* note 95, at 61–65.

<sup>120</sup>See Matthew C. Ingram, *Crafting Courts in New Democracies: Ideology and Judicial Council Reforms in Three Mexican States*, 44 COMPAR. POL. 439, 450 (2012).

<sup>121</sup>See Islam Jusufi, *How the EU-Induced Institutional Changes Facilitated Patronage over and Capture of Judiciary in North Macedonia*, 24 J. BALKAN & NEAR E. STUD. 836, 843 (2022).

<sup>122</sup>See MOUSTAFA, *supra* note 94, at 200–01.

<sup>123</sup>Such practices occur at some courts in Belgium and until recently at the Israeli Supreme Court. See also MOUSTAFA, *supra* note 94, at 199 (mentioning the use of seniority at the Supreme Constitutional Court of Egypt and violation of this “strong norm” by President Hosni Mobarak).

<sup>124</sup>See Serhii Lashyn, Anastasia Leshchynshyn, and Maria Popova, *Civil Society as an Informal Institution in Ukraine's Judicial Reform Process*, in this issue.

<sup>125</sup>See Martin Krygier, *Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?*, in GETTING TO THE RULE OF LAW 64, 67–68 (James E. Fleming ed. 2011).

overlooked potential benefit of informal institutions. For example, Czech formal rules led to a practice whereby court presidents staffed “their” courts. Partly due to the lack of detail, court presidents came up with different ways of picking suitable candidates. The most promising informal practice, considering both input and output requirements, then became formalized.

When informal institutions are stricter than the requirements set by formal rules, the benefits must outweigh the costs to justify such “tightening.” The example of informally raising the bar in Indian Supreme Court judicial appointments illustrates the point. On the one hand, the Indian case stresses the laudable policy objectives of maturity, experience, and legitimacy. More mature and experienced judges should satisfy the output criterion, while diversity considerations satisfy the input criterion. On the other hand, the informal institution creates winners and losers. The set of potential candidates necessarily shrinks when informal criteria of age and seniority are applied. Considerably limiting the pool of eligible candidates translates into less diversity, which younger judges or judges from lower tiers of the judicial hierarchy could introduce. Moreover, the stricter the criteria are, and hence the more closed the system is, the more likely it is that the elite will perpetuate their prerogatives. For different jurisdictions with different needs and sensitivities the evaluation of such an informal institution may be different than in India’s case.

When informal institutions directly contradict formal rules, the benefits they bring must be extremely high. For example, judicial resistance in the form of organizing a series of public protests—possibly in violation of judicial codes of conduct—<sup>126</sup> may be justifiable from the perspective of fundamental values of judicial systems, when such practices defend at least rudimentary judicial independence. A counterfactual exercise might help in evaluating such a case. What would happen if there were no informal acts of judicial resistance? If the absence of informal acts would lead to much worse results, then even judicial protests may be justified. Nevertheless, this scenario is preserved only for extreme situations.

The ambivalence of informal judicial institutions has potential practical implications. The EU, the COE, and their bodies have recently pushed for formalization in the judiciary’s sphere of operation.<sup>127</sup> Nevertheless, the decision on what is formalized and what is performed by informal practice may be better left to careful debate in individual jurisdictions. Supranational blueprints inviting formalization may upset the domestic consensus and replace informal institutions with a formalized solution insensitive to national historical trajectories and specifics.

The literature on rule of law promotion and legal transplants provides ample warnings about the futility of imposing detailed templates on diverse jurisdictions.<sup>128</sup> Even the World Bank Report admitted that building new formal institutions may not be a priority when informal institutions operate effectively.<sup>129</sup> Moreover, the same institutions may function differently in different cultures.<sup>130</sup> Various supposedly universalizable checklists or recipes were modeled on alien experiences, with insufficient reflection of their original purpose.<sup>131</sup>

<sup>126</sup>See Matthes, *supra* note 98, at 469.

<sup>127</sup>The approach of supranational bodies is not completely unified, though. Some bodies, such as the Consultative Council of European Judges and the Venice Commission, appreciate in some instances the value of informal mechanisms. See Mathieu Leloup, *Supranational Actors as Drivers of Formalization*, in this issue.

<sup>128</sup>See Frank K. Upham, *Speculations on Legal Informality: On Winn’s “Relational Practices and the Marginalization of Law”*: Comment, 28 L. & Soc’y REV. 233, 235 (1994); Stephen Holmes, *Can Foreign Aid Promote the Rule of Law* Special Report, 8 E. EUR. CONST. REV. 68, 71 (1999); Martin Krygier, *The Rule of Law between England and Sudan: Hay, Thompson, and Massoud*, 41 L. & SOC. INQUIRY 480, 482–483 (2016); HAGGARD ET AL., *supra* note 60, at 220.

<sup>129</sup>See WORLD BANK, *World Development Report 2002: Building Institutions for Markets* (2002), [https://documents.worldbank.org/en/publication/documents-reports/documentdetail/850161468336075630/world-development-report-2002-building-institutions-for-markets#:~:text=The%20World%20Development%20Report%20\(WDR,and%20how%20to%20build%20them.](https://documents.worldbank.org/en/publication/documents-reports/documentdetail/850161468336075630/world-development-report-2002-building-institutions-for-markets#:~:text=The%20World%20Development%20Report%20(WDR,and%20how%20to%20build%20them.)

<sup>130</sup>See Alesina & Giuliano, *supra* note 9, at 938.

<sup>131</sup>See Krygier, *supra* note 125, at 72.

International bodies do not hesitate to offer formalizing suggestions even in cases such as that of Norway. GRECO proposed there a more formalized system of allocation of cases to increase transparency, even though the current system has not caused any problems.<sup>132</sup> Unfortunately, the supranational actors usually do not elaborate further on their normative preferences. Only rarely do they verbalize why a formalized legal framework should trump an informal one.<sup>133</sup> Such an approach strikes commentators as insensitive to the local context,<sup>134</sup> especially in the case of common law countries, which rely much more on informal institutions than their continental counterparts where those supranational bodies have their seats.<sup>135</sup>

The trend towards increased formalization spreads anyway, hand in hand with principles of good governance, such as transparency or diversity. The rising value of formalized transparency and inclusion, at the expense of other competing values, can be documented in the German example of access to information about new judgments. Only a restricted circle of journalists had advanced access to the judgments and press releases of the German Constitutional Court. This decades-long privilege for high-profile journalists sought to safeguard the quality of reporting. At the same time, it attracted accusations of favoritism and confidential elite collusion. After the wave of criticism in 2020, the practice promised to become more inclusive. In 2023 the Constitutional Court decided to abandon it altogether as part of its overall restructuring of communication.<sup>136</sup> The informal practice, formerly legitimized by its output orientation, hence gave way to new input-oriented justifications like transparency and inclusion.

## E. Conclusion

This Article examines the hitherto underexplored topic of positive informal judicial institutions. Despite the current trend of formalization in European democracies, several informal institutions, practices, and *ad hoc* acts prevail. Discourse in highly formalized systems of governance of the judiciary and judicial decision-making, such as Belgium, Germany, Spain, and Italy, remains suspicious of informal institutions.<sup>137</sup> Yet at the same time, such highly formalized systems—as well as less formalized systems—enjoy benefits of informality.

The Article demonstrates that informal judicial institutions are deeply context-dependent. Hence, when evaluating a given informal institution from the perspective of its influences on the fundamental values of judicial systems, we may conclude that it is positive in one jurisdiction but negative in another. I have developed a framework for assessing informal institutions based on their agreement with formal rules. Such institutions typically struggle in terms of input legitimacy standards, such as the lack of transparency, participation, and public deliberation. These legitimacy standards must be offset in terms of the outputs they bring with them for the fundamental values of liberal democratic judicial systems.

<sup>132</sup>See Mathieu Leloup, *Supranational Actors as Drivers of Formalization*, in this issue.

<sup>133</sup>See Mathieu Leloup, *Supranational Actors as Drivers of Formalization*, in this issue.

<sup>134</sup>See Cheesman, *supra* note 55, at 170; Frank Munger, *Thailand's Cause Lawyers and Twenty-First-Century Military Coups: Nation, Identity, and Conflicting Visions of the Rule of Law*, 2 *ASIAN J. L. & SOC'Y* 301, 303 (2015); Mark Fathi Massoud, *Ideals and Practices in the Rule of Law: An Essay on Legal Politics*, 41 *L. & SOC. INQUIRY* 489, 493 (2016); Mark Fathi Massoud, *The Rule of Law in Fragile States: Dictatorship, Collapse, and the Politics of Religion in Post-Colonial Somalia*, 47 *J. L. & SOC'Y* 111, 119 (2020).

<sup>135</sup>See Patrick O'Brien, *Informal Judicial Institutions in Ireland*, in this issue.

<sup>136</sup>See Silvia Steininger, *Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the Bundesverfassungsgericht*, in this issue.

<sup>137</sup>See Chavance, *supra* note 5, at 66 (discussing how such an approach concurs with mainstream economic theory, according to which formal institutions show the best way to optimality, while informal rules are treated as detrimental unless they correspond to formal rules).



This special issue shows that informality manifests itself intensely in the judiciary, even though it represents one of the less likely places where one would expect informal institutions to have strong influence, given the highly legalized environment staffed with legal professionals who arguably have a greater tendency to formalization than do other professions.

In highly formalized European continental jurisdictions, occasional informal institutions appear to fill in gaps in lax laws or to bend unsatisfactorily performing formal rules. When the operation of informal judicial institutions fulfills the expectations of key actors in the system, then those institutions often become formalized. The new formal rules supersede the informal ones and capitalize on expectations and routines created by the informal institutions.

Literature has so far ignored the extent to which informality can be used as a space for experiments. When a rudimentary law leaves space for various solutions, different informal practices may appear. The most fitting one then can serve as an informal example to follow or be turned into a formal law. This formal, informal, formal interplay provides a lesson about the dynamic character of institutions.

Informal institutions flourish even in formalized jurisdictions in the area of judges' off-bench activities. Informal networking to promote underrepresented, in terms of power, groups in the judiciary or to raise public awareness should not lead to many normative controversies. Nevertheless, in the area of governance of the judiciary and judicial decision-making, a high level of formalization is generally preferred in continental Europe as it guarantees objectivity and contains clientelism and political influences.<sup>138</sup>

The Georgian example shows that formalization does not work as a panacea. Georgia is one of the countries with formalized governance of the judiciary, yet it is not one of the best performers in terms of democracy or the rule of law.<sup>139</sup> Following pressure from the United States and Europe, Georgia put in place a relatively modern formal regulation of judicial governance, formally insulating judges from political power. Still, in practice, a group of elite judges circumvents formal rules and makes deals with politicians. Georgia represents a case in which informality has negative connotations because it is used in practice to follow aims not compatible with fundamental judicial values. It also shows that even a highly formalized and demanding judicial appointment procedure does not always succeed against pervasive informal networks which ensure that the appointing authority consists of members that are biased towards certain candidates.<sup>140</sup>

The inherent context specificity of informal judicial institutions closely relates to their ambivalent normative assessment. While in one context an informal institution may be viewed positively, it will be regarded negatively in another. This results from balancing competing interests which will be weighed differently in various jurisdictions depending on their historical trajectories, needs, and sensitivities. Such a proposition holds despite the international trend towards formalization, which goes hand in hand with the globally spreading narrative of good governance, linked to principles such as transparency or inclusion. Despite these universalizing drives toward formalization, the literature on rule-of-law promotion warns us against one-size-fits-all solutions. For all of these reasons, one should be cautious when suggesting international blueprints without considering unique domestic contexts.

<sup>138</sup>See Sara Iglesias & Rafael Bustos, *What Does it Take to Become a Judge in Spain? An Informal First Step into a Formal World*, in this issue.

<sup>139</sup>*Compare Democracy Index 2022*, ECONOMIST INTELLIGENCE, <https://www.eiu.com/n/campaigns/democracy-index-2022/> (ranking 90th out of 167 countries) with WJP Rule of Law Index, WORLD JUSTICE PROJECT (2022), <https://worldjusticeproject.org/rule-of-law-index/global/2022> (ranking 49th out of 140 countries).

<sup>140</sup>See Nino Tsereteli, *Judicial Recruitment in Post-Communist Context: Informal Dynamics and Façade Reforms*, 30 INT'L J. LEGAL PRO. 37, 51 (2023).

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