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INTRODUCTION

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

Informality and Courts: Uneasy Partnership

David Kosař[1], Katarína Šipulová[1] and Marína Urbániková[1]

[1]Masaryk University, Brno, Czech Republic
Corresponding author: David Kosař; Email: david.kosar@law.muni.cz

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Abstract
This introductory Article provides a conceptual umbrella for the Special Issue on Informal Institutions and Democratic Decay. It offers conceptual clarity to studying informal institutions and explains their relationship to other concepts such as constitutional conventions or judicial culture. The article summarizes findings of the Special issue in four key observations. First, it shows that it is impossible to understand the functioning of courts without understanding the informal rules that shape courts' governance and decision-making. These informal rules (institutions) appear within courts (internal), between courts and other actors (mixed) and among non-judicial actors with effects on courts (external judicial institutions). Second, it identifies a strong trend of formalization of rules, sponsored mostly on the supranational European level .Third, it explains why reforms of formal rules are often not sufficient to trigger behavioral changes and highlights the role of informal institutions in created commitment of actors to key democratic principles. Fourth, it argues that informal judicial institutions significantly impact the quality of democracy.

Keywords: Informal institutions; courts; judges; judicial culture; constitutional conventions; democratic decay

A. Introduction

Courts operate in a highly formalized environment. They follow tight procedural rules, gather evidence under strict evidentiary rules, and accept only certain types of argument. Most of these rules are written and often also codified. Judges, unlike politicians, are not supposed to engage in *quid-pro-quo* deals nor informal background talks. They are not supposed to negotiate. They decide cases and issue judgments. These judgments are again written and carefully reasoned. This very formalized portrait of courts is not self-serving. Judges are meant to be neutral arbiters and the stress on formality aims to increase the predictability of their decision-making.

Yet, courts and judges are subject to a plethora of *informal institutions* – rules of the game that are largely unwritten and created outside of officially sanctioned channels, and that are considered binding by their actors and shape their behavior. These informal institutions are sometimes described as the invisible social glue of constitutional systems. They fill in the gaps in the formal regulation, they keep the political regime flexible and adaptable to change, and they help spread norms, beliefs, and values beyond the written word of the law.

Informal institutions, ranging from those influencing judicial careers and governance to those affecting judicial decision-making and extra-judicial activities, thus significantly shape the functioning of the judiciary. Depending on their consonance with key principles that underline the formal framework, such as judicial independence or the rule of law, informal institutions can

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either subvert the quality of democracy or help to protect it. For example, "gentlemen's agreements" between judicial associations regarding the selection and promotion of judges may compete with or even substitute for formal rules governing the process.[1] These pacts may in turn entrench patronage,[2] nepotism,[3] and vertical gender segregation.[4] Similarly, politically savvy chief justices can tweak the formal rules and forge informal alliances with politicians,[5] with other court presidents,[6] or with transnational judicial networks.[7] Informal practices like corruption,[8] telephone justice,[9] and clientelism[10] may undermine existing formal institutions.

On the other hand, many informal institutions also have positive effects. For example, judges typically partake in various informal networks, learning best practices across supranational levels.[11] They can team up with journalists and mobilize the public through social networks to defend judicial independence.[12] Some informal judicial institutions (IJI) have helped foster transparency in judicial decision-making. Other informal institutions can be viewed as neutral. For instance, in several countries where judges are elected by the parliament, political parties have developed various informal agreements related to this election, such as the rule of concordance in Switzerland[13] or an informal system of alternating nominations of candidates to the Federal Constitutional Court between major mainstream political parties in Germany.[14] A different type of informal practice related to the selection of judges has emerged in many post-communist countries, where the hierarchical model of judicial careers typically expects new judges to start at first instance courts and slowly climb the ladder, although there is no explicit regulation preventing the assignment of new judges straight to appeal courts.[15]

In other words, IJI lie at the heart of every legal system[16] and they have always played just as important role in shaping the interactions among judges, as well as between judges and other

[1]Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 Am. Pol. Science Rev. 251–67 (2000); Andrea Pozas-Loyo & Julio Ríos-Figueroa, *Anatomy of an informal institution: The 'Gentlemen's Pact' and judicial selection in Mexico, 1917–1994*, 39 Int. Pol. Sci. Rev. 647–61 (2018).

[2]Carlo Guarnieri, *Judicial Independence in Europe: Threat or Resource for Democracy*, 49 J. of Representative Democracy 347–359 (2013); Simone Benvenuti & Davide Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model*, 19 German L.J. 1641–70 (2018); Antoine Vauchez, *The Strange Non-Death of Statism: Tracing the Ever-Protracted Rise of Judicial Self-Government in France*, 19 German L.J. 1613–40 (2018).

[3]Samuel Spáč, *The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia*, Problems of Post-Communism 1–11 (2020).

[4]Spyros Sofos, *Charting the waters: populism as a gendered phenomenon*, OpenDemocracy, (Jan. 27, 2020), https://www.opendemocracy.net/en/rethinking-populism/charting-waters-populism-gendered-phenomenon/.

[5]David Kosař & Samuel Spáč, *Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?*, 13 HJRL 107–42 (2021).

[6]David Kosař, *Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice*, 13 EuConst 96–123 (2017).

[7]Cristina Dallara & Daniela Piana, Networking the Rule Of Law: How Change Agents Reshape Judicial Governance in the EU (2015); Cristina E. Parau, Transnational Networking and Elite Self-empowerment (2018).

[8]Maria Popova, *Why Doesn't the Bulgarian Judiciary Prosecute Corruption?*, 59 Problems of Post-Communism 35–49 (2012).

[9]Maria Popova, Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine (2012).

[10]Maria Popova & Daniel Beers, *No Revolution of Dignity for Ukraine's Judges: Judicial Reform after the Euromaidan*, 28 Demokratizatsiya 113–42 (2020).

[11]Shai Dothan, *Three Paradigms of International Judicial Review* (December 15, 2023). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3937966.

[12]Alexei Trochev & Rachel Ellett, *Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance*, 2 J. of L. & Courts 67–91 (2014); Chistian Davies, Judges Join Silent Rally to Defend Polish Justice, The Guardian (Jan. 12, 2020), https://www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest-lawyers.

[13]Regina Kiner, *Judicial Independence in Switzerland*, *in* Judicial Independence in Transition 403–445 (Seibert-Fohr ed. 2012).

[14]*See* Silvia Steininger, *Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the Bundesverfassungsgericht*, in this issue.

[15]Kosař & Spáč, *supra* note 5; David Kosař, Perils of Judicial Self-Government in Transitional Societies (2016).

[16]H. L. A. Hart, The Concept of Law (2012).

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actors, as formal institutions.[17] Judges are embedded in various circles of social interactions and their behavior is shaped by relational flows in the networks to which they belong.[18]

Yet, the workings of IJI, particularly in European jurisdictions, are massively under-studied. The existing scholarship primarily analyses the functioning of IJI in Latin America[19] or South-East Asia.[20] Only a few studies have explored the role of informality in democratic decay of judicial structures in European countries,[21] or the role of informal networks in selection processes in the United States.[22] Even more importantly, the existing scholarship largely focuses on *negative* informal institutions such as corruption, and the detrimental effects of nepotism and patronage on selection processes and judicial independence. Informality in the functioning of the judiciary thus has been portrayed mainly as a phenomenon with negative repercussions on judicial independence or accountability. Less scholarly attention has been paid to IJI with neutral or positive effects on the functioning of the judiciary, even though their role in increasing the resilience of the democratic judiciary might be crucial.

Similarly, the interaction of IJI with democracy remains underexplored. While in some countries, well-designed formal institutions do not function well effectively owing to the existence of competing informal institutions, in other countries, poorly-designed formal institutions operate smoothly because of the existence of corresponding informal institutions that fill-in gaps or foster judicial resilience.[23] Informal judicial institutions, thus, may complement and accommodate formal judicial institutions, but they might also compete with or even replace them.[24] This, in turn, means that informal institutions may contribute to democratic decay or provide an additional layer of resistance against it.

The aim of this Special Issue is three-fold. First, it shows the importance of informality for the functioning of courts and offers it comprehensive conceptualization. Second, it documents informal judicial institutions in thirteen jurisdictions in Europe and neighboring countries and analyzes their effects. Third, it theorizes about the role of informal judicial institutions in the deterrence of increasing de-democratization.

This introductory Article provides a conceptual umbrella for the Special Issue articles on individual jurisdictions as well as horizontal articles treating these themes in a cross-jurisdictional perspective. It offers conceptual clarity to studying informality by distinguishing between Informal acts, informal practices, and informal institutions, and explains their relationship to constitutional conventions as well as adjacent concepts such as judicial culture and professional role conception. It also shows that informality permeates judicial decision-making as well as judicial governance and provides typical examples of each.

[17]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. of Comp. Law 760–800 (2020); Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Practices: Opening the "Black Box" of International Courts*, 40 Michigan J. of Intl. Law 47–113 (2018).

[18]Björn Dressel & Raul Sanchez-Urribarri & Alexander Stroh, *The Informal Dimension of Judicial Politics: A Relational Perspective*, 13 Annual Rev. of Law & Social Science 413–30 (2017).

[19]Pozas-Loyo & Ríos-Figueroa, *supra* note 1.

[20]Björn Dressel, Tomoo Inoue, & Cristina Regina Bonoan, *Justices and Political Loyalties: An Empirical Investigation of the Supreme Court of the Philippines,* Law & Social Inquiry 1–25 (2023); Dressel & Sanchez-Urribarri & Stroh, *supra* note 18; Erica Harper & Yann Colliou, *Re-Imagining Customary Justice Systems: Interrogating Past Assumptions and Entertaining New Ones*, 15 HJRL 75–94 (2022).

[21]Jakab, *supra* note 17; Edit Zgut, *Informal Exercise of Power: Undermining Democracy Under the EU's Radar in Hungary and Poland,* 14 HJRL 287–308 (2022).

[22]Christine Bird & Zachary McGee, *Going Nuclear: Federalist Society Affiliated Judicial Nominees' Prospects and New Era of Confirmation Politics,* 51 Am. Pol. Research 1–20 (2022).

[23]Pierson, *supra* note 1.

[24]Gretchen Helmke & Steven Levitsky, Informal Institutions and Democracy: Lessons From Latin America (2006).

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We offer four main contributions. First, we show that it is impossible to understand the functioning of courts without understanding the informal rules that shape courts' governance, judicial decision-making and extra-judicial activities. Analysis of IJI offers a unique peek behind the veil and helps us to better understand how judicial systems work. In fact, uncovering IJI is one of the necessary steps allowing us to understand the translation of rules from the *de jure* to the *de facto* level, particularly in the area of judicial independence.[25]

Second, although IJI play a vital role in judicial systems, and often help to solidify the formal legal framework, fill in the gaps and offer a great amount of flexibility and social responsiveness, we identified a strong trend of rules formalization. The source of this trend is mostly the supranational level (EU, CoE). Surprisingly, the pressure on formalization also appears in countries where IJI previously worked well and were compatible with constitutionally protected values. The undoing of informality results from increased emphasis on the rule of law, which requires the regulation to be transparent and non-arbitrary. Moreover, the process of formalization reflects the increasing trust in law and technocratic norms to provide a resilient design of democratic institutions. However, as we argue in Part D, the process of formalization comes at a heavy cost.

Third, we have also seen several indications that formal reforms of rules might not be a sufficient trigger for behavioral changes, particularly if they compete with incongruent, well institutionalized informal practices. This finding is particularly important in relation to the above-mentioned process of formalization and increasing trust vested in law as a means of regime change (democratization). We show that proper understanding and commitment to the principles behind institutions are a decisive factor for their effectiveness.

Fourth, we highlight the need to study IJI and their dynamics because of their relationship with the quality of democracy. On the one hand, we argue that IJI that are compatible with the principles of constitutional democracy can play an important role in building the responsiveness of formal institutions as well as in the internalization of these principles across society. Since they emerge through bottom-up processes, they can increase the legitimacy and acceptance of formal rules of the game. On the other hand, IJI are fragile and their erosion can easily increase the window of opportunity for actors seeking to trigger de-democratization processes. In a similar fashion, long-term incongruence between formal rules and informal judicial institutions can lead to the hollowing out of judicial structures and their internal decay.

The article proceeds as follows. Section B sets the scene, explains the concept of informality, and shows why informal institutions matter when we want to understand the courts. Section C conceptualizes informal judicial institutions and shows how they operate in three domains relevant to the functioning of courts: Judicial governance, judicial decision-making, and extra-judicial activities of judges. Section D summarizes the core findings from individual articles in this Special Issue and shows how informal judicial institutions can offer important insights into the role of courts in building democratic resilience or in fueling democratic decay.

B. Setting the Scene: Why Do Informal Institutions Matter When Studying the Courts?

In order to understand how informal institutions affect courts, it is necessary to explain the difference between formal and informal institutions, identify what aspect of the functioning of the judiciary they permeate, and detect the actors between which informal judicial institutions can emerge. This is what this Section does. It begins by briefly sketching the main differences between formal and informal institutions. Then it shows that informality affects both judicial decision-making, judicial governance and extra-judicial activities of judges. Finally, it defines three arenas in which informal judicial institutions can emerge: Within the judiciary—internal judicial

[25]*See* Andrea Pozas-Loyo & Julio Ríos-Figueroa, *Informal Institutions and de facto Judicial Independence: The Missing Link towards Formal Efficacy*, 29 Política y Gobierno 1–27 (2022).

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institutions—; between judges and other actors such as politicians—mixed judicial institutions—; and among non-judicial actors, such as politicians, oligarchs, and other legal professions—external judicial institutions.

I. Formal and Informal Institutions

Institutions can be defined as the sum of the rules of the game and of the ways in which those rules are acted upon and played out.[26] They comprise "regulative, normative, and cultural-cognitive elements that, together with associated activities and resources, provide stability and meaning to social life"[27] and consist of "both informal constraints (sanctions, taboos, customs, traditions, codes of conduct) and formal rules (constitutions, laws, property rights)".[28] Institutions are relatively durable and resistant to change, but can undergo change over time, incrementally or revolutionary.[29] They help shape behavior in society and provide stability and order not the least because the rules are backed with sanctioning power (formal or informal).

Before we start discussing the relationship between formal and informal institutions, we need to add one conceptual caveat. In order to avoid conflation of informal institutions with mere routinized behavior or even one-off instances of informal behavior, we must differentiate between informal acts, informal practices, and informal institutions. Practice is "a routinized type of behavior"[30] and "a pattern which can be filled out by a multitude of single and often unique actions reproducing the practice."[31] Acts can be one-off—single acts—, but they can also become routinized over time into a practice, and practice can become institutionalized over time and become an institution. In other words, not every informality meets the threshold informal institution and despite the fine line between the informal practice and the informal institution, only institutionalized practice amounts to institution. We explain this triadic conceptualization of informality in more detail in Section C.I.

It can often be difficult to determine whether an institution is formal or informal because (in) formality is not a question of a clear dichotomy, but rather a continuum. For a more comprehensive and detailed delineation of informal institutions, based on a literature review, we identified a set of various more or less common characteristics of informal institutions. Yet, these characteristics should not be considered as strictly necessary conditions in order to define an institution as informal. They relate to three areas: The nature of the rules on which the institution is based; the designers of the rules and the circumstances of their emergence; and the enforcement of the rules and the sanctions for breaking them.

First, formal and informal institutions differ in the nature and the form of the rules on which they are based. In both cases, these rules prescribe some kind of action (or omission). But in informal institutions, they are often not clearly specified,[32] not written,[33] or not formally codified in official documents.[34] They are usually unwritten[35] and are not published or made publicly

[26]Marie-Laure Salles-Djelic, *Institutional Perspectives: Working towards Coherence or Irreconcilable Diversity?, in* The Oxford Handbook of Comparative Institutional Analysis, 15–40, 26 (Morgan *et al.* eds. 2010).

[27]W. Richard Scott, Institutions and Organizations, Ideas, Interests, and Identities 56 (2014).

[28]Douglas C. North, Institutions 97 (1991).

[29]Scott, *supra* note 27, at 58.

[30]Andreas Reckwitz, *Toward a Theory of Social Practices: A Development in Culturalist Theorizing*, Eur. J. of Social Theory 243–63, 249 (2002).

[31]*Id.* at 250.

[32]Vivien Lowndes, *Something Old, Something New, Something Borroweed (. . .): How Institutions Change (And Stay the Same) in Local Governance*, 26 Policy Studies 291–309 (2005).

[33]Hans-Joachim Lauth, *Informal Institutions and Democracy*, 7 Democratization 21, 24 (2000).

[34]Hans-Joachim Lauth, *Formal and informal institutions, in* Routledge Handbook of Comparative Political Institutions 57 (Gandhi & Ruiz-Rufino eds. 2015).

[35]Helmke & Levitsky, *supra* note 24, at 5; Julia R. Azari, & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 Perspectives on Politics 37–55 (2012).

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available.[36] In addition, the informal rules can have a customary element,[37] they are socially shared,[38] and although they may be non-transparent for outsiders, they are well-known to the relevant actors and are part of their common knowledge.[39]

Second, formal and informal institutions differ in how they emerge. Informal institutions, unlike the formal ones, are not always consciously designed.[40] They often emerge spontaneously and in the private realm,[41] and their origin is often unknown.[42] Informal institutions are "created and communicated outside of officially sanctioned channels,"[43] they are not centrally designed,[44] are not a part of an officially mandated and enforced legal system,[45] and do not receive legitimacy from the state and from the sovereignty of the people.[46]

Third, formal and informal institutions differ in the enforcement of the rules and sanctions for their violation. They both entail sanction if they are violated or grossly ignored, but informal institutions are enforced outside of officially sanctioned channels[47] and their violation does not have legal consequences.[48] Their enforcement is typically private[49] and imposed by the actors themselves,[50] even though they may be unwilling to admit it.[51]

As useful as it is to positively define informal institutions, it is valuable to also define what they are not. As noted by Helmke and Levitsky,[52] the concept of informal institutions is often treated as a residual category and is used to "describe virtually any behavior that departs from, or is not accounted for by, the written-down rules." Our understanding of informal institutions does not cover any behavioral regularities, non-formally codified patterns of behavior, fashions, or trends. On the contrary, in our definition, informal institutions are based on rules and are rooted in shared expectations.[53] Also, informal institutions are not synonymous with culture or cultural patterns—culture is a broader concept, values play a bigger role here, and it lacks sanctioning mechanisms. They do not refer to weak institutions, customs, or informal politics, which can have a spontaneous or erratic character, or informal organizations—as these are the "players" and not the "rules".[54]

II. Pervasiveness of Informality at Courts

It has mainly been political science literature that has paid significant attention to informal institutions and their effects,[55] since it sees institution-building as a complex process, consisting of

[36]Natalie Galea *et al.*, *The Gendered Dimensions of Informal Institutions in the Australian Construction Industry*, 27 Gender, Work & Organization 1214–31 (2020).

[37]Mark Christopher Casson *et al.*, *Formal and Informal Institutions of Development*, 38 World Development 137–41 (2010).

[38]Helmke & Levitsky, *supra* note 24, at 5.

[39]Guillermo *O'Donnell, On Informal Institutions, Once Again, in* Informal Institutions and Democracy: Lessons From Latin America 285–89, 286 (Helmke & Levitsky eds. 2006).

[40]Lowndes, *supra* note 32.

[41]Claudia R. Williamson & Carrie B. Kerekes, *Securing Private Property: Formal Versus Informal Institutions*, 54 The Journal of Law and Economics 537–72 (2011).

[42]Elin Bjarnegård, Gender, Informal Institutions and Political Recruitment 31 (2013).

[43]Helmke & Levitsky, *supra* note 24, at 5.

[44]Claudia R. Williamson, *Informal institutions rule: institutional arrangements and economic performance*, 139 Public Choice 371–87 (2009).

[45]Williamson *et al.*, *supra* note 41, at 544.

[46]Lauth, *supra* note 33, at 58.

[47]Helmke & Levitsky, *supra* note 24, at 5.

[48]Lauth, *supra* note 33, at 57.

[49]Williamson *et al.*, *supra* note 41, at 544.

[50]Jack Knight, Institutions and Social Conflict 3 (1992).

[51]Bjarnegård, *supra* note 42, at 31.

[52]Helmke & Levitsky, *supra* note 24, at 6.

[53]*Id.*; Lauth, *supra* note 33.

[54]Helmke & Levitsky, *supra* note 24; Lauth, *supra* note 33.

[55]Helmke & Levitsky, *supra* note 24; Daniel M. Brinks, *Las instituciones informales y el estado de derecho*, Revista Jurídica de la Universidad de Palermo 85–104 (2006).

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recursively related formal and informal elements.[56] Political science scholarship acknowledges that any change in formal institutions at any particular time may give rise to informal institutions, which, in turn, affect the functioning of formal institutions.[57] O'Donnell[58] defines the dominance of informal institutions as "the unrule of law," while Lauth claims that inherited informal institutions such as nepotism, kinship, or clientelism survive at the expense of formal ones by occupying or penetrating them.[59]

The disregard that law and legal science in continental Europe showed towards informal institutions also means that we have a rather weak understanding of where exactly in the field of functioning of courts these informal judicial institutions are placed. This Special Issue offers a clear-cut answer: Everywhere. IJI are so important because they impact virtually every segment of the judiciary, both in how courts are governed, how they decide, and in how judges behave extra-judicially. This Special Issue attests to this complexity.

1. Informal Judicial Institutions in Judicial Decision-Making

When it comes to the decision-making domain, IJI can appear at various stages of judges' deliberations. Sometimes, they simply complement or add details to formal procedural rules. At other times, IJI lead to results unforeseen by the formal framework. At the *pre-deliberation stage*, IJI can further shape the panel composition, selection of judge rapporteurs, or case assignment. For example, in Czechia, the presidents of the Supreme Court and the Supreme Administrative Court hand-pick those few selected judges sitting in the Grand Chamber, which allows them to influence the substantive development of an entire area of law.[60] Czech court presidents also decide on panel composition and informally influence case allocation.[61] Neither these prerogatives, nor the processes by which they are carried out, are formally secured. As Kadlec and Blisa demonstrate, a selected group of judges, often court presidents, thus have far greater influence than the formal account of their roles might suggest.[62] The pre-deliberation dimension also captures the eventual contact of judges with attorneys or potential parties. In Russia, for example, lower court judges are easily accessible to potential claimants during daily reception hours, when these claimants are allowed to ask judges any questions related to procedural or legal aspects of their claims.[63]

But IJI also tell us a lot about how judges arrive at a decision and the logistics of how decisions are taken. For example, in the United States, the *deliberation* itself is impacted by the so-called informal "rule of four." According to this rule the Supreme Court grants a petition for review only if there are at least four votes for doing so.[64] In Czechia, the Constitutional Court, which needs a supermajority of nine votes out of fifteen to decide on the constitutionality of a law in a plenary

[56]Jakab, *supra* note 17.

[57]Henry Farrell & Adrienne Héritier, *Formal and Informal Institutions under Codecision: Continuous Constitution-Building in Europe*, 16 Governance 577–600 (2003).

[58]Guillermo O'Donnell, *Polyarchies and the (Un) Rule of Law in Latin America: A Partial Conclusion, in* The (Un) Rule of Law and the Underprivileged in Latin America 303–37 (Mendez & O'Donnell & Pinheiro eds. 1999).

[59]Hans-Joachim Lauth, *Informal Institutions and Democracy*, 7 Democratization 21–50 (2000).

[60]*See* Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue (reporting on Czechia).

[61]*Id.*

[62]*Id.*

[63]Varvara Andrianova, *The everyday experiences of Russian citizens in Justice of the Peace Courts, in* A Sociology of Justice in Russia 68–91 (Marina Kurkchiyan & Agnieszka Kubal eds. 2018).

[64]*See* Joan Maisel Leiman, "The Rule of Four", 57 Colum. L Rev 975 (1957); Rick Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. Pa. L. Rev. 1067, 1119 (1988); Ryan C. Black & Christina L. Boyd, *Selecting the Select Few: The Discuss List and the U.S. Supreme Court's Agenda-Setting Process.*, 94 Social Science Quarterly 1124 (2012); M. Patrick Yingling, *Judicial Conventions: An Examination of the US Supreme Court's Rule of Four*, 38 Dublin U. L.J. 477 (2015).

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session, will not take a decision unless there are at least 13 judges present.[65] Of course, not all IJI are equally consequential. Courts develop many informal rules that have no direct repercussions on the quality of their decision-making. For instance, the Irish Supreme Court recognizes an unwritten rule establishing which judge sits in which seat.[66]

When it comes to the substantive *content of judicial decisions*, IJI often appear around the publication of dissents, as well as established routes for internal and external interferences and engagement with judges. Many of these informal rules are formed around principles of seniority and the role of court presidents and chief justices. In some countries, junior judges who have just joined the bench are not expected to dissent[67] or act as judge rapporteurs. A similar practice can be seen around the world. When the newest members of the court author the lead judgment at the Australian High Court, their colleagues will offer single-line concurrences.[68] Many of these IJI have also have very clear negative connotations. For example, research has already reported on the indirect influence court presidents can have on young rank-and-file judges. In Russia, this often results from the informal practice of asking older peers "for guidance" in politically sensitive cases.[69]

Finally, a lot of IJI related to the decision-making domain emerge in the *communication of the decision* to the public, media, and the parties to the proceedings. Communication strategies gain importance with the pressure laid on courts and their transparency, as well as the rise of social media.[70] Yet, this facet of the work of judges remains unregulated. The majority of the rules of communication initially evolved informally, often with negative impact on their transparency or accessibility.[71] However, we noted a lot of development in this area, including the increased pressure to formalize the rules for courts' communication. A typical example is the relationship between the German Federal Constitutional Court and the *Justizpressekonferenz*,[72] a registered association of journalists with privileged access to fresh decisions of the German Federal Constitutional Court. The informal practice, followed for decades, gave only those journalists organized in the *Justizpressekonferenz* access to the press release on the day before the announcement of the Court's judgment. This was supposed to ensure the "high-quality and accurate reporting" necessary in a democratic society. Yet, the lack of transparency involved in this informal practice, and the resulting discrimination among journalists it produced, were challenged and eventually abandoned.[73]

Another element of communication relates to the relationship between the judiciary and political branches. In several countries, IJI required politicians to refrain from public criticism of courts' decisions, particularly in criminal cases, or cases still under review.[74] In England, cabinet ministers may comment on or disagree with an announced judgment, but they cannot criticize the motives of the judges involved in the decision.[75] To the outrage of the judiciary, this informal

[65]Katarína Šipulová & Alžbeta Královά, *The Czech Constitutional Court: The Inconspicuous Constrainer, in* Constitutional Review in Central and Eastern Europe: Judicial-Legislative Relations in Comparative Perspective (Pócza ed. 2024).

[66]Oran Doyle, *Conventional Constitutional Law*, 38 Dublin Univ. Law J. 311, 317 (2015).

[67]Dunoff & Pollack, *supra* note 17.

[68]Kcasey McLoughlin, *'A Particular Disappointment?' Judging Women and the High Court of Australia*, 23 Fem Leg Stud 273–94 (2015).

[69]Maria Popova, Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine (2012).

[70]Silvia Steininger, *Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the Bundesverfassungsgericht*, in this issue; and Renate E. Meyer, *A Processual View on Institutions: A Note from a Phenomenological Institutional Perspective, in* Institutions and Organizations: A Process View 33–41, 37 (Reay *et al.* eds. 2019).

[71]See Silvia Steininger, *Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the Bundesverfassungsgericht*, in this issue.

[72]*Id.*

[73]*Id.*

[74]*See* Oliver Dawn, *Politicians and the Courts*, 41 Parliamentary Affairs 13–33 (1988); Scott Stephenson, *Constitutional Conventions and the Judiciary*, 41 Oxford J. Legal Stud. 750 (2021).

[75]*See* Sophie Turenne, *Informal Judicial Institutions - The Case of the English Judiciary*, in this issue.

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practice was breached after the tabloid *Daily Mail* reacted to the Brexit decision of the Supreme Court with the headline: "Enemies of the People." Many prominent politicians publicly criticized the judgment for "frustrating the will of people."[76] The increasing tension between political branches and the judiciary, including a rising number of political attacks at courts, has led to the gradual dismantling of these informal practices.

2. Informal Judicial Institutions in Judicial Governance

The second domain that is greatly influenced by IJI is judicial governance. Many IJI develop in the personal dimension, particularly in relation to the selection of judges, judicial careers, and accountability mechanisms. Social science research suggests that professional or even ideological considerations can be rather easily overridden by dynamics of gratitude, obligation, and reciprocity.[77] The strongest evidence of this dynamic can be seen in the judicial selection processes. Informality based on relational ties creates alternate incentives for selection, particularly in those systems, that are more hierarchical than merit-based.

However, many informal institutions revolving around the selection of judges in fact develop also in consolidated democracies, where they serve to secure a greater legitimacy of the whole process. Various gentlemen's agreements among political actors partaking in the selection processes serve to ensure a better representativeness of core interest or social groups. Take, for example, the Belgian rule that Constitutional Court justices should approximately represent the proportional size of the different parties in the democratic landscape,[78] the co-optation principle in the Netherlands,[79] or the German rule that a candidate for the Constitutional Court is proposed by inter-party agreement between the Social Democrats and the Christian Democrats.[80] Similar rules exist outside of Europe. The candidates for Constitutional Court in Nicaragua need to be proposed by all major parliamentary parties in the Nicaraguan parliament.[81] US Presidents usually pre-emptively consult Senate party leaders and members of the Senate Judiciary Committee regarding their Supreme Court nominees.[82]

Informally created merit-based selection criteria also fall into this category.[83] However, many informal institutions impair the judicial recruitment process. Informal criteria, methods of selection, lack of transparency, and ties between actors often rig judicial selection and reshape the pool of eligible candidates for judicial positions.[84] In some countries, existing informal institutions

[76]*Id.*

[77]Dressel *et al.*, *supra* note 20.

[78]Toon Moonen, *The Council of State of Belgium: Advising the Political Branches, and the Constitutional Court*, [vol. 3] European Yearbook of Constitutional Law 2021: Constitutional Advice 83–102 (2022). *See* Mathieu Leloup, Informal Judicial Institutions in the Belgian Legal Order: A Story of Incremental and Reactive Development, in this issue.

[79]Geerten Boogaard, *Bipolar Constitutionalism in The Netherlands and Its Consequences for the Independence and Accountability of the Judiciary*, *in* [vol. 1] European Yearbook of Constitutional law 2019: Judicial Power: Safeguards and Limits in a Democratic Society 97–120 (2020).

[80]Uwe Kischel, *Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective*, 11 INT. J. OF CONST. L. 962–980 (2013).

[81]Rachel E. Bowen, The Achilles Heel of Democracy: Judicial Autonomy and the Rule of Law in Central America (2017).

[82]Denis Steven Rutkus, Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate (2010).

[83]Abhinav Chandrachud, The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India (2014); Andrea Pozas-Loyo & Julio Ríos-Figueroa, *The Politics of Amendment Processes: Supreme Court Influence in the Design of Judicial Councils*, 89 Texas L. Rev. 1807–33 (2011); Lawrence Repeta, *Reserved Seats on Japan's Supreme Court*, 88 Washington Uni. L. Rev. 1713–44 (2011); Nino Tsereteli, *Judicial Recruitment in Post-communist Context: Informal Dynamics and Façade Reforms*, 30 Int. J. of the Legal Profession 37–57 (2023).

[84]*See* Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue; Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue.

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emerged as a result of the politicization of the selection process. In Italy, for example, judicial appointment occurs in the shadow of the electoral campaign to the Judicial Council, which is strongly dominated by a fight among individual factions—*correnti*—inside the Judicial Council.[85] It is due to informal institutions that some merit-based selection systems still do not deliver a sufficient pool of highly qualified candidates.[86]

In a similar vein, IJI impact promotions, transfers, and other career decisions concerning already appointed judges. A fitting example comes from Hungary, where emerging constitutional convention presumed that the new chief justice of the Supreme Court will always be selected only from among the sitting judges of the Court.[87] In many countries, IJI provide that the promotion of judges to apex courts will happen only after they have served time at first-instance and second-instance—appeal levels.[88] Similarly, judicial internships, the assignment of judges to difficult cases, dismissals of judges on probation (*Richter auf Probe*), or sudden transfers to different courts can often be driven purely by informal rules.[89]

Disciplining and other accountability mechanisms might then prompt other questions and concerns related to the personal dimension of judicial governance. For instance, what informal accountability mechanisms can the chief justice use against rank-and-file judges? In the Dominican Republic, President Trujillo held undated letters of resignation from each member of the Supreme Court, allowing him to remove a judge at any time he was displeased with the Supreme Court's decision.[90] In Ukraine, there was a time when court presidents had discretion over bonus payments—they could even withhold salaries—and case assignments, or they used other extra-salary bonuses as carrots and sticks. Judges who delivered decisions that angered incumbent politicians sometimes faced sudden evictions from court housing accommodation.[91] A different type of informal practice may involve informal pressure on a judge to resign, instead of the initiation of official disciplinary proceedings. This may serve several purposes, from the protection of the judiciary from media interest and public backlash (i.e. reputation of the whole judiciary and protection of public trust in courts), to the protection of the given judge from potential reputational drawbacks. A famous example of informal disciplining comes from Ireland and involves the infamous Golfing Dinner. The Supreme Court Justice Woulfe attended a dinner during the COVID-19 pandemic lockdown. After the media drew attention to the case, three of Woulfe's colleagues met with the justice privately and simply informed him that it would be best if he just resigned.[92]

Lastly, in many jurisdictions, IJI can also impact the administration or composition of courts. For example, the Slovak Chief Justice and President of the Slovak Judicial Council have used the reshuffling of panels. On the one hand, this was done to influence the composition of panels deciding highly salient cases. On the other hand, recalcitrant judges were frequently transferred to panels deciding issues about which the judges were least expert.[93] In Czechia, there is no statutory provision that would set the number of judges at the Supreme Court and the Supreme Administrative Court. The number of judges of these two crucial apex courts is thus determined

[85]*See* Simone Benvenuti, *The Italian System of Judicial Governance: An Arena of Confronting Informal Practices and the Push Towards Formalization*, in this issue.

[86]*See* Samuel Spáč, *The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia*, 26 Problems of Post-Communism 1–11 (2020).

[87]*See* Attila Vincze, *Schrödinger's Judiciary—Formality at the Service of Informality in Hungary*, in this issue.

[88]Kadlec and Blisa, *supra* note 60.

[89]Popova, *supra* note 9.

[90]Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. Mia Inter-Am. L. Rev. 1–35 (1987).

[91]*See* Serhii Lashyn, Anastasia Leshchyshyn and Maria Popova, *Civil Society as an Informal Institution in Ukraine's Judicial Reform Process*, in this issue.

[92]In his letters to the Chief Justice, Woulfe stated that he "developed a serious medical condition in consequence of the stress." The letters were subsequently published and are available here: https://www.rte.ie/news/courts/2020/1110/1177081-letters-seamus-woulfe-chief-justice/; last accessed January 2023.

[93]Kosař & Spáč, *supra* note 5.

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by informal negotiations between the presidents of these courts with the Minister of Justice and the Government.

3. Extra-judicial activities

The third dimension where we can see IJI with potential impact on the functioning of courts is the dimension covering extra-judicial activities. This dimension only very slowly—if at all—emerges on the radar of ethical committees and other official regulatory bodies of judicial governance. For this reason it is mostly informal rules that set the boundaries on judges' extra-judicial activities and outline what judges can and cannot do.[94] There are informal rules preventing US judges from fund-raising for charities, from participating actively in business activities, or holding shares.[95] The newly adopted Code of Conduct for Justices of the Supreme Court of the United States,[96] albeit fully self-enforcing,[97] attests to the growing concern about the informal activities of several associate justices.[98] At the same time, several members of the UK Supreme Court hold shares in a number of publicly traded companies.[99] This suggests an informal institution that tolerates conduct that could call the Court's integrity and neutrality into question.

III. Arenas in which Informal Judicial Institutions Operate—Internal, Mixed and External Judicial Judicial Institutions

In the previous subsection, we showed that IJI permeate various dimensions of judicial decision-making and judicial governance. IJI are almost everywhere. But they are often also difficult to spot. They are less visible than formal rules. Importantly, they not only emerge within the judiciary, but also involve other actors. Sometimes, IJI that affect courts do not involve judges at all. In order to get a complete picture, we need to carefully examine arenas where these IJI are created.

We show that IJI can operate in three different arenas. Legal scholars distinguish between judicial and extra-judicial activities, often referring to the former as on-the-bench activities while the latter are referred to as off-the-bench activities. Recent political science scholarship exploring informality in the functioning of courts has adopted a different vocabulary: the on-bench, between-bench, and off-bench arenas, depending on whether judges act in their decision-making capacity— on-the-bench when acting within a single court and between-bench when interacting among different courts—or whether they engage in extra-judicial activities—off-the-bench.[100]

None of these taxonomies fully fits our analysis, because we are also interested in informal institutions that affect the judiciary but do not involve judges at all. A typical example would be an informal agreement between all major political parties regarding the selection of judges. Such an informal agreement is neither an on-bench, nor between-bench, or off-bench activity in the sense discussed above. For this reason, we propose a slight adjustment of this logic. In other words, we are broadening our arenas beyond those exclusively staffed by judges and acknowledge that informal judicial institutions may emerge also between politicians, business actors, and civil society. Based on that insight, we differentiate between internal, mixed, and external IJI.

[94]*See* David Kosař & Attila Vincze, *Constitutional Conventions Concerning the Judiciary beyond the Common Law*, in this issue.

[95]The Code of Conduct for United States Judges, last revised on March 12, 2019, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

[96]Supreme Court of the United States, Statement of the Court Regarding the Code of Conduct (Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

[97]*The Supreme Court's code of conduct is a good first step*, The Economist (Nov. 15, 2023), https://www.economist.com/united-states/2023/11/15/the-supreme-courts-code-of-conduct-is-a-good-first-step.

[98]Bob Bauer, *The Supreme Court Needs an Ethics Code*, The Atlantic (May 18, 2022), https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-roe-leak-ethics-code/629884/.

[99]Andrew Le Sueur, *Developing Mechanisms for Judicial Accountability in the UK*, 24 Legal Stud. 73 (2004).

[100]Dressel *et al.*, *supra* note 18, at 419.

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Internal judicial institutions appear inside the courts and influence both the structure of judicial governance and the quality of judicial decision-making. Typical examples of internal judicial informal institutions are *correnti* meetings in Italy,[101] the informal college of regional court presidents in Czechia,[102] meetings of the Jurisconsult with the ECtHR's section president on diverging case law,[103] and the annual meetings between CJEU and ECtHR judges.[104] At the same time, informal internal judicial institutions also emerge within judicial associations,[105] within grand chambers,[106] and among chief justices.[107] Regarding judicial governance, informal internal judicial institutions were reported, for instance, in the selection,[108] promotion,[109] and disciplining of judges.[110] Regarding judicial decision-making, informal internal judicial institutions may include informal rules concerning the deliberation of judges, choosing a judge rapporteur, or quora for decisions on leave to appeal.[111]

Mixed judicial institutions are informal institutions existing between judges and non-judges—typically politicians, oligarchs, or prosecutors. A majority of well-described mixed judicial informal institutions covers negative practices, such as informal institutions between politicians and judges in France,[112] judicial corruption,[113] and clientelist networks with oligarchs in Ukraine.[114] But neutral—or even positive—informal mixed judicial rules and practices may also emerge in the dimension of judicial selection and appointments. For instance, the executive appointing apex court justices in some jurisdictions informally consults the chief justice even if the executive authority does not have to do so. Moreover, some mixed judicial informal institutions might be perceived differently in different countries. In Belgium the practice of the secondment of magistrates of the public prosecutor's office to the ministries has recently come under scrutiny because it negatively affected *de facto* judicial independence.[115] A similar conclusion has been arrived at by the Czech Constitutional Court, which reacted to the widespread practice of secondment of judges to the Ministry of Justice, a practice that was later formalized in the law. The rationale for this practice was that judges might contribute "their experience," particularly for the purpose of drafting new legislation. Nevertheless, the Czech Constitutional Court eventually

[101]Guarnieri, *supra* note 2; Benvenuti & Paris, *supra* note 2.

[102]Kosař, *supra* note 6; Adam Blisa, Tereza Papoušková, & Marína Urbániková, *Judicial Self-Government in Czechia: Europe's Black Sheep?*, 19 German L.J. 1951–76 (2018).

[103]Başak Çalı & Stewart Cunningham, *Judicial Self Government and the Sui Generis Case of the European Court of Human Rights*, 19 German L.J. 1977–2006 (2018).

[104]Dean Spielmann, *The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or How to Remain Good Neighbours After the Opinion 2/13*, Revista Română de Drept European 11–22 (2017).

[105]Saskia Ruth-Lovell & Maria Spirova, Clientelism and Democratic Representation in Comparative Perspective (2019).

[106]Ondřej Kadlec, Role Velkých Senátů v Rozhodování Vrcholných Soudů České republiky (2019).

[107]Kosař & Spáč, *supra* note 5; Jakab, *supra* note 17.

[108]Samuel Spáč, *Recruiting European Judges in the Age of Judicial Self-Government*, 19 German L.J. 2077–2104 (2018); Pozas-Loyo & Ríos Figueroa, *supra* note 1.

[109]Guarnieri, *supra* note 2; Spáč, *supra* note 83.

[110]Katarina Šipulová, Samuel Spáč, & Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia,* German L.J. 1741–68 (2018).

[111]Doyle, supra note 66.

[112]Violaine Roussel, *Changing Definitions of Risk and Responsibility in French political scandals*, 29 J. of L. and Society 461–86 (2002); Vauchez, *supra* note 2.

[113]Mary Noel Pepys, *Corruption Within the Judiciary: Causes and Remedies*, *in* Global Corruption Report 3–11 (Diana Rodrigues ed. 2007); Daniel Beers, *Judicial Self-Governance and the Rule of Law, Evidence from Romania and the Czech Republic*, 18 Problems of Post-Communism 28–55 (2012); Popova, *supra* note 9; Cristina E. Parau, *The Drive for Judicial Supremacy*, *in* Judicial Independence in Transition 619–65 (Anja Seibert-Fohr ed. 2012); Maria Popova & Vincent Post, *Prosecuting High-level Corruption in Eastern Europe*, 51 Communist and Post-Communist Stud. 231–44 (2018).

[114]Maria Popova, *Ukraines Politized Courts*, *in* Beyond the Euromaidan: Comparative Perspectives on Advancing Reform in Ukraine 143–61 (2016).

[115]*See* Mathieu Leloup, *Informal Judicial Institutions in the Belgian Legal Order: A Story of Incremental and Reactive Development*, in this issue.

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abolished the practice as contrary to the principle of separation of powers.[116] In contrast, secondment of judges to the Ministries of Justice is regarded in Germany as both positive and necessary to secure sufficient expertise for the ministerial apparatus.

External judicial informal institutions cover those practices and activities that emerge from interactions concerning the judiciary between non-judicial actors, such as politicians, private business actors—corporations, businessmen, and oligarchs—and other legal professionals. As in the previous two categories, some of them carry positive or neutral, and some negative consequences for the functioning of the judiciary. Most common examples of external judicial informal institutions cover political conventions and informal agreements regarding the selection of judges that may pursue several goals: Proportionality between the opposition and a coalition, geographic proportional representation, gender requirements, and other diversity considerations.

A typical example of such an external judicial institution is the informal practice between two major German political parties regarding the selection of Justices at the German Federal Constitutional Court.[117] A similar rule can be found in Belgium, where the members of the Constitutional Court are elected by applying not only the rules explicitly stipulated in the Belgian Constitution concerning linguistic division and professional background, but also conventional rules concerning political diversity. More specifically, the judges of the Belgian Constitutional Court are expected to be representative of the political landscape. This means that for each vacancy it is known in advance which political party is "at bat" to select the new judge. The informal practice is that each party tries to choose a judge that will be acceptable for the other parties and that the other political parties simply do not complain.[118]

C. Conceptualizing Informality and Courts

Before we identify four major European—writ large—trends regarding informal judicial institutions, we need to stress that there is significant conceptual cacophony concerning the understanding of informal institutions themselves and the relationship of informal institutions with adjacent concepts. In order to avoid conflation of informal institutions with mere routinized behavior or even one-off instances of informal behavior, we adopt a triadic structure of informality that distinguishes informal acts, informal practices, and informal institutions. To clarify what we mean by informal institutions—and what we do not—, we also explain our understanding of conceptual differences between an informal institution and adjacent concepts such as judicial culture—which we view as a broader concept than informal institutions—and conventions—which we consider a subset of informal institutions. We follow this conceptual taxonomy throughout this Introduction and it informs the entire Special Issue, despite the fact that it is sometimes difficult to classify certain behavior unequivocally.

I. Informal Institutions and Their Relationship with Adjacent Concepts

Institutions—both formal and informal—are one of the several concepts that can be used to explain how and why judiciaries function the way they do, how and why their functioning in practice differs from their functioning on paper, and why some judiciaries contribute to the democratic decay in their countries even though their legal framework may be quite standard and has not undergone any sudden change. We therefore begin by situating the concept of institutions within a broader framework of related concepts.

[116]*See* Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.

[117]Kischel, *supra* note 80.

[118]*See* Mathieu Leloup, Informal Judicial Institutions in the Belgian Legal Order: A Story of Incremental and Reactive Development, in this issue; Toon Moonen, *House of Courts? De vernieuwing van het grondwettelijk hof [House of Courts? The Renewal of the Constitutional Court]*, 83 RECHTSKUNDIG WEEKBLAD 443, (2019) (Belg.).

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In general, we draw on Anthony Giddens' structuration theory,[119] which explains the relationship between individuals and society and replaces the traditionally established dualism between voluntaristic and deterministic types of theory with the central notion of the duality of structure. According to Giddens,[120] individuals do not act completely independently, but their behavior is constrained by social structures such as norms, rules, and institutions. At the same time, these social structures are the products of human agency. In other words, social structures are both created—and reproduced, modified, and transformed—by individuals while also shaping individual behavior. This is also true in the field of the judiciary: The behavior of judges and other actors is shaped and constrained by norms, values, beliefs, rules, formal and informal institutions, laws, customs, and, in the broadest sense, culture. But it must be acknowledged that this behavior is, at the same time, the product of human agency. The conceptualization of the different types of social structures that constrain and shape judicial behavior—and the position of informal institutions in it—is depicted in Figure 1.

This broad approach also integrates two perspectives that are used in the socio-legal literature to explain the workings of the judiciary and the gap between formal rules and how they work in practice. First, institutionalist and neo-institutionalist perspectives draw attention to the continuum between formal and informal institutions,[121] and they aim to map "the formal architecture and informal networks, connections, conventions, rules, and norms of institutions."[122] They primarily focus on various social structures constraining the behavior of judicial and non-judicial actors. Second, the relational perspective focuses on actors and personal interactions which animate individual behavior,[123] and, in short, argues that "relational dynamics between judges and other judges, politicians, political groups, legal actors, and other individuals and collective entities *matter*."[124] From the perspective of the structuration theory, however, these two approaches are not contradictory. The social structures that shape and constrain human behavior are necessarily the result of human action. But an interest in actors and their relationships is a necessary part of the study of social structures, including institutions.

Turning the focus to Figure 1, at the broadest level, the behavior of judges and other actors in the judicial field is shaped and constrained by the *culture* prevailing in each country or region. According to a widely cited definition by Kroeber and Kluckhohn, culture:

> [C]onsists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive achievement of human groups, including their embodiments in artefacts; the essential core of culture consists of traditional (i.e. historically derived and selected) ideas and especially their attached values; culture systems may, on the one hand, be considered as products of action, on the other as conditioning elements of further action.[125]

For example, the extent to which corruption, nepotism, and clientelism are prevalent in a country's judiciary is usually related to the broader culture of that country—these phenomena are typically not limited to the judiciary but are part of broader cultural patterns.

[119]Anthony Giddens, The Constitution of Society: Outline of the Theory of Structuration (1984).

[120]*Id.*

[121]Philip Ethington & Eileen McDonagh, *The Eclectic Center of the New Institutionalism: Axes of Analysis in Comparative Perspective*, 19 Social Science History 467, 470 (1995).

[122]Jane Lovenduski, *Foreword, in* Gender, Politics and Institutions: Towards a Feminist Institutionalism (M. L. Krook & F. Mackay eds. 2011).

[123]Dressel *et al.*, *supra* note 18.

[124]Björn Dressel & Raul Sanchez-Urribarri & Alexander Stroh, *Courts and Informal Networks: Towards a Relational Perspective on Judicial Politics outside Western Democracies*, 39 Int. Pol. Sci. Rev. 573, 574 (2018).

[125]A. L. Kroeber & Clyde Kluckhohn, *Culture: A Critical Review of Concepts and Definition*, 47 Paper of the Peabody Museum of American Archaeology and Ethnology 357 (1957).

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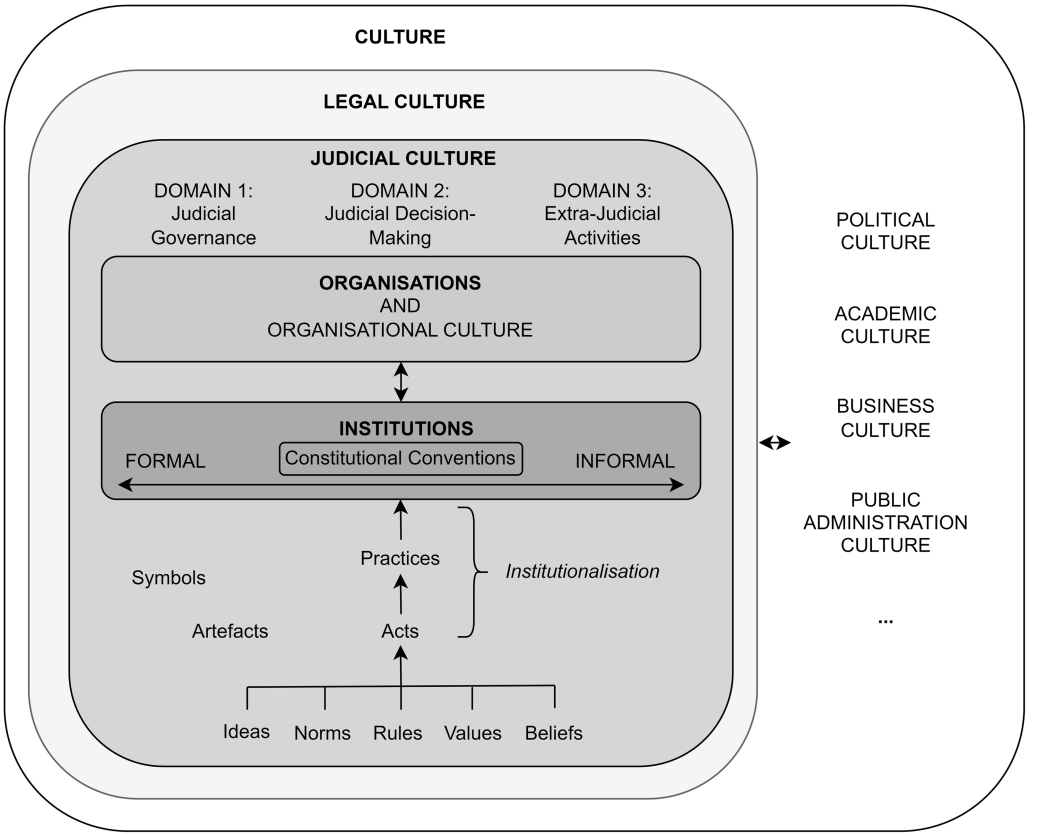

Figure 1. Social structures constraining and shaping judicial behavior.
Source: authors.

Furthermore, narrowing the scope specifically to the field of law, a specific subset of culture that shapes and constrains the behavior of actors in the judicial field is the *legal culture*, which can be defined as "relatively stable patterns of legally oriented social behavior and attitudes."[126] It includes institutions, various forms of behaviors, ideas, values, aspirations, and mentalities.[127] Legal culture helps us to explain why "individuals and societies differ in their use of law, or why legal systems differ, for example, in their litigation or prison rates."[128] Legal culture interacts with the culture of other social sectors, including political culture, religious culture, academic culture, business/commercial culture, public administration culture, and others.

Even more specifically, then, *judicial culture*—as a subset of legal culture—refers to the "features that shape how the work of a judge is performed and valued within particular legal systems."[129] Judicial culture covers the areas of judicial decision-making, judicial governance, and extra-judicial activities—interactions with other fields. As with any cultural-frame, judicial culture also involves norms, values, beliefs, ideas, symbols, artefacts, rules, practices, institutions, and organizations.

[126]David Nelken, *Using the Concept of Legal Culture*, 29 Australian J. of Legal Philosophy 1–25, 1 (2004).
[127]*Id.*
[128]David Nelken, *Sociology of Legal Culture*, *in* Research Handbook on the Sociology of Law 136–49 (Jiří Přibáň ed. 2020).
[129]John Bell, Judiciaries Within Europe: A Comparative Review (2006).

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By *organizations*, we mean organized groups of people who have gathered for a specific purpose—such as individual courts, judicial academies, judicial associations. Different judicial organizations, even within one judiciary and one judicial culture, may have a different *organizational cultures* that can be defined as:

> [A] pattern of shared basic assumptions that was learned by a group as it solved its problems of external adaptation and internal integration, that has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems.[130]

Although the terms "organization" and "institution" are sometimes used synonymously in common language, conceptually there is a significant difference between them. *Institutions* —formal or informal—are "the sum of (abstract and formal) rules of the game and of the ways in which those rules are concretely acted upon and played out,"[131] they are "the humanly devised constraints that shape human interaction,"[132] which provide "stability and meaning" to social life.[133] Thus, while "organizations" refer to a group of actors—players—and their particular strategies and tactics, "institutions" refer to the rules according to which the game is played,[134] and the ways in which these rules are applied—the practices.[135] "Culture," is a much broader and theoretically superordinate concept that encompasses all the elements mentioned above—and more. It helps to shape institutions and organizations and, unlike in case of institutions, the formal/informal duality does not apply here. Formal and informal judicial institutions are entrenched in culture as such, and legal culture in particular, they grow out of it, and their concrete form is one of its manifestations and expressions.

Finally, when thinking about informality, legal scholarship has long employed the concept of conventions, and we therefore consider it important to explain its place in our conceptualization. Since this Special Issue deals with informal institutions concerning the judiciary, we focus in our conceptualization only on *constitutional conventions*. According to Jaconelli, constitutional conventions are a species of social rules.[136] More concretely, they refer to those social rules that possess a constitutional significance, have a normative quality, they prescribe certain standards of behavior, and are not enforced in the courts. Constitutional conventions need some historical precedents, a belief that the rule is binding, and a reason for the existence of the rule.[137] In terms of our conceptualization outlined above, constitutional conventions can be understood as a specific type of informal institution—sets of rules that are considered binding and that are accepted as a social fact, and practices carried out on the basis of them—that operate in the field of constitutional law and that are usually considered legitimate by actors—which is not necessarily the case for all informal institutions.

II. Triadic Structure of Informality: Informal Act-Practice-Institution

Institutions are born in the process of institutionalizing human practices. Here, we distinguish between the concepts of "practice" and "act." On the one hand, "practice" is "a routinized type of behavior"[138] and "a pattern which can be filled out by a multitude of single and often unique

[130]Edgar H. Schein, Organizational Culture and Leadership 17 (2004).
[131]Djelic, *supra* note 26, at 26.
[132]Douglas C. North, Institutions, Institutional Change and Economic Performance 3 (1990).
[133]Scott, *supra* note 27.
[134]North, *supra* note 132, at 4.
[135]Djelic, *supra* note 26, at 26.
[136]Joseph Jaconelli, *Do Constitutional Conventions Bind?*, 64 The Cambridge L.J. 149, 151–52 (2005).
[137]Ivor Jennings, The Law and the Constitution 136 (1959).
[138]Andreas Reckwitz, *Toward a Theory of Social Practices: A Development in Culturalist Theorizing*, Eur. J. of Social Theory 243–63, 249 (2002).

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actions reproducing the practice."[139] On the other hand, "acts" in our understanding involve something done or performed. Practices and acts are shaped by actors' ideas, societal rules, principles or regulations governing conduct and behavior, norms, defined as "rules supported by a combination of empirical and normative expectations,"[140] values, the conceptions that we have about what is desirable, important, valuable, and correct, and beliefs, an acceptance that something exists or is true.

Acts can be of a one-off nature, single acts, but they can also become routinized over time in practice, and practice can become institutionalized over time and become an institution. There are at least three different mechanisms leading to *institutionalization*.[141] First, it can occur because of positive feedback—when a particular practice is rewarded and when the opportunity costs of an alternative practice increase over time. Second, it can occur because of actors' increasing commitment to the practice and their increasing interdependence—for example, when vested interests and ideologies become associated with a particular practice. Third, institutionalization can occur as a result of an increasing objectification of shared beliefs—when those who constructed certain practices pass them on to third parties as a fact. The process of institutionalization is completed when the shared understanding "is passed on to a new generation of actors who were not involved in its original formation" and the practice is accepted as a social fact.[142]

D. Lifting the Veil of Formality

Vibrant, multidisciplinary research in the area of judicial studies has been concerned with understanding *how* and *why* courts operate in a certain way, including what determines their effectiveness, their fairness, or their ability to fulfil their constitutional roles. Lately, however, it has become clear that understanding in this area is fully possible only if we go beyond the analysis of written law and observe the *de facto* behavior of courts and judges. That range of phenomena often relies on informality.

What can we learn about the functioning of the judiciary once we observe informal judicial institutions? How does the judiciary perform behind the veil of formal rules? This Special Issue describes the dynamics of informal and formal judicial institutions in the domains of judicial governance, decision-making and extra-judicial activities. We get a deeper insight into the *de facto* powers of court presidents who, in many countries, possess wide discretion regarding the formation of panels, case (re)assignment, and other managerial decisions that more-or-less directly impact judges' decision-making capacities. Informal rules also partly explain why some judiciaries struggle with vertical or horizontal gender segregation. The selection of judges in Europe is typically a formalized and transparent event. Still, broader, opaque, and informal factors shape initial pools of candidates, and incentivize judges to apply for promotions or pursue careers at the top level. Identifying IJI and networks among judges and third actors allows us to observe the weak spots in courts' independence and their insulation from political or business interests. In a very similar manner, informal practices can explain how chief justices create successful leadership styles and how they are able to protect "their courts" from external pressures.

As this Special Issue documents, these informal acts, practices, or institutions are often less visible, are difficult to observe, and sometimes they are even undertaken beyond an actor's conscious recognition. It can also be very difficult to draw a strict line between formal and informal rules and practices. There is a lot of scholarship exploring the interaction between the

[139] *Id.* at 250.

[140] Christina Bichieri & Hugo Mercier, *Norms and Beliefs: How Change Occurs*, 63 IYYUN: THE JERUSALEM PHILOSOPHICAL QUARTERLY 60–82, 61 (2014).

[141] SCOTT, *supra* note 27.

[142] Renate E. Meyer, *A Processual View on Institutions: A Note from a Phenomenological Institutional Perspective, in* INSTITUTIONS AND ORGANIZATIONS: A PROCESS VIEW 33–41, 37 (Reay et al. eds. 2019).

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two worlds, inquiring when and how informal institutions evolve into formal institutions. This Special Issue understands the informal—formal axis as a continuum, while formalization is a moment when informal rules and practices are absorbed by public authorities and turned into formally enunciated, enforceable norms sanctionable via formal channels.

How do these fragile dynamics manifest in the area of judicial governance and judicial decision-making? Does informality help or hinder courts' efficiency? The careful comparison of the thirteen case studies and five cross-cutting articles included in this Special Issue allowed us to observe four major trends in the internal dynamics between formal and informal judicial institutions.

First, IJI are an important link between the *de jure* and *de facto* performance of courts. Some scholars have already suggested that informal institutions appear among the key factors that create the causal explanation of differences between judicial independence on the *de jure* and *de facto* level.[143] Individual case studies in the Special Issue pursue this argument and show that IJI can operate both in positive and negative directions. The compatibility between aims followed by formal and informal rules has a significant impact on the gap between *de jure* and *de facto* independence, quality of justice, or efficiency of courts.

Second, there is a strong trend towards formalization, both in countries whose judiciaries were largely informally governed, and in states dominated by formal rules. The tendency to remove IJI appears even in those cases where informality worked well, was long embedded, and had positive effects on the functioning of courts. The major drivers of this trend are supranational bodies. Several authors explore why this trend appears and what its repercussions are.

Third, although we have comparatively more examples of IJI with negative repercussions, informality can in fact also bear many positive effects, particularly due to its bottom-up character. As some authors suggest, existence of IJI is necessary for the increased trust in institutions, and elites' commitment to values protected by a formal framework. From this perspective, informal institutions play a crucial role in transforming systems and transitioning judiciaries. If actors do not internalize the values behind new institutional formal reforms, the old conflicting informal institutions might be able to survive and will not be eradicated through the formalization of practices. Then, the lack of understanding and internalization of values such as judicial independence will sooner-or-later trigger the emergence of new IJI. This process will deepen the incongruence between values preserved by formal changes of the judicial system and its *de facto* activity, or the perception of the role courts should play in society.

Fourth, the appreciation of IJI is important for our understanding of current constitutional crises and democratic decay that targets courts as one of its first aims. IJI that have effect on democracy work in two directions, they can increase resilience or make courts more vulnerable. But as we have also seen, no matter how well embedded IJI are, they are relatively easy to remove in severely polarized societies. Below, we address each of these trends in more detail.

I. Informal Institutions as a Link Between the De Jure *and the* De Facto *Performance of Courts*

Courts are generally seen as rather formalized actors. They are the products of and embedded in constitutions and legal statutes. Although judges fill in gaps in these codified regimes and sometimes actively develop new legal rules, the general principle of their deliberation and decision-making is that they interpret—written—law, and, while doing so, they are bound by domestic or international legal norms. It is therefore not all that surprising that the continental legal and political science scholarship was somehow reluctant to acknowledge the impact of informal institutions on the governance and decision-making of courts. An exception to that tradition involved studies on socio-economic factors that impact judges' decision-making. But these studies were more common in common law jurisdictions. Despite this general academic

[143]Pozas-Loyo & Ríos-Figueroa, *supra* note 25.

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neglect, IJI are very much present in all judicial systems, although they might not be easy to observe. Sometimes they emerge to improve the position of individual actors compared to how much power and space for maneuver they are given by the formal institutional framework. In such a scenario, actors benefit from their mutual relations, the more networks and connections they have, the more arenas they participate in, the more informal practices they are able to initiate allowing them to tweak the power distribution to their benefit.

Many Special Issue authors have identified the emergence of IJI in those arenas where, at least according to the formal institutional framework, judges have a rather limited voice: They are formally engaged in governance, but with a limited formal impact on its regulation. In many European jurisdictions judges develop new informal rules, including self-constraining rules of behavior, to keep themselves from political pressure, or to increase judicial independence, accountability or transparency.[144] For these reasons, many judges engage in the development of ethical standards, rules of proportionality, or impartiality. These are IJI that actually complement the constitutional design and support the rule of law, while also slightly reshaping the arena and empowering judges when compared to their political counterparts.

Silvia Steininger shows in her article *Talks, Dinners, and Envelopes at Nightfall* that even in a system as formalized as the German judiciary, the majority of extra-judicial activities of German judges, their communication strategies, or their contacts with politicians, were in fact governed exclusively by informal practices. To an extent, the lack of formal regulation might be the result of stakeholders' lower interest in some areas of judicial governance and decision-making. The lack of attention on the part of legislative and executive power naturally left judges with large space for maneuver, which they had to fill with their own bottom-up created, informal rules. However, the recent increase in the public's interest in judicial communication, legitimacy, and ethical standards, has had the effect of imposing a greater number of formal rules on judges and their behavior. External judicial practices suddenly appeared in the limelight of the public debate. For a long time, the German Constitutional Court used informality to exclude outsiders but also to promote its authority across the political and legal fields. Now, the *Bundesverfassungsgericht* struggles to coordinate with outsiders and faces increased pressure to make its rules on the behavior of judges and their communication more transparent for the sake of the—perceived—judicial independence and the rule of law.

Czechia also belongs to the family of continental career models for the judiciary. That tradition is commonly seen as deeply formal, hierarchical, and conservative. The scholarship mapped relatively well why Czechia, as the sole black sheep of the Eastern enlargement wave, rejected the supranationally recommended model of judicial council that delegates the governance of courts to a mixed body with a dominant representation of judges. Instead, it rests the judicial governance on the cooperation between the Ministry of Justice and court presidents.[145] Ondřej Kadlec and Adam Blisa go back one step further and show that much of this cooperation rests on informal powers of court presidents who have capitalized on the inability of the Ministry to properly govern the judiciary.[146] Kadlec and Blisa closely examine Czech practices in the selection of judges, decisions on composition of panels and case assignment, or off-bench activities. They explain how some judges managed to utilize the lack of regulation to informally increase their influence and eventually reach the position of "super-judges." Super-judges are a relatively small class of judges

[144]Joost Pauwelyn & Krzysztof Pelc, *Can Informal Judicial Norms Protect Against Political Pressure?* (June 15, 2023). Available at SSRN: https://ssrn.com/abstract=4480057.

[145]Kosař, *supra* note 15; Kosař, *supra* note 6; Blisa *et al.*, *supra* note 102; Katarína Šipulová, Marína Urbániková, & David Kosař, *Nekonečný příběh Nejvyšší rady soudnictví: Kdo ji chce a proč ji pořád nemáme?*, 29 Časopis pro Právní Vědu a Praxi 87–122 (2021).

[146]Katarína Šipulová and her co-authors make a similar observation based on quantitative measurement of the self-governance of judges. *See* Katarína Šipulová, Samuel Spáč, David Kosař, Tereza Papoušková, & Viktor Derka, *Judicial Self-Governance Index: Towards a Better Understanding of the Role of Judges in Governing the Judiciary*, 17 Reg. & Gov. 22–42. (2023).

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who, through the use of informal practices, enhance their already—formally—strong positions and wield immense influence on the functioning of the judiciary in both its administrative and decision-making dimensions. These super-judges have far more influence than their official roles suggest. The article's authors warn that, although superjudges arose out of systems with great levels of institutional as well as individual judicial independence, their powers can now compromise the integrity of judicial processes and undermine the authority and perceived legitimacy of courts.

Interestingly, the concept of super-judges has also emerged in Spain, albeit with very different connotations. Sara Iglesias Sánchez and Rafael Bustos Gisbert offer an insight in the Spanish judiciary that places a high value on formality as a guarantee of objective and unbiased judiciary, and as a shield against politicization. Yet, the authors explain that this system was still able to generate very strong informal networks and informal institutions that now present a potential danger for democracy. In the article *What Does It Take to Become a Judge in Spain? An Informal First Step into a Formal World,* the authors focus on widespread informal institutions concerned with the training of new judges—which requires an expensive and lengthy coaching program for state exams. They argue that informal coaching endangers democracy with its lack of transparency, its imposition of economic barriers on the access to the profession, and its adverse impact on the overall judicial culture.

Another unexpected actor in judicial governance appears in the article *Civil Society as an Informal Institution in Ukraine's Judicial Reform Process*, which has been authored by Serhii Lashyn, Anastasia Leshchyshyn and Maria Popova. The authors discuss the unique repercussion of the Revolution of Dignity and the failed professional transformation of the Ukrainian judiciary. Since then, judicial reform has remained a salient topic. The inability of courts and judges to reform from the inside and rid their ranks of judges suspected of involvement in corruption or susceptible to capture by oligarchs triggered a unique change in society. Societal actors now pose as the watchdog of the judicial reform process and the key accountability actor. Society, mostly via grass-roots, bottom-up, and decentralized processes, monitors the judiciary and *de facto* replicates accountability mechanisms against the behavior of judges, as well as the more general performance of the judiciary. Civil society monitoring is well-institutionalized and finds support and leverage in EU institutions.

Finally, Lukáš Hamřík penned the article *Actors of Informal Judicial Institutions and Practices*, which examines the role and empowerment of unexpected actors through IJI. Hamřík argues that IJI can, in many jurisdictions, significantly reshape the field of power and influence of individuals. IJI either empower or bring completely new actors into the game. Unless an optic is adopted that allows us to explore IJI, we will never be able to map the whole field.

What follows from these observations? First, all these articles implicitly show that formal rules do not necessarily paint a real picture of the balance of power inside the judiciary and its governance. On the surface, IJI shape the functioning of courts. Some informal institutions are detrimental to the independence and legitimacy of courts. They may skew the selection processes and insert biases by lowering the impartiality of judges—who, because of IJI, might enter the judiciary in subservient position due to expectations of loyalty and gratitude. Other times, IJI further the protection of judicial independence or the insulation of judges from potential political pressure. They may reflect various proportionality rules, for example, to secure wide societal or multipartisan participation in the process of judicial selection. IJI may skew merit-based selection processes, but they might also insert new checks and balances and increase the legitimacy of indirectly elected judiciary.

The case studies in this Special Issue also hint at deeper consequences. Understanding IJI seems to be essential for the proper mapping of autonomy and power dynamics between individual actors of judicial governance and decision-making. The formal rules do not correspond to the *de facto* powers of individual stakeholders. In some instances, the appropriation of powers via the creation of informal rules is a natural consequence of a lack of regulation. We often see this in the

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case of chief justices and court presidents who have to be able to promptly react and adapt their managerial roles in order to secure the efficient functioning of their courts. The actors who benefit from IJI are not arbitrary. Typically, IJI emerge to advantage those actors who already bear relatively significant powers, or, at least, access to channels between crucial stakeholders. Yet, the multiplication of powers above the regulatory framework bears significant risks for the principle of separation of powers, and in the worst cases, will create an unbalanced system with skewed accountability mechanisms.[147]

II. Dynamics Between Formal and Informal Institutions: The Trend of Increasing Formalization

New informal institutions emerge for various reasons. Sometimes they fill the vacuum that exists because formal institutions are absent and do not regulate a given arena sufficiently.[148] Formal institutions can be incomplete or ineffective,[149] or not supported by sufficiently strong enforcement mechanisms.[150] In such scenarios, actors might seek to introduce new IJI to reshape the balance of power created by formal institutional design and improve their own position. Naturally, this process is not available to all actors, but only those who can multiply their high social capital and embeddedness in various relational networks.[151] Alternatively, if the formal norms are sufficiently effective, new IJI will evolve to reinforce the local culture, better coordinate the arena, resolve potential conflicts, and reduce transaction costs.[152]

In Czechia, the judicial governance model overseen by the Ministry of Justice leads to many gaps that have been appropriated by court presidents. Actors also create informal rules if they feel that the formal framework is too difficult to change, weak, or if it blocks them from pursuing goals that are not publicly acceptable.[153] As Šipulová and Spáč suggest, IJI can also emerge when actors do not internalize values behind newly introduced formal rules, and then create alternate systems of rules that better reflect their own understanding of, for example, limits and margins of judicial independence. This means that reasons behind the emergence of informal institutions move on two axes: One describes the ability of informal institutions to fill in the gaps in the existing formal framework; another captures the compatibility between the aims pursued by formal and informal institutions, since IJI can be created both to support the goals of formal rules, or to undermine them to prevent them from working effectively.

It is also worth noting that the relationship between formal and informal institutions can change due to their mutual interaction. IJI can diffuse in time, but they can also weaken or disappear completely if they are not functional, go unenforced, or if new eroding norms or a change of cultural beliefs emerge.[154]

The reasons for the emergence of informal institutions foreshadows their interaction with formal institutions. Based on the type of interaction, different authors in this Special Issue distinguish between different types of informal institutions. Helmke and Levitsky's[155] typology is based on the degree of convergence between the aims of formal and informal institutions and the degree of effectiveness of formal institutions. Accordingly, they distinguish four types of informal institutions: Complementary—which reinforce effective formal institutions—, substitutive—

[147]*See* Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.

[148]Lauth, *supra* note 33.

[149]*Id.* at 60.

[150]Terry L. Anderson & Dominic Parker, *Culture, Sovereignty, and the Rule of Law: Lessons from Indian Country*, PUBLIC CHOICE 2023. Available at: https://link.springer.com/article/10.1007/s11127-022-01026-9#citeas.

[151]Joost Pauwelyn & Krzysztof Pelc, *supra* note 144.

[152]Anderson & Parker, *supra* note 150.

[153]HELMKE & LEVITSKY, *supra* note 24, at 19–20.

[154]SCOTT, *supra* note 27.

[155]HELMKE & LEVITSKY, *supra* note 24, at 13–17.

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which substitute ineffective formal institutions—, accommodating—which subvert the expected outcome of effective formal institutions—, and competing—which take advantage of the ineffective formal institutions. According to Azari and Smith,[156] informal institutions can perform three functions: complete formal institutions, co-ordinate the function of formal institutions, or operate parallel to formal institutions. Similarly, Grzymala-Busse argues[157] that informal institutions can replace, undermine, support, or strengthen formal institutions.

How does this dynamics manifest inside the judiciary? The largest trend we have observed across common law and continental jurisdictions, and across various models of judicial governance, was the gradual decline of informality and growing pressure to formalize the rules, irrespective of how well IJI function.

Continental courts are organized around formal institutions; the UK has always been standing on the opposite bank. As Sophie Turenne points in her article *Informal Judicial Institutions – the Case of the English Judiciary*, the informality at the heart of the judiciary in England and Wales reaches back to the inherited development of English law. The tradition assumes independent, creative judges who join the bench at a senior age and perceive the profession as an opportunity to contribute to the development of the law through their decisions. Informality drives not only decision-making but also the structure and organization of judicial governance, including the patterns and routines of judges' behavior. This, however, does not come without drawbacks. The post-Brexit constitutional crisis demonstrated the government's capacity to swiftly abandon long-established and observed unwritten constitutional norms. The conflict and tension between the government and the judiciary increases the pressure for the formalization of the separation of powers principle. That process of formalization curtailed the powers of the Lord Chancellor, but also imposed new expectations on courts, which were expected to modernize, engage more closely with the public, and increase the transparency of their internal processes.

Patrick O'Brien in his article *Informal Judicial Institutions in Ireland* collects evidence of an even stronger drift towards formalization behind full-fledged modernization of the Irish judicial governance system. Originally, governance of the judiciary was largely informal and political. Over the past 25 years, this system has been abandoned in favor of much more formalized governance, which resembles the model recommended and promoted by European supranational institutions. Interestingly, it was judges and politicians who stood behind this development, using the leverage of EU and CoE soft-law measures perceived as best practices. This actually shows us a lot about responsibility shifting: the system needed reform and the government happily externalized the effort and took on board recommendations from supranational European partners. There were some drawbacks—like rules completely missing in less politically salient areas—, but the judiciary was generally effective and stable, and enjoyed robust public trust. As O'Brien aptly points out, the formalization seems to have resulted from a quest for world in which rules would replace faith as a foundation for judicial governance and authority.

The formalization drift also appears in jurisdictions where we normally associate courts with a high degree of formality. Mathieu Leloup observes a similar trend in his article *Informal Judicial Practices in the Belgian Legal Order: A Story of Incremental and Reactive Development*. Leloup describes the Belgian judiciary as a system that is primarily formalized. But it also generates IJI filling in the gaps in the contours of the system. Interestingly, however, the Belgian legislature has interfered with increasing frequency and is formalizing these informal rules, typically as a reaction to external pressure.

The two horizontal articles, *Supranational Actors as Drivers of Formalization*, by Mathieu Leloup, and *Informality as a Virtue*, penned by Hubert Smekal, take a step back and look at more

[156]Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSPECTIVES ON POLITICS 37–55, 38 (2012).

[157]Anna Grzymala-Busse, *The Best Laid Plans: The Impact of Informal Rules on Formal Institutions in Transitional Regimes*, 45 ST. COMP. INT. DEV. 311–33 (2010).

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general patterns and repercussions of the process of formalization. As Leloup states, the drivers of these processes are supranational actors on the European level. First, they pose as a source of inspiration, nudging domestic actors with particular examples of their effectiveness and prominence. Leloup warns that supranational actors think very little about informality and have a tendency to overlook informality and its meaning. Similarly, in his analysis of benefits and potential positive effects of IJI, Smekal warns that the process of formalization deprives IJI of their capacity to "fill in the gaps" of less flexible formal regulation. Smekal argues that IJI have their place in the constitutional framework because, if they are consonant with principles of formal rules, they actually decrease transaction costs, reduce uncertainty, and promote social trust. This observation echoes works that suggest that informal institutions are a natural part of the evolution of political and social systems and they represent the bottom-up creation of rules, including the rules necessary for fostering democracy and the rule of law. Their bottom-up character increases social trust, reinforces legal culture, and potentially also lowers deviation.

But, if informal institutions play a potentially positive role, why do we see increased pressure for formalization? This Special Issue provides three tentative explanations. First, the formalization of informal institutions concerning the judiciary results from a shift in judicial culture and more stringent requirements of the rule of law. Nowadays, the principles of transparency and accountability apply also to the judiciary, which resisted these pressures for a long time. For this reason, informality in the functioning of the judiciary is being replaced with formalized rules of behavior. This development is not necessarily motivated by the lack of effectiveness of informal institutions or because of their negative repercussions, but because of the belief that the formal rules increase the participation of individuals in the rule of law systems. However, this formalization without deep and developed democratic cultures, that create informal "guardrails" for the protections against a slide into autocracy, is futile. Moreover, formalization often decreases flexibility and effectiveness of courts. There are empirical studies that suggest that informality in judicial decision-making and management emerges as a means of increasing the ability of courts to deal with growing case-loads, and in any case to be more effective or efficient. As a drawback, however, this informality in managerial style makes the systems less understandable and creates a significant barrier for individual participation.[158]

Second, formalization results from the tendency of some stakeholders to rely on the technocratic style of governance, which uses overregulation and imposition of top-down rules. This also relates to change in the arena where the rules are developed. In Europe, many formal requirements now emerge at the supranational level and are imposed on domestic actors via the organs of the European Union and the Council of Europe bodies.[159] These supranational bodies attempt to approximate the legal and judicial systems across the Continent, with the promise to increase institutional safeguards against democratic decline. Many EU member states have internalized this mindset and voluntarily adjusted to these supranational efforts.[160] Others have resisted[161] or perverted[162] the supranational signals.

Third, formalization is expected to decrease the vulnerability of informal norms, which are perceived as more fragile and susceptible to change.[163] Many IJI originally developed to protect judges from political pressure. They attached to the principles of democracy and the rule of law,

[158]Lucy Welsh, *Informality in Magistrates' Courts as a Barrier to Participation*, 74 INT. J. OF L., CRIME AND JUSTICE 1–11 (2023).

[159]*See* Mathieu Leloup, *Supranational Actors as Drivers of Formalization*, in this issue.

[160]*See id.*; Patrick O'Brien, *Informal Judicial Institutions in Ireland*, in this issue.

[161]Poland has presented firm resistance to EU pressure. Only time will tell whether the results of the recent 2023 Polish parliamentary elections will reverse this posture in the long term.

[162]*See* Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue; Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue.

[163]See Patrick O'Brien, *Informal Judicial Institutions in Ireland*, in this issue.

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and they provided an additional layer of protection above codified ethical standards or various rules of representation. One way IJI added protection was by increasing the number of potential veto points actors would need to overcome in an attempt to capture the judiciary. Formalization is a sort of pre-commitment strategy that follows a "judicial stress test."[164] This is not surprising. As Guy Lurie suggests in his study of the Israeli judiciary, informal institutions are often very fragile. Some of them are relatively easy to dismantle, even if they were properly internalized and observed by the majority of relevant actors. In other words, there is a tendency to translate informal institutions directly into formal frameworks because they are put under stress. In this way, they are absorbed by actors who identify them as binding and start enforcing them via formal sanctioning channels—typically supreme courts and constitutional tribunals. If some of these sanctioning channels are approaching a collision course with dominant political actors, then there is even more impetus to increase informal norms' embeddedness in constitutional structures.

III. Commitment of Elites and Internalization of Values

The third trend the authors in this Special Issue explored is the role of IJI in institutional reforms, and, in particular those institutional changes pursued by the European Union and Council of Europe that sought to foster processes of democratization. The observation that transplantation of institutional reforms from one country to another is problematic, is neither new nor surprising.[165] This was very much the case with the establishment of judge-dominated judicial council, built on the example of the Italian model and promoted by the Venice Commission and European Commission in the post-communist region. Nino Tsereteli,[166] Katarína Šipulová & Samuel Spáč,[167] and Attila Vincze[168] offer more evidence of the degree to which these models not only failed, but, in fact, magnified negative phenomena in those countries that were already struggling with widespread corruption, clientelism, low public trust, politicization, and a general lack of independence inside the judiciary.

But why were the supranational recommendations so unsuccessful? Generally, we know that institutional changes on their own rarely trigger behavioral change.[169] Existing research suggests that the weak effect of formal institutional changes results from elites' shallow commitment to the underlining values of democracy and the rule of law.[170] Several authors in the Special Issue broaden this idea further and point to, on the one hand, a lack of congruence between new formal and surviving informal institutions, and, on the other hand, the ability of informal institutions to increase trust and loyalty due to their organic, bottom-up character.

Simone Benvenuti, in the article *The Italian System of Judicial Governance: An Arena of Confronting Informal Practices and the Push Towards Formalization*, uncovers informal rules and practices operating inside the Italian judicial council, and particularly in the appointment of court presidents and the evaluation of judges. Some IJI amplified the corporatist character of the Italian judicial council that also allowed the judicial associations and stakeholders to increase their

[164]*See* Mathieu Leloup, *Informal Judicial Practices in the Belgian Legal Order: A Story of Incremental and Reactive Development,* in this issue; Patrick O'Brien, *Informal Judicial Institutions in Ireland,* in this issue.

[165]Antoaneta Dimitrova, *The New Member States of the EU in the Aftermath of Enlargement: Do new European Rules Remain Empty Shells?* 17 Journal of European Public Policy 137 (2010); Attila Ágh, *The Bumpy Road of Civil Society in the New Member States: From State Capture to the Renewal of Civil Society,* 11 Politics in Central Europe, 7 (2015).

[166]Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue.

[167]Šipulová & Spáč, *supra* note 162.

[168]Attila Vincze, *Schrödinger's Judiciary—Formality at the Service of Informality in Hungary*, in this issue

[169]Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, 14 Eur. Pub. L. 99–123 (2008); Brinks, *supra* note 55; Santiago Basabe-Serrano, *Informal institutions and judicial independence in Paraguay*, 1954–2011, 37 Law & Policy 350–78 (2015); Tsereteli, *supra* note 83; Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue.

[170]Tsereteli, *supra* note 83, Maria Popova, *Can a Leopard Change its Spots? Strategic Behavior versus Professional Role Conception During Ukraine's 2014 Court Chair Elections*, 42 Law & Policy 365–81 (2020).

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influence and power. Yet, it would be wrong to portray them in negative terms only. Some IJI add to the overall flexibility of the legal framework, particularly if this is too complex, or has many loopholes due to hyper-regulation.

Katarína Šipulová and Samuel Spáč take this argument one step further. Their Article *No Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia* shows that the formal reform of judiciaries might not provide sufficient incentives for judges to change their behavior. Slovakia implemented a supranationally recommended model involving a judicial council and shifted the concentration of power from the political branches and the Ministry of Justice to the judges. Yet, the reform failed to rid the national judiciary of a strong clientelist tradition and corruption networks. Why? The authors argue that formal institutions have only limited impact on the ideational level. In order to be effective, they must achieve the internalization of the underlying values of democracy by individual stakeholders—elites. The transformation of the Slovak post-communist judiciary relied on the presumption that judges' interests are automatically complementary to the principles of the rule of law. The majority of the reforms insulated the judiciary from the political branches, but allowed strong hierarchical relationships inside the courts to persist and flourish. The authors use examples of judges' behavior on- and off-bench to demonstrate that judicial independence and its margins were never properly understood and internalized by the majority of Slovak judges. This eventually led to a skewed conception and to their diminished sensitivity to threats to judicial independence specifically, as well as to the rule of law and democracy in general.

The study of Georgia by Nino Tsereteli entitled *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, extrapolates the negative experience of judicial reforms that are not embraced by elites who understand, share, and internalize the core values informing the changes. Tsereteli cautions that in some societies strong judicial councils and judicial self-governance bodies can be easily manipulated so that they benefit oligarchs. As Tsereteli argues, many societies fight never-ending battles against judicial corruption because the rest of the judicial elites simply do not care and have very little interest to engage in questions of governance.

What do these case studies teach us? The common narrative is that, while supranationally sponsored reforms are not wrong *per se*, they are often not enough to realize their aims. Success requires that these supranational reforms are supported by mechanisms that allow actors to properly understand and internally conceptualize the values that these formal reforms ought to protect. It is crucial that judges understand what judicial independence is. Unless they properly internalize it, they can hardly be committed to the values these detailed reforms seek to implement. The lack of internalization will allow the subsequent creation of contradictory new informal acts, practices, and eventually institutions. As studies suggest, it is essential, for the democratization efforts, that we are able to spot old IJI that might be competing with the spirit of new reforms. Once those irritants have been spotted, it will also be necessary to know how to effectively see them off. In this respect, emerging informal practices are a good litmus test to assess whether actors understand and share the principles that the new regulation aims to promote and protect. If judges do not share the same understanding of judicial independence, if they are not committed to it, then any formal reform will lead to a situation in which open challenges to, as well as small departures from, judicial independence persist.

IV. Democracy and Informal (Judicial) Institutions

As we already noted, IJI can have both positive and negative repercussions on the functioning of courts. Since the research on positives is rather underdeveloped, Hubert Smekal, in his Article *Informality as a Virtue*, offers a novel framework for the analysis of the positive relationship between formal and informal institutions. Smekal explains three core IJI scenarios and formal rules co-existence: (1) Formal institutions remain largely absent while informal institutions dominate and enhance the fundamental values of judicial systems; (2) formal and informal

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institutions are congruent, and informal institutions further improve the design or functioning of formal institutions—"fill-in gaps"; and (3) formal and informal institutions conflict, with informal institutions rectifying the poor design or functioning of formal institutions. The framework for assessing the level of (dis)agreement between informal and formal institutions then changes depending on whether IJI fill in the gaps of missing, or too general, formal rules, whether they tighten formal rules towards a stricter norm, or, to the contrary, loosen the rules.

The relationship and congruence between formal institutions and IJI is at the heart of the Article by Katarína Šipulová and David Kosař that deals with *Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries*. The authors situate IJI in the process of de-democratization and decline of democratic structures of courts, and they argue that informal institutions interact with democracy in two core directions. The first is endogenous and describes the decay of democratic judiciaries as a result of a long-term incongruence between formal and informal judicial institutions. The second direction captures the gradual erosion of informal institutions that have positive effects on judicial democratic resilience. These two processes—decay and the erosion of informal judicial institutions—should not be neglected. While they are less visible, slower, and often unintentional, they are as dangerous as frontal, executive-led attacks on courts, because they significantly increase the window of opportunity for politicians who wish to downgrade the substance of democracy or even implement a regime change.

IJI can either increase the resilience of the judiciary or open the window for its further erosion or decay. The contribution by Sorina Doroga and Raluca Bercea on *The Role of Judicial Associations in Preventing Rule of Law Decay in Romania* shows the strength of strategic alliances formed by Romanian judges during the rule of law crisis triggered by the 2017–2019 reforms. The Romanian judicial associations pushed the overarching aim of those entities—namely, the protection of rule of law—to the next level. The associations led an intentional coordination of individual court disputes with the aim of utilizing and pressuring the European Court of Justice to adjudicate on the Romanian situation via the use of the preliminary ruling procedure.

David Kosař and Attila Vincze then follow up with a discussion of constitutional conventions concerning the judiciary. They show that constitutional conventions—the typically unwritten rules that inform, guide, and curtail the actions of constitutional actors—are an essential part of constitutional architecture in any constitutional system and permeate not only the political branches but also the judiciary. Importantly, these constitutional conventions concerning the judiciary do not only exist in the common law world. They can also be found in civil law jurisdictions. On a more general level, Kosař and Vincze connect legal scholarship on constitutional conventions with the writings on informal institutions in the social sciences. They argue that constitutional conventions are a subcategory of a broader class of informal institutions, but they are a specific species among informal institutions. At least three features distinguish constitutional conventions from informal practices, informal institutions, and "non-constitutional" conventions. First, constitutional conventions must concern issues of constitutional significance and must involve constitutional actors, which not all informal institutions do. Second, constitutional conventions are usually considered legitimate by the relevant constitutional actors, which is again not necessarily the case for all informal institutions. Finally, there must be a constitutional justification enshrined in the constitutional convention.

In contrast, Guy Lurie in his Article *The Invisible Safeguards of Judicial Independence in Israeli Judiciary* shows that informal rules, that long existed in Israel as safeguards against political interferences in judicial independence, are very fragile and relatively easy to dismantle. The political attempt to change these informal institutions can even be seen as a harbinger of the current attempt of Netanyahu's coalition government to adopt a constitutional overhaul that formally changes the constitutional status of the Israeli judiciary.[171] If this judicial reform

[171] A lot has been written on the 2023 judicial reform and the protests against it. The Israel Law Review has the most detailed analysis to date. *See* 56 Israel Law Review (Special Issue 3: The Constitutional Crisis in Israel).

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succeeds, which is by no means clear at the moment of writing this article, even though the Israeli government had implemented one major pillar of the reform before the Israeli-Hamas war was triggered, it will strengthen political and partisan considerations in judicial appointments as well as opaquely change who is responsible for court administration in Israel.[172] This may in turn tighten the political grip over the Israeli judiciary,[173] as well as halt the judicial anti-corruption check on Israeli politicians.[174]

E. Conclusion

For decades, social, political and legal scholars pursued the puzzle: Why is there such a significant gap between formal institutional design and the actual performance of courts? The discrepancy is most visible in the comparison of *de jure* and *de facto* judicial independence,[175] but the evidence is also present in the participation of judges in judicial governance—with judges informally executing many of competences held by ministries of justice or other actors.[176]

In this Special Issue, we abandoned the traditional legal analysis of courts, which places formal structures, laws, or jurisprudence in the forefront of its attention. Instead, we have focused on informal judicial institutions.

The thirteen case studies and five cross-cutting articles demonstrate that informal institutions are crucial for understanding the mechanisms behind judicial decision-making. The contributions to this Special Issue also demonstrate that an analysis of informal institutions provides a more nuanced perspective on courts' existence and functioning. Informality impacts how judges think about their role in society, how they interpret rules, and how they understand key concepts like democracy or independence. And, depending on how actors understand these values, these studies show how they participate in new informal practices that either complement and fill in the gaps of the legal framework, or contradict it.

In this respect, the Special Issue lifts the veil of formality. The interaction between the judicial culture and professional role conception of judges—how judges understand their role—and informal institutions, practices or acts, also allows us to better understand why attempts to formally change rules sometimes fails to trigger behavioral change. In order to make new legal reforms effective, actors must be able to understand their core aims and be willing to internalize them. Despite the best efforts of European supranational bodies, many judicial reforms, particularly in transitional environment and processes, have been failing precisely because of a skewed understanding of what values they aim to protect, or because of the ability of actors to instead rely on informal networks and institutions that better align with their own preferences.

This observation is interesting particularly in the face of the major trend we identified across nearly all the surveyed jurisdiction: the formalization of rules. The authors contributing to this Special Issue found numerous examples of formalization that have been supervised and triggered—mainly by supranational bodies—in consolidated democracies with independent and well-working courts, as well as in countries with high judicial corruption and nepotism and a low-level of independence. Informal institutions are slowly being replaced with more, and more detailed, formalization, irrespective of whether they supported the working of independent courts or not.

[172]*See* Guy Lurie, *The Invisible Safeguards of Judicial Independence in the Israeli Judiciary*, in this issue. See also Guy Lurie, *The Attempt to Capture the Courts in Israel*, 56 Israel Law Review 456 (2023).

[173]Yaniv Roznai, Rosalind Dixon, & David E. Landau, *Judicial Reform or Abusive Constitutionalism in Israel*, 56 Israel Law Review 292 (2023).

[174]Tom Ginsburg, *The Long Hand of Anti-Corruption: Israeli Judicial Reform in Comparative Perspective*, 56 Israel Law Review 385 (2023).

[175]Pozas-Loyo & Ríos-Figueroa, *supra* note 25.

[176]Šipulová *et al.*, *supra* note 146, at 22–42.

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Why do we see such a strong trend towards formalization? There are several possible explanations. First, a large part of formalization is simply a natural result of a regime transition. Restructuring and democratizing regimes also requires a reshaping of actors' incentives. New formal rules are adopted to serve both as a "good practices" to guide young elites, and as a means for reinforcing the fragile structures and values behind the new regime. This closely relates to the second reason. Formalization has been a response to the crisis of democracy and to the rise of populism. Informal judicial institutions, even if working well, are relatively easy to undo once judicial independence is under stress. Hence the trend we see is the attempt to stabilize and strengthen the institutions and build a more resilient model. The interesting paradox surrounding informal institutions rests in their resistance. On the one hand, and at a technical level, they are relatively easy to remove as they are not protected against large constitutional majorities who wish to change the rules of the game and tweak them to their own interest. If the democratic core is under stress, then informal institutions can be easily removed with the strength of a simple law. On the other hand, informal institutions are difficult to amend on the margins. If actors wish to adapt the institutions to respond to public demand or social needs, then they may find it easier to do so via formal legislation than by reshaping the informal institution itself.

The third motive behind the trend towards formalization is the will of actors to adjust the rules of the game. But this motive also oscillates on a complex axis: While some transformations into formal rules aim for a more modern, dynamic, responsive regulatory framework, others seek to gain more room for maneuver or to secure discretion for actors.

Fourth, the drift towards formalization also follows from changing requirements regarding the rule of law, which lays increasing focus on the values of transparency and the foreseeability of rules. While IJI can play an important role, it is true that they are much less visible and can function as gatekeepers for certain actors. Finally, increasing formalization is also a byproduct of the technocratization of the state. Many formal rules are in fact created outside of domestic parliamentary debate and instead emerge via executive agencies, fourth-branch-type of institutions, or supranational judicial bodies.

This process brings both positives and negatives. On the one hand, formalization fosters the predictability of rules. Formal rules can increase the sense of inclusiveness, by bringing transparency to the table. Formal rules are also more difficult to overrule. On the other hand, increasing formalization places a huge administrative and financial burden on the state. It is accompanied by an increase in regulation, which may be negatively perceived by those actors who are at their receiving end. In other words, the shift towards formalization that has a clear top-down dimension and empties the space in which actors and addressees of those rules fill in their gaps by mutual co-interpretation of their meaning, weakens the deliberative character in which institutions emerge and gain legitimacy.

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