

ARTICLE

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

Actors of Informal Judicial Institutions and Practices

Lukáš Hamřík¹ 

¹Masaryk University, Brno, Czechia
Email: lukas.hamrik@law.muni.cz

(Received 04 November 2023; accepted 06 November 2023)

Abstract

While informal institutions significantly affect the functioning of courts, they also change the powers, position, and influence of individual actors in judicial systems. This Article analyzes how the presence of informal judicial institutions and practices reshapes the influence and importance of roles individual actors play in the functioning of the judiciary. The aim of this Article is three-fold. First, it maps the actors of informal judicial institutions and practices. Second, it stresses the importance of looking at actors who are not formally involved in particular judicial processes and recognized as decision-makers but have the ability to influence the judiciary informally. Third, it shows why it is necessary to keep in mind that also collective bodies can take part in informal judicial institutions and practices.

Keywords: Informal institutions; informal practices; judicial politics; individual and collective actors; court presidents; chief justices; judicial self-governing bodies

A. Introduction

Scholars from all around the world have acknowledged the importance of distinguishing between *formal* and *informal* aspects of the functioning of political systems in general,¹ and judiciaries in particular.² To

¹See Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSP. ON POL. 725, 726 (2004); Gretchen Helmke & Steven Levitsky, *Introduction*, in *INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA* 1, 4–8 (Gretchen Helmke & Steven Levitsky eds., 2006); Hans-Joachim Lauth, *Informal Institutions and Democracy*, 7 DEMOCRATIZATION 21, 22 (2000); Hans-Joachim Lauth, *Informal Governance and Democratic Theory*, in *INTERNATIONAL HANDBOOK ON INFORMAL GOVERNANCE* 40, 46–51 (Thomas Christiansen & Christine Neuhold eds., 2013); Kellee S. Tsai, *Adaptive Informal Institutions and Endogenous Institutional Change in China*, 59 WORLD POL. 116 (2006); Anna Grzymala-Busse, *The Best Laid Plans: The Impact of Informal Rules on Formal Institutions in Transitional Regimes*, 45 STUD. IN COMPAR. INT'L DEV. 311 (2010); Michael Brie & Erhard Störling, *Formal Institutions and Informal Institutional Arrangements*, in *INTERNATIONAL HANDBOOK ON INFORMAL GOVERNANCE* 19 (Thomas Christiansen & Christine Neuhold eds., 2013).

²See Santiago Basabe-Serrano, *Informal Institutions and Judicial Independence in Paraguay*, 37 LAW & POL'Y 350 (2015); Maria Popova, *Politicized Justice in Emerging Democracies* 128–147 (2012); David Kosař, *Perils of Judicial Self-Government in Transitional Societies* 65–68 (2016); Bjoern Dressel, Raul Urribarri & Alexander Stroh, *The Informal Dimension of Judicial Politics: A Relational Perspective*, 13 ANN. REV. OF L. & SOC'Y 413 (2017); Mariana Llanos et al., *Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases*, 23 DEMOCRATIZATION 1236 (2016); Andrea Pozas-Loyo & Julio Ríos-Figueroa, *Anatomy of an Informal Institution: The 'Gentlemen's Pact' and Judicial Selection in Mexico, 1917–1994*, 39 INT'L POL. SCI. REV. 647 (2018); Andrea Pozas-Loyo & Julio Ríos-Figueroa, *Instituciones informales e independencia judicial de facto: El eslabón olvidado en el camino hacia la eficacia institucional*, 29 POLÍTICA Y GOBIERNO 1 (2022); Alexei Trochev, *Patronal Politics, Judicial Networks and Collective Judicial Autonomy in Post-Soviet Ukraine*, 39 INT'L POL. SCI. REV. 662 (2018).

understand how a judicial branch is organized and how it, in reality, performs its tasks it is necessary to take one step further and look beyond the formal framework setting up the “rules of the game”. The following examples illustrate that necessity.

In 2019, the Palamara affair shook the Italian public. It was revealed that a former member of the Superior Council of the Judiciary (*Consiglio Superiore della Magistratura*, hereinafter CSM) and the National Association of Magistrates’ (*Associazione Nazionale Magistrati*, hereinafter “ANM”) President, Luca Palamara, used to have private meetings with politicians. Apparently, the purpose of these meetings was to discuss and reach an agreement about the appointment of court presidents and chief prosecutors.³ Further investigation also exposed links between him and other private-sector actors, allegedly affecting court decisions in some relevant cases.⁴

In Slovakia, the investigations following the murder of investigative journalist Ján Kuciak and his fiancée revealed networks of judges, court presidents, prosecutors, public authorities, organized crime groups, and oligarchs. The purpose of these networks was to influence the judicial decision-making process. Moreover, for some oligarchs, networks served as a source of income as they used their connections to offer desired decisions to other persons who were willing to pay for such a “service.”⁵

Obviously, informality does not always directly involve judicial corruption and appointments. As the dramatic rise in popularity of the Antonin Scalia Law School at George Mason University indicates, informal institutions and practices can also be present in extra-judicial activities, such as teaching at law schools. The Scalia Law School invested a lot of resources in developing good relations with the Justices of the United States Supreme Court. Some Justices became teachers at the Scalia Law School, and they were offered generous salaries and various non-monetary benefits. Of course, there is nothing informal about that. What can be considered informal and problematic, however, is the fact that some Justices closely affiliated with Scalia Law School used their Court’s staff for the administration of their extra-judicial activities.⁶

Informal judicial institutions and practices involve a great variety of actors, placed both within and outside a judiciary. As regards the actors operating within a judiciary, one would typically

³See Maurizio Catino, Cristina Dallara & Sara Rocchi, *The Organizational Reasons for Wrongdoing. The case of Italy’s Superior Council of the Judiciary (CSM)*, 79 CRIME, L. AND SOC. CHANGE 453 (2023); Marco Fabri, *Clash of Visions: Regulating Judges and Prosecutors in Italy*, in REGULATING JUDGES 245 (Richard Devlin & Adam Dodek eds., 2016).

⁴See *Corruption, the “hidden” affairs of the former magistrate Palamara also in Olbia*, L’UNIONESARDA.IT (Dec. 23, 2022), <https://www.unionesarda.it/en/italy/corruption-the-quot-hiddenquot-affairs-of-the-former-magistrate-palamara-also-in-olbia-cv5usbxg>; Giovanni Bianconi, *Luca Palamara, cade l’accusa di corruzione nel processo a Perugia e patteggiamento*, CORRIERE DELLA SERA (Apr. 18, 2023), https://roma.corriere.it/notizie/cronaca/23_aprile_18/luca-palamara-cade-accusa-l-accusa-di-corruzione-nel-processo-a-perugia-e-patteggia-5850128c-a390-4aa2-9e3b-f7345d848xlk.shtml.

⁵Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue. For scholarship on informal judicial institutions where judges and other judicial actors form networks to the benefit of each other, see JUAN CARLOS CALLEROS-ALARCÓN, *THE UNFINISHED TRANSITION TO DEMOCRACY IN LATIN AMERICA* 163–64 (2008), and Raúl Sánchez Urribarri, *Courts Between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court*, 36 LAW & SOC. INQUIRY 854 (2011) (arguing that in Venezuela, the judicial system is dominated by the judicial tribes (*tribus judiciales*), where judges and other judicial actors, including lawyers, court personnel, and politicians, make use of personal connections to obtain a desirable outcome for their clients in exchange for a benefit that usually takes the form of a monetary award); Pozas-Loyo & Ríos-Figueroa, *supra* note 2, at 650 (describing “Gentlemen’s Pact’s”, the informal process by which justices determine procedures for filling vacancies in lower courts in Mexico); Ling Li, *The Moral Economy of Guanxi and the Market of Corruption: Networks, Brokers and Corruption in China’s Courts*, 39 INT’L POL. SCI. REV. 634, 635–638 (2018) (describing how personal relationships driven by loyalty and trust play a key role in favor-exchange networks in China, known as *guanxi*). *But see*, Alexei Trochev & Rachel Ellett, *Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance*, 2 J. OF L. AND CT., 67 (2014) (describing how the creation of informal networks could be one of the few strategies employed by judicial actors when faced with undue pressure or interference); Claudia-Y. Matthes, *Judges as Activists: How Polish Judges Mobilise to Defend the Rule of Law*, 38 E. EUR. POL. 468 (2022); Hubert Smekal, *Informality as a Virtue: Exploring Positive Informal Judicial Institutions*, in this issue; Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue (discussing Georgia).

⁶See Steve Eder & Jo Becker, *How Scalia Law School Became a Key Friend of the Court*, N.Y. TIMES (Apr. 30, 2023), <https://www.nytimes.com/2023/04/30/us/supreme-court-scalia-law-school.html>.

think of rank-and-file judges, court presidents, justices, and chief justices. Nevertheless, there are also “less visible” individuals who could influence judges or who could be informally targeted for that purpose. These include lawyers, law clerks, or court personnel.⁷ In each jurisdiction, and besides the individual actors, collective actors (or bodies) are essential. These could include—national, international, or supranational—courts, judicial councils, selection and promotion committees, disciplinary panels, judicial associations, and other bodies of various kinds composed of both judicial and non-judicial actors.

This Article targets actors of informal judicial institutions and practices. The overarching question the Article poses is: Who are the actors of such institutions and practices? In order to answer that question, one must focus on (a) individual and collective actors operating within judiciaries, and (b) informal institutions and practices in both judicial decision-making as well as judicial governance fields.

Based on contributions to this issue and the review of literature covering various European jurisdictions, this Article puts forth three arguments. First, when analyzing informal judicial institutions, it is not sufficient to look at actors who have any kind of formal powers or responsibilities. Rather, it is necessary to pay attention to actors who are not involved in formal processes but are able and willing to use informal means of influence. In other words, judicial governance and decision-making can be affected by actors whose influence and presence are unexpected if one focuses on formal rules and practices. Second, informal judicial institutions and practices do not influence the behavior and expectations of exclusively individual actors, but they can also involve collective bodies, typically those having specific powers in the judicial governance field. Third, if that is the case, the presence of informal judicial institutions and practices usually *de facto* bolsters the importance of these collective bodies, which makes it even more crucial to look at the composition of the collective judicial self-governing bodies and actors who could either formally or informally influence the composition and decisions of those bodies.

This Article is structured as follows: Section B contains the conceptualization of informal institutions and clarifies the article’s scope. Section C analyzes individual actors of informal judicial institutions and practices. Section D generalizes the findings from the previous section. Section E concludes and suggests avenues for further research on actors of informal judicial institutions and practices.

B. Informal Judicial Institutions, Practices, and the Scope of the Article

The judicial branch, just like any other branch of power or system of social interactions in general, is regulated by institutions. They create a “strategic context”⁸ in which the societal actors operate. Irrespective of whether we refer to that context as institutions, rules, practices, conventions, or habits, all these concepts have a common feature. The main rationale behind their existence is to express shared opportunities or constraints that permit, forbid, prescribe, or advise certain actions or outcomes for actors.⁹

This can occur in two forms. On the one hand, there are formal institutions. Formal institutions are mostly written, they set a general framework in which interactions between actors take place, define the powers and responsibilities of actors, state criteria for various actions and procedures, and so on. On the other, actors’ behavior can be regulated by informal institutions

⁷See Urribarri, *supra* note 5; CALLEROS-ALARCÓN, *supra* note 5; Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform*, WORLD BANK TECHNICAL PAPER (1996), <https://biblioteca.cejamerica.org/bitstream/handle/2015/3567/dakolias-elements-reform2.pdf?sequence=1&isAllowed=y>.

⁸Junko Kato, *Institutions and Rationality in Politics: Three Varieties of Neo-Institutionalists*, 26 BRIT. J. OF POL. SCI. 553, 556 (1996).

⁹See Sue E.S. Crawford & Elinor Ostrom, *A Grammar of Institutions*, 89 THE AM. POL. SCI. REV. 582, 583 (1995); Kato, *supra* note 8, at 556; Douglass C. North, *Institutions*, 5 THE J. OF ECON. PERSPECTIVES 97 (1991).

that can be understood as “socially shared rules, usually unwritten, that are created, communicated, and enforced [in contrast to the formal ones] outside of officially sanctioned channels.”¹⁰

This Article refers to both informal judicial institutions and informal judicial practices,¹¹ even though it is beyond its aim to draw a demarcation line between the two concepts. There are two reasons for a broader perspective and higher inclusiveness. First, informal institutions do not emerge suddenly.¹² In their very beginnings, informal institutions were rather “adaptive and creative responses” by actors to the constraints and opportunities of formal institutions.¹³ Only with repetition, diffusion, and internalization did they become institutions.¹⁴ In reality, however, it is challenging to observe a point at which a practice becomes an institution. Second, for a lot of the instances of informal judicial practices dealt with in this Article, it would be impossible to evaluate to what extent they are, for example, socially shared, or how the sanction mechanism—if any—works. Because of this impossibility, a narrower focus on informal judicial institutions could lead to situations where some important informal judicial practices, with the potential of becoming institutions and influential actors would be left out of the scope.

Before we move to the next section focusing on actors of informal judicial institutions and practices, three remarks should be made. First, in what follows, the Article maps the actors of informal judicial institutions and practices operating between judges—internal judicial institutions—and between judges and non-judges—mixed judicial institutions—¹⁵ while taking into account both judicial decision-making and judicial governance fields.

Second, the scope of this Article is limited to judicial actors, in other words actors involved in judicial decision-making or governance, usually operating within judiciaries. Informal judicial institutions and practices can involve various non-judicial actors such as politicians, other social, economic, and state actors such as NGOs, economic interest groups,¹⁶ police,¹⁷ military,¹⁸ intelligence services,¹⁹ and organized crime.²⁰ These actors are generally outside the scope of this article. The only section to let them in is Section C.II.1, discussing informal judicial practices and institutions in selection and appointment procedures and, therefore, includes political actors.

Third, the aim of the Article is not to provide an exhaustive overview of all actors taking part in informal judicial institutions and practices. Rather, it looks at the actors who quite often employ informal means of action and such means can be observed in more jurisdictions. The next Section builds on the analysis and findings of the individual case studies in this issue and accompanies them with a review of the literature on individual European Jurisdictions.

¹⁰Helmke & Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, *supra* note 1, at 727. See also Lauth, *supra* note 1, at 47–48.

¹¹For a conceptual debate on the differences between informal judicial institutions, practices, and acts, see David Kosař, Katarína Šipulová & Marína Urbániková, *Informality and Courts: Uneasy Partnership*, in this Special Issue.

¹²Lauth, *supra* note 1, at 48.

¹³Tsai, *supra* note 1, at 125–26.

¹⁴Tsai, *supra* note 1; Lauth, *supra* note 1, at 48.

¹⁵See David Kosař, Katarína Šipulová & Marína Urbániková, *Informality and Courts: Uneasy Partnership*, in this Special Issue.

¹⁶Basabe-Serrano, *supra* note 2.

¹⁷See Daniel M. Brinks, *The Rule of (Non)Law: Prosecuting Police Killings in Brazil and Argentina*, in *INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA 201* (Gretchen Helmke & Steven Levitsky eds., 2006).

¹⁸See Rachel Sieder & Patrick Costello, *Judicial Reform in Central America: Prospects for the Rule of Law*, in *CENTRAL AMERICA: FRAGILE TRANSITION 169* (Rachel Sieder ed., 1996).

¹⁹POPOVA, *supra* note 2, at 124–25.

²⁰See RACHEL E. BOWEN, *THE ACHILLES HEEL OF DEMOCRACY: JUDICIAL AUTONOMY AND THE RULE OF LAW IN CENTRAL AMERICA 143* (2017); Rachel Sieder, *Renegotiating ‘Law and Order’: Judicial Reform and Citizen Responses in Post-war Guatemala*, in *DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 99, 107* (Roberto Gargarella, Siri Gløppen & Elin Skaar eds., 2004); Donatella Della Porta, *A Judges’ Revolution? Political Corruption and the Judiciary in Italy*, 39 *EUR. J. OF POL. RSCH.* 1 (2001). See also Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue.

C. Actors of Informal Judicial Institutions and Practices

This section focuses on actors of informal judicial institutions and practices. It begins with those institutions involving actors operating in their individual capacities, individual actors, namely court presidents, chief justices, and law clerks. Then, collective actors and bodies, namely collective judicial self-governance bodies, associations of judges, and informal platforms created mainly by court presidents, are discussed.

I. Individual Actors of Informal Judicial Institutions and Practices

1. Court Presidents and Chief Justices

Court presidents and chief justices, as well as other actors such as court managers or court directors, play an important role in almost all jurisdictions. In many Central and Eastern European countries they are seen as the most powerful actors.²¹ Their powers and influence come not only from formal responsibilities assigned to the office but typically also from unwritten rules and practices they develop or take part in. In other words, the powers of court presidents and chief justices are often informal, in the sense that the law does not explicitly regulate them.²² Court presidents can affect the functioning of a judiciary or a court in almost every possible way as they may have powers over the careers of judges—their selection, promotion or disciplining—financial matters concerning a court or a judge's well-being, allocation of cases, panels' composition, and the assignment of judges to a panel. Moreover, court presidents and chief justices are also active in relations beyond a particular court or jurisdiction. These include interactions with other branches, media, academia, the legal profession, or the general public.²³ This part of the Article contains instances of informal judicial institutions and practices that involve court presidents and/or chief justices.

²¹See KOSAŘ, *supra* note 2; 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 EUR. CONST. L. REV. 13, 97 (2017). See e.g., Daniela Piana, *The Power Knocks at the Courts' Back Door: Two Waves of Postcommunist Judicial Reforms*, 42 COMPAR. POL. STUD. 816 (2009); Attila Vincze, *Schrödinger's Judiciary: Formality at the Service of Informality in Hungary*, in this issue (discussing Hungary); Anna Šledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, 19 GER. L.J. 1839 (2018) (discussing Poland); David Kosař & Samuel Spáč, *Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?*, 13 HAGUE J. ON THE RULE OF L. 107 (2021) (discussing Slovakia); Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue (discussing Czechia); Lydia F. Müller, *Judicial Administration in Transitional Eastern Countries*, in JUD. INDEP. IN TRANSITION 937 (Anja Seibert-Fohr ed., 2012); POPOVA, *supra* note 2 (discussing Russia and Ukraine); Matej Avbelj, *Contextual Analysis of Judicial Governance in Slovenia*, 19 GER. L.J. 1901 (2018) (discussing Slovenia); Patrick O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland*, 19 GER. L.J. 1871 (2018) (discussing Ireland).

²²See, e.g., J. Clifford Wallace, *Comparative Perspectives on the Office of Chief Justice*, 38 CORNELL INT'L L. J. 219 (2005); Tin Bunjevac, *Court Governance in Context: Beyond Independence*, 4 INT'L J. FOR CT. ADMIN. 35 (2011); Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue. For a discussion of the informal powers and influence of the U.S. Chief Justices, see Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief Justice*, 40 STETSON L. REV. 717 (2011); Dawn M. Chutkow, *The Chief Justice as Executive: Judicial Conference Committee Appointments*, 2 J. OF L. AND CTS. 301 (2014); Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665 (2006); LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005). For a discussion of the Chief Judges of the Courts of Appeals, see Burton M. Atkins & William Zavoina, *Judicial Leadership on the Court of Appeals*, 18 AM. J. OF POL. SCI. 701 (1974); Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *The Role and Impact of Chief Judges on the United States Courts of Appeals*, 24 THE JUST. SYS. J. 91 (2003); Wilfred Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 369 (1984). For powers and responsibilities of Chief Judges at the U.S. District Courts, see FED. JUD. CENTER, *DESKBOOK FOR CHIEF JUDGES OF U.S. DISTRICT COURTS* (2003), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/deskbook-chief-judges-us-district-courts-third-edition>.

²³See Adam Blisa & David Kosař, *Court Presidents: The Missing Piece in the Puzzle of Judicial Governance*, 19 GER. L.J. 2031 (2018); Rosemary Hunter & Erika Rackley, *Judicial Leadership on the UK Supreme Court*, 38 LEGAL STUD. 191 (2018); Wallace, *supra* note 22.

The selection and appointment of judges usually involve a variety of actors, including court presidents and chief justices, selection committees, judicial councils, and political actors. Court presidents and chief justices in particular are in a position to use informal powers and influence the selection process. In Czechia and Slovenia, the court presidents informally “pre-approve” candidates before they take part in a formal selection procedure.²⁴ Besides “handpicking” the eventual candidates, the court presidents and chief justices can also influence the composition of the selection committees, make use of their personal relationship with the members of a body responsible for selecting judges, or lobby for particular candidates to be considered by, for example, political actors involved in the selection of judges.

Thus, court presidents are highly influential actors in this regard, and in some countries, such as Czechia,²⁵ Slovenia,²⁶ Slovakia,²⁷ Poland,²⁸ Hungary,²⁹ or Ukraine,³⁰ they can be considered the *de facto* key players. Beyond Europe, for example, the Japanese Supreme Court Chief Justice selects the candidates from the recommendations made by the Japan Federation of Bar Associations. Nevertheless, in reality, the Cabinet follows the Chief Justice’s recommendations.³¹ In India, the Supreme Court Chief Justice is involved in the appointment process as she is consulted by the President. Moreover, the Chief Justice’s informal powers and influence could play a role beyond the consultations as, in practice, the appointments are the result of the collegium of the most senior judges of the Supreme Court.³²

The allocation of cases to individual judges, or to particular panels and the decisions on panel/grand chambers’ composition represent the initial steps on a path leading to a court’s decision. Even though many countries have adopted strict criteria and detailed procedures or automated processes,³³ informal practices still exist in these areas. As regards case assignment at the apex courts, it is an informal practice in the United Kingdom that the Lord Chief Justice or the Master of the Rolls “reserves” the publicly or legally most important cases for himself. A similar practice can be observed in Hungary, where the Chief Justice of the Constitutional Court himself often decides salient cases.³⁴ In Israel, such cases are allocated to a Justice based on the seniority rule, which also plays an informal role in panel composition at the Israeli Supreme Court when important cases are decided. Chief Justices at the Czech apex courts, the Supreme and Supreme Administrative Courts, have much more discretion and the ability indirectly to influence a case as they are *de facto* free to decide on the grand chambers’ membership.³⁵ A rather high degree of flexibility in (re-)assignments of cases is evident also at lower courts where the court presidents

²⁴See Samuel Spáč, *Recruiting European Judges in the Age of Judicial Self-Government*, 19 GER. L.J. 2077 (2018).

²⁵Kosař, *supra* note 21; Adam Blisa, Tereza Papoušková & Marína Urbániková, *Judicial Self-Government in Czechia: Europe’s Black Sheep?*, 19 GER. L.J. 1951 (2018); Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.

²⁶Avbelj, *supra* note 21.

²⁷See Samuel Spáč, *The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia*, 69 PROBS. OF POST-COMMUNISM 528 (2022); Kosař & Spáč, *supra* note 21.

²⁸Piana, *supra* note 21.

²⁹Piana, *supra* note 21; Attila Vincze, *Schrödinger’s Judiciary: Formality at the Service of Informality in Hungary*, in this issue.

³⁰Trochev, *supra* note 2.

³¹See Yasuo Hasebe, *The Supreme Court of Japan: A Judicial Court, Not Necessarily a Constitutional Court*, in CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 289, 290 (Albert H.Y. Chen & Andrew Harding eds., 2018).

³²See Aparna Chandra, William H.J. Hubbard & Sital Kalantry, *The Supreme Court of India: An Empirical Overview of the Institution* 5 (PUB. L. & LEGAL THEORY WORKING PAPER NO. 600, 2018), https://chicagounbound.uchicago.edu/public_law_and_legal_theory/821/ (discussing the informality within the selection and appointment of judges). See also David Kosař & Attila Vincze, *Constitutional Conventions Concerning the Judiciary Beyond the Common Law*, in this issue.

³³See, e.g., Marco Fabri & Philip M. Langbroek, *Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries*, 1 EUR. J. OF LEGAL STUD. 292 (2007).

³⁴See Attila Vincze, *Schrödinger’s Judiciary: Formality at the Service of Informality in Hungary*, in this issue.

³⁵See Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.

play a dominant role in countries such as Czechia,³⁶ Slovakia,³⁷ Ireland,³⁸ Georgia,³⁹ Israel,⁴⁰ and Ukraine.⁴¹

As regards the education and training of judges, the court presidents or chief justices usually do not play much of a role, as judicial training is often organized by the central judicial authority, for example, judicial schools.⁴² Nonetheless, court presidents and chief justices can be involved as trainers,⁴³ or they can provide advice and their expertise on various legal problems as part of legal consultations, or provide training on the recent case law of their higher courts.⁴⁴ Indeed, the practice of providing consultations on legal problems relevant to a particular case is not limited to chief justices and court presidents. Obviously, communication can occur exclusively between rank-and-file judges at an individual court as well as among rank-and-file judges from different courts, including the ones situated higher in the judicial hierarchy.⁴⁵ These informal practices exist in Czechia,⁴⁶ Slovakia,⁴⁷ Romania,⁴⁸ or Israel.⁴⁹ However, due to their prestige and jurisprudential influence,⁵⁰ court presidents, and especially chief justices, are often involved in such kind of judicial training.

Recently, many courts have realized that active communication with the public is becoming desirable. On the one hand, the courts are in charge of explaining their decisions to the citizens in an accessible way. On the other hand, such efforts create a window of opportunity for judges to become visible, publicly known, and possibly more influential. Because the chief justices and court presidents are perceived as representing a court, a jurisdiction, or even a whole judiciary, it is quite common for them to be active in communicating with media and the general public through, for instance, giving interviews or holding press conferences.⁵¹ In some jurisdictions we can observe

³⁶See *Id.*

³⁷KOSAŘ, *supra* note 2. See Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue.

³⁸See Patrick O'Brien, *Informal Judicial Institutions in Ireland*, in this issue.

³⁹See Nino Tsereteli, *Constructing the Pyramid of Influence, Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue.

⁴⁰See Guy Lurie, *The Invisible Safeguards of Judicial Independence in the Israeli Judiciary*, in this issue.

⁴¹Kosař, *supra* note 21.

⁴²COUNCIL OF EUR.: CONSULTATIVE COUNCIL OF EUR. JUDGES (CCJE), THE ROLE OF COURT PRESIDENTS, OPINION NO. 19 (Nov. 10, 2016), <https://rm.coe.int/opinion-no-19-on-the-role-of-court-presidents/16806dc2c4>.

⁴³GABRIELLE APPLEBY ET AL., JUDICIAL EDUCATION IN AUSTRALIA: A CONTEMPORARY OVERVIEW, REPORT PREPARED FOR THE AUSTRALASIAN INSTITUTE OF JUDICIAL ADMINISTRATION, THE AUSTRALASIAN INSTITUTE OF JUDICIAL ADMINISTRATION (2021), <https://aija.org.au/wp-content/uploads/2021/12/Judicial-education-in-Australia-a-contemporary-overview-2021.pdf>.

⁴⁴See, e.g., Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.

⁴⁵See Benjamin Weiser, *Faced With Legal Puzzles, Judges Often Turn to Fellow Jurists*, N.Y. TIMES (May 19, 2015), <https://www.nytimes.com/2015/05/20/nyregion/faced-with-legal-puzzles-judges-often-turn-to-fellow-jurists.html>.

⁴⁶See Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.

⁴⁷See Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue.

⁴⁸See Sorina Doroga & Raluca Bercea, *The Role of Judicial Associations in Preventing Rule of Law Decay in Romania: Informal Communication and Strategic Use of Preliminary References*, in this issue.

⁴⁹See Guy Lurie, Amnon Reichman & Yair Sagy, *Agencification and the Administration of Courts in Israel*, 14 REGULATION & GOVERNANCE 718, 10–12 (2020).

⁵⁰See generally Matthew C. Ingram, *Networked Justice: Judges, the Diffusion of Ideas, and Legal Reform Movements in Mexico*, 48 J. OF LAT. AM. STUD. 739 (2016); David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 THE J. OF LEGAL STUD. 371 (1999); Janet M. Box-Steffensmeier, Dino P. Christenson, & Claire Leavitt, *Judicial Networks*, in THE OXFORD HANDBOOK OF POLITICAL NETWORKS 491 (Jennifer Nicoll Victor, Alexander H. Montgomery & Mark Lubell eds., 2017).

⁵¹Wallace, *supra* note 22. See also Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757 (2006); Mark Tushnet, *Judicial Leadership, in DISPERSED DEMOCRATIC LEADERSHIP: ORIGINS, DYNAMICS, AND IMPLICATIONS* 141 (John Kane, Haig Patapan & Paul't Hart eds., 2009).

that individual judges and justices are seizing the opportunity to become the “faces” of the judiciary. The justices of the Ukrainian Constitutional Court and the Supreme Court,⁵² justices and chief justices at the Czech apex courts,⁵³ and the Chief Justice of the Constitutional Court of Italy⁵⁴ seem to be active in this regard. At this point it should be stressed that chief justices’ active media presence is not limited to a particular region or to national jurisdictions.⁵⁵ Rather, it is quite common for chief justices to represent the judiciary vis-à-vis the general public.⁵⁶

2. Law-Clerks

Law clerks are able to perform various roles and informally influence decisions in many ways. They can, for instance, serve as a filter of incoming petitions, prepare summaries of the cases, recommend how a particular case could or should be decided, or even write draft judgments.⁵⁷ Hungarian law clerks working at the Secretariat of the Constitutional Court are highly influential in deciding whether or not a case will reach a justice. It is estimated that approximately 40 percent of cases are rejected at this very initial stage.⁵⁸

The law clerks at the German Federal (*Bundesverfassungsgericht*) and Czech Constitutional Courts prepare summaries of cases and recommend how a case should be decided.⁵⁹ Probably the most influential and, at the same time, controversial task law clerks have is that of drafting judgments. This practice seems to be widespread, as it is observable in many European countries.⁶⁰ For instance, in Germany the law clerks are the most influential in drafting the judgments of small chambers consisting of three Justices.⁶¹ Under Németh’s leadership of the Hungarian Constitutional Court, law clerks drafting decisions had to sign them using their own initials.⁶² Law clerks with an informal influence on the decision-making process also work at courts in Switzerland⁶³ or the Netherlands.⁶⁴

II. Collective Actors of Informal Judicial Institutions and Practices

This section of the Article examines informal judicial institutions and practices involving collective actors. In this regard, the primary interest lies in collective actors of judicial self-governance, associations of judges, and informal platforms created—mostly—by the court presidents and chief justices.

⁵²See UKRAINIAN JUDICIARY, *News and Events* (Sep. 7, 2023), <https://court.gov.ua/eng/supreme/pres-centr/news/>.

⁵³See Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.

⁵⁴See Simone Benvenuti, *The Italian System of Judicial Governance: An Arena of Confronting Informal Practices and the Push Towards Formalization*, in this issue.

⁵⁵See, e.g., Blisa & Kosař, *supra* note 23 (discussing Chief Justices of the Court of Justice of the European Union and the European Court of Human Rights).

⁵⁶Wallace, *supra* note 22; Blisa & Kosař, *supra* note 23. See also Scheppele, *supra* note 51; Tushnet, *supra* note 51; Josephine Dawuni & Alice Kang, *Her Ladyship Chief Justice: The Rise of Female Leaders in the Judiciary in Africa*, 62 AFR. TODAY U. NEB.–LINCOLN, FAC. PUBL’N: POL. SCI. 45 (2015); Simon Butt, *Indonesia’s Constitutional Court and Indonesia’s Electoral Systems*, in CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 214 (Albert H.Y. Chen & Andrew Harding eds., 2018).

⁵⁷See Anne Sanders, *Judicial Assistants in Europe: A Comparative Analysis*, 11 INT’L J. FOR CT. ADMIN. 2 (2020); Nina Holvast & Peter Mascini, *Is the Judge or the Clerk Making the Decision? Measuring the Influence of Judicial Assistants via an Experimental Survey among Dutch District Court Judges*, 11 INT’L J. FOR CT. ADMIN. 4 (2020); Katalin Kelemen, *The Decision-making Process of European Constitutional Courts. A Comparative Perspective*, 24–27 (DIRRITTI COMPARATI WORKING PAPER NO. 1, 2016), <https://oru.diva-portal.org/smash/get/diva2:1076126/FULLTEXT01.pdf>.

⁵⁸Kelemen, *supra* note 57.

⁵⁹Kelemen, *supra* note 57, at 25.

⁶⁰Sanders, *supra* note 57.

⁶¹Sanders, *supra* note 57.

⁶²Kelemen, *supra* note 57.

⁶³Holvast & Mascini, *supra* note 57.

⁶⁴*Id.*

1. Judicial Self-Governance Bodies

Judicial governance involves a variety of actors who are responsible for all aspects related to the functioning of a judiciary, such as budget and resources, selection of judges and judicial careers, and the allocation of cases, to name a few. Whilst judicial governance in terms of structure refers to all actors responsible for the administration of judiciaries, judicial self-governance focuses primarily on the role and powers of judicial self-governance bodies.⁶⁵ The group of judicial self-governing bodies typically includes judicial councils, but also court services, judicial selection and promotion committees, judicial associations and academies, and, last but not least, court presidents.⁶⁶ Selection and appointment procedures are the fields in which informal judicial institutions and practices involving judicial self-governing—collective—actors can mainly be found and seem to be widespread.

An actor responsible for the appointment of judges in Belgium is the Appointment and Selection Committee of the High Council of Justice (*Hoge Raad voor de Justitie*). Once the Committee has proposed a list of candidates, the King—*de jure* holding decision-making powers—may appoint the judges or refuse to do so. In reality, the King accepts the Committee's proposals.⁶⁷ In Czechia, judges are formally proposed by the Minister of Justice and appointed by the President of the Republic. Nevertheless, the crucial actors in the procedure are the court presidents. Despite recently imposed constraints on their informal influence, they were able to retain this influence through an informal memorandum with the Minister of Justice.⁶⁸ As a result, the Minister needs court presidents' informal agreement.⁶⁹ In Denmark, *de facto* decision-making power belongs to the Judicial Appointments Council (*Dommerudnævnelserådet*). The Council submits its proposals to the Minister of Justice, who subsequently forwards the nominations to the Queen. In reality, the Minister never disagrees, despite the fact that she is allowed to do so.⁷⁰

In Austria, the formal prerogatives for appointing judges lie within the executive power at both the federal and state levels. Formally, the executive, especially the Minister of Justice, and the Federal President as the actor having a final say, has wide discretion in the process as the proposals for appointments, made by staff committees and plenary conferences, are not binding. Usually, the Minister follows the proposals, and if she does not agree an informal practice forces her to provide a reasoned statement.⁷¹ In the Netherlands, formal nominations are made by the Council of the Judiciary (*Raad voor Rechtspraak*). The Minister of Justice countersigns royal decrees and is free to accept or decline proposals. She chooses the second option only exceptionally.⁷² Swedish and Irish judges are appointed in a similar way. Even though the proposals of judicial self-governing bodies are not binding on the Government, the executive follows them in almost all cases.⁷³

⁶⁵These bodies share some responsibilities within the judicial governance field, and, at the same time, the judiciary is represented by at least one judge within these bodies. See, e.g., Katarína Šipulová, Samuel Spáč, David Kosař, Tereza Papoušková, & Viktor Derka, *Judicial Self-Governance Index: Towards Better Understanding of the Role of Judges in Governing the Judiciary*, 17 REGUL. & GOVERNANCE 22 (2023); David Kosař, *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe*, 19 GER. L.J. 1567, 1571 (2018).

⁶⁶Šipulová et al., *supra* note 65; Kosař, *supra* note 65.

⁶⁷See Mathieu Leloup, *Informal Judicial Practices in the Belgian Legal Order: A Story of Incremental and Reactive Development*, in this issue.

⁶⁸The memorandum was signed in 2022. See, Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.

⁶⁹*Id.*

⁷⁰CURIA, *Procedures for the appointment and designation of judges in the Member States and the role played by the executive or legislature in those procedures* (2020), https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/ndr_2020_007_neutralisee_en.pdf.

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.*

2. Associations of Judges

Judicial associations can play an important role despite their formally recognized status. On the one hand, they can perform many functions defined in their statutes. Typically, these include protecting and promoting judges' professional interests, improving the effective administration of justice, maintaining independence, and strengthening the reputation of a judiciary.⁷⁴ Nevertheless, judicial associations can also make use of informal methods when intending to shape public policies in relevant areas,⁷⁵ mobilize judges⁷⁶—when there is a need to, for instance, protect judicial independence—or influence the functioning of bodies responsible for judicial self-governance or even the judicial decision-making process. The cases of Italy⁷⁷ and Romania⁷⁸ stress the informal role associations of judges can play within judiciaries.

Judicial governance, and especially judicial careers, are in Italy primarily governed by the CSM.⁷⁹ Judicial members of the CSM are usually, at the same time, members of the Association of Judges (ANM). The ANM is internally divided on political and ideological lines, forming four main informal groups of judges or cliques, so-called *correnti*.⁸⁰ As demonstrated by Benvenuti,⁸¹ individual factions have a significant influence on the internal functioning of the CSM as well as on the results of the exercise of the CSM's formal responsibilities. For example, individual *correnti* draft lists of their candidates for the posts of judge members of the CSM. As a result, all main factions have their representatives.⁸² Once candidates are appointed, they continue to cooperate with their cliques when working on the CSM's responsibilities, where *correnti* form informal council groups composed of the judge members the *correnti* originally nominated.⁸³ Furthermore, the decisions of the CSM are discussed and negotiated in advance during regular meetings of the representatives of the four council groups.⁸⁴

The logic of cooperation between individual factions and CSM council groups is also reflected in the CSM's decisions affecting the careers of judges, especially judicial appointments and the evaluation of judges. For instance, judicial appointments can be perceived as being the result of informal agreements between individual groups. These agreements represent a deal stipulating

⁷⁴AMERICAN JUDGES ASSOCIATION, *About US* (2022), <https://amjudges.org/about/>; DER DEUTSCHE RICHTERBUND (DRB), *Starke Stimme des Rechtsstaates - Interessenvertreter der Richter und Staatsanwälte* (Jun. 9, 2021), <https://www.drj.de/drj/ueber-uns/ziele/>; THE ASSOCIATION OF EUROPEAN ADMINISTRATIVE JUDGES (AEA), *Statutes* (Oct. 15, 2021), <https://www.aeaj.org/page/Statutes>; THE ASSOCIATION OF JUDGES OF IRELAND (AJI), *Our Aims & Objectives* (Sept. 3, 2023), <https://aji.ie/our-aims-objectives/>; THE ISRAELI ASSOCIATION OF JUDGES (ILAJ), *ILAJ-Aims and Objectives* (Oct. 7, 2018), https://www.gov.il/en/departments/general/isaj_aims_and_objectives; COURTS AND TRIBUNALS JUDICIARY, *REPRESENTATIVE BODIES* (Sept. 3, 2023), <https://www.judiciary.uk/related-offices-and-bodies/representative-bodies/>; AUSTRALIAN JUDICIAL OFFICERS ASSOCIATION, *About Us* (Sept. 3, 2023), <https://www.ajoa.asn.au/about/>.

⁷⁵See Nuno Garoupa & Tom Ginsburg, *Judicial Roles in Nonjudicial Functions* 75 (COASE-SANDOR WORKING PAPER SERIES IN L. & ECON., Working Paper No. 676, 2014), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1669&context=law_and_economics.

⁷⁶Trochev, *supra* note 2.

⁷⁷See Simone Benvenuti, *The Italian System of Judicial Governance: An Arena of Confronting Informal Practices and the Push Towards Formalization*, in this issue.

⁷⁸See Sorina Doroga & Raluca Bercea, *The Role of Judicial Associations in Preventing Rule of Law Decay in Romania: Informal Communication and Strategic Use of Preliminary References*, in this issue.

⁷⁹See Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 THE AM. J. OF COMP. L. 103, 108 (2009); Giuseppe Di Federico, *Judicial Independence in Italy*, in JUDICIAL INDEPENDENCE IN TRANSITION 357 (Anja Seibert-Fohr ed., 2012).

⁸⁰See Simone Benvenuti & Davide Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model*, 19 GER. L.J. 1641 (2018).

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.*

how the vacancies are to be filled.⁸⁵ As far as the evaluation of judges is concerned, the CSM set out quite clear criteria and detailed procedures for assessments. Interestingly, however, almost every judge is evaluated positively.⁸⁶

Another example of judicial associations' informal influence concerns Romania. There, the associations of judges played an essential role in defending the rule of law. In order to raise awareness of the rule of law situation in Romania as well as to provide exhaustive information on national legal developments, the associations of judges actively engaged in debates with international organizations and EU institutions. Through networking activities, they often succeeded in gaining support or turning others' attention to Romania's rule of law issues. Moreover, the associations—or a small group of their representatives—went beyond the networking and awareness-raising activities as they were also involved in drafting specific questions they considered crucial for Romania to be answered by the Court of Justice of the European Union. As argued by Doroga and Bercea,⁸⁷ the Romanian associations of judges were able to push the Romanian courts into a dialog with the Court of Justice of the European Union through the preliminary reference procedure.⁸⁸

Indeed, beyond the two mentioned cases, judicial associations can be considered significant actors of judicial politics in other European jurisdictions, too. For instance, it is argued that the judicial associations and their links to the political parties mirror themselves in the composition of the Spanish Judicial Council (*Consejo General del Poder Judicial*).⁸⁹ In other words, political parties can indirectly influence the Council's membership through often politicized associations of judges.⁹⁰ Similarly, in Germany, the selection of judges in some States seems to be politicized to a certain extent, as the judicial associations, and their members taking part in selection committees as judicial members, form *de facto* coalitions with political parties and their representatives on the committees.⁹¹

3. Informal Platforms

It is pretty common for court presidents to establish informal platforms. In Czechia, regional court presidents formed the College of Presidents of Regional Courts.⁹² Using this platform, the regional court presidents meet regularly and discuss judiciary-related policies and challenges the regional courts face.⁹³ Their informal power is mirrored in the fact that they seem to be needed for carrying

⁸⁵Benvenuti & Paris *supra* note 80. See also Simone Benvenuti, *The Italian System of Judicial Governance: An Arena of Confronting Informal Practices and the Push Towards Formalization*, in this issue (describing how court presidents are appointed when there are vacancies).

⁸⁶See Simone Benvenuti, *The Italian System of Judicial Governance: An Arena of Confronting Informal Practices and the Push Towards Formalization*, in this issue (providing two potential explanations for the high rate of successful evaluation: personal on-bench relationships between court presidents and judges and the possibility of a negative evaluation could jeopardize relationships within and between *correnti*). See also Fabri, *supra* note 3.

⁸⁷See Sorina Doroga & Raluca Bercea, *The Role of Judicial Associations in Preventing Rule of Law Decay in Romania: Informal Communication and Strategic Use of Preliminary References*, in this issue.

⁸⁸Besides doing everything mentioned here, associations of judges could be active in supporting nominees for the office of member of the Judicial Council, or in disciplinary proceedings against judges. See, e.g., Sorina Doroga & Raluca Bercea, *The Role of Judicial Associations in Preventing Rule of Law Decay in Romania: Informal Communication and Strategic Use of Preliminary References*, in this issue.

⁸⁹See Nuno Garoupa, Marian Gili & Fernando Gómez-Pomar, *Political Influence and Career Judges: An Empirical Analysis of Administrative Review by the Spanish Supreme Court*, 9 J. OF EMPIRICAL LEGAL STUD. 795 (2012); Joaquín Urías, *Spain has a Problem with its Judiciary*, VERFASSUNGSBLOG (Jan. 15, 2020), <https://verfassungsblog.de/spain-has-a-problem-with-its-judiciary/>.

⁹⁰Urías, *supra* note 89.

⁹¹See Fabian Wittreck, *German Judicial Self-Government—Institutions and Constraints*, 19 GER. L.J. 1931 (2018).

⁹²See Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue; Kosař, *supra* note 21.

⁹³Blisa et al., *supra* note 25.

out reforms affecting the Czech judiciary.⁹⁴ The informal method of coordination was also adopted by three Czech Chief Justices—of the Supreme, Supreme Administrative, and Constitutional Courts—when they established the “Trinity of top court presidents.”⁹⁵ In Israel, and similarly in Czechia, judicial actors often create and use informal platforms as means of coordination. The court presidents and vice-presidents are most active in this regard.⁹⁶

D. Discussion

The last section mapped the actors of informal judicial institutions and practices by focusing on both individual actors and collective bodies. Here, the aim is to provide more general observations that can be made about the actors and their involvement in informal judicial institutions and practices.

First, it is evident from the examples of informal judicial institutions and practices in this issue that it is crucial to take informal institutions and practices into consideration. The same holds true for the analysis of actors of informal judicial institutions and practices. It would be short-sighted to think about the scope and limits of the influence of actors who are formally expected to perform and entrusted with performing certain duties and have particular powers related to judicial decision-making or governance. The cases of *correnti* and judicial oligarchs in Georgia⁹⁷ are highly illustrative in this regard. The Italian Judicial Council (CSM) is perceived as a strong judicial council equipped with extensive powers over the administration of the Italian judiciary and judicial careers.⁹⁸ These powers include the appointment of judges, promotion, disciplining, transfer, and the removal of judges.⁹⁹

However, a legally established actor (ANM) without a formal role in the judicial governance field was able to transplant its own structure and its dynamics into the internal structure of the actor formally recognized and co-responsible for judicial governance (the CSM). As a consequence, the networks of -ANM- members and within the *correnti* now directly affect the functioning and decisions of the CSM. In the case of the Georgian judiciary, we can also observe the existence of an alternative or parallel center of power.¹⁰⁰ Judicial oligarchs are *de facto* in a position to influence basically every sphere of the judiciary.

Second, even an individual actor or a collective effort of a small group of actors can make a difference if it decides informally to shape its own or others' positions and powers within a judiciary. For instance, the Czech “Superjudges,” a rather small group of the most influential judges, operate within the formal framework and make use of opportunities available to them. However, their “success” depends on a proactive approach to internal judicial—they often provide informal consultations to colleagues from their own courts or usually lower courts on various legal problems—and extra-judicial activities, for example taking part in political expert bodies,

⁹⁴Kosař, *supra* note 21.

⁹⁵Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue; Kosař, *supra* note 21 (describing the “Judicial Six” in Czechia which informally binds together Chief Justices of the Supreme and Supreme Administrative Courts, the Supreme State Attorney, representatives of the Union of Judges, the Union of State Attorneys, and a representative of regional courts' presidents). See also Blisa et al., *supra* note 25.

⁹⁶See Guy Lurie, *The Invisible Safeguards of Judicial Independence in the Israeli Judiciary*, in this issue; Lurie, Reichman & Sagy, *supra* note 49.

⁹⁷See Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue.

⁹⁸Garoupa & Ginsburg, *supra* note 79. See also Pablo Castillo Ortiz, *The Politics of Implementation of the Judicial Council Model in Europe*, 11 EUR. POL. SCI. REV. 503 (2019).

⁹⁹Di Federico, *supra* note 79; Benvenuti & Paris *supra* note 80; Simone Benvenuti, *The Politics of Judicial Accountability in Italy: Shifting the Balance*, 14 EUR. CONST. L. REV. 369 (2018); Carlo Guarnieri, *Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government*, 24 LEGAL STUD. 169 (2004); Wim Voermans & Pim Albers, *Councils for the Judiciary in EU Countries* (2003), <https://www.ency.eu/images/stories/pdf/judiciaries/voermansalberscouncilsforthejudiciaryintheeu.pdf>.

¹⁰⁰Brie & Stölting, *supra* note 1.

publishing, lecturing, and taking part in networks in which they have a dominant position. Consequently, they have gained influence and informal powers beyond what is presupposed by the formal rules, practices, and institutions.¹⁰¹ As Katz and Stafford argue, “the actions of a series of micro-motivated judicial actors map to the judiciary’s overall macro-behavioral jurisprudential outputs.”¹⁰²

Third, it is essential to keep in mind that informal judicial institutions and practices do not operate only between individuals. As demonstrated above, collective judicial actors’ behavior can also be affected by the presence of such institutions and practices. From the judicial governance point of view, some such institutions and practices are favorable to the judicial actors because they give them *de facto* more powers. In other words, if there is an informal practice that, for example, political actors usually agree with suggestions of the judicial self-governance bodies, it is less important that the formal involvement of such bodies is reduced to providing consultations or recommendations.

Thus, the informal judicial institution or practice moves *de facto* decision-making powers to the judicial actors, assuming that such a practice or institution is followed by all relevant actors. In a similar vein, informal judicial institutions and practices involving collective self-governance bodies also show us the limits to evaluating and comparing how much formal power judges hold in this field in individual jurisdictions.¹⁰³ Unless the presence of informality in judicial governance is taken into account, we cannot draw a complete picture of the real power of judges in the administration of judiciaries.

Fourth, and closely related to the existence of informal judicial institutions and practices involving collective actors, it is even more crucial to examine the composition of collective bodies. In many jurisdictions, the chief justices and/or court presidents chair the judicial councils or other collective judicial self-governing bodies such as disciplinary panels or promotion committees, or they are at least members of those bodies.¹⁰⁴ Even if the chief justices and court presidents are excluded from being members of particular judicial self-governing bodies, the risk remains that they could use their influence on other members. Such influence can be realized through, for example, personal and professional ties or by using formal powers such as disciplining or rewarding particular judges in order to change behavior and decisions in a desired direction.

The cases of Georgia and Slovakia illustrate the importance of looking at the composition of collective bodies. Formally, the most powerful actor of judicial self-governance in Georgia is the judge-dominated High Council of Justice. It is equipped with extensive competences in judicial recruitment and appointments, promotions, and the disciplining of judges.¹⁰⁵ However, despite its strong formal position, the real power lies elsewhere. As Tsereteli has shown, the Georgian judiciary is *de facto* governed by a small group of the most powerful judicial actors consisting of

¹⁰¹See Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.

¹⁰²Daniel Martin Katz & Derek Stafford, *Hustle and Flow: A Social Network Analysis of the American Federal Judiciary* 5 (U. Mich. L. Sch., L. & Econ. Working Paper No. 5, 2008), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1084&context=law_econ_archive.

¹⁰³See e.g., Šipulová et al., *supra* note 65.

¹⁰⁴See, e.g., Kosař, *supra* note 65; Blisa & Kosař, *supra* note 23; Wallace, *supra* note 22. See also O’Brien, *supra* note 21 (discussing Ireland); Avbelj, *supra* note 21 (discussing Slovenia); Spáč, *supra* note 27 (discussing Slovakia); Wittreck, *supra* note 91 (discussing Germany); Antoine Vauchez, *The Strange Non-Death of Statism: Tracing the Ever Protracted Rise of Judicial Self-Government in France*, 19 GER. L.J. 1613 (2018) (discussing France); Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue (discussing Georgia); CALLEROS-ALARCON, *supra* note 5 (discussing Latin America); Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 47 LAT. AM. POL. AND SOC’Y 87 (2005) (discussing Mexico); Dawuni & Kang, *supra* note 56 (discussing Nigeria).

¹⁰⁵See Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue; Nino Tsereteli, *Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia’s Failed Judicial Reforms: Informal Judicial Networks and Limited Access to Leadership Positions*, 47 REV. OF CENT. AND E. EUR. L. 167 (2022).

former Council members and prosecutors.¹⁰⁶ According to Tsereteli, one of the prerequisites for their success is control over the Judicial Council.¹⁰⁷ Having a decisive informal influence on the Council allows the judicial oligarchs to take advantage of the Council's formal powers. Appointment procedures and the promotion of judges are especially crucial here.¹⁰⁸ Before the Council's *de jure* powers are employed, the appointments are informally agreed on in advance by the oligarchs, and only then formally processed and approved. This procedure of "talking first informally" applies also to other judiciary-related decisions.

In their article, Šipulová and Spáč¹⁰⁹ show what the risks are of accumulating the powers of the chief justice and head of the judicial self-governing body in the hands of one person. Until 2014, the Supreme Court Chief Justice chaired the Judicial Council. During the Harabín leadership of the Supreme Court the Council was packed with loyal judges.¹¹⁰ Apart from that packing, Harabín was willing to use his formal powers with the intention of creating a group of loyal judges by rewarding them and punishing those in opposition to him. For instance, he used to prevent them from participating in meetings of the Supreme Court or working groups organized by the Ministry of Justice. Moreover, he was very active in disciplinary proceedings against other judges.¹¹¹ The Georgian and Slovak examples show that, for some actors, it could be their priority either formally, as a chair, or informally, through personal and professional connections with the members, to lead and control the judicial self-governing bodies.

E. Conclusion

Informal judicial institutions and practices are an inherent feature of basically every judicial system. Because formal institutions usually do not cover every aspect of behavior or all possible situations, do not always deliver the result for which they were institutionalized, or do not exist, there are actors willing to develop informal practices and institutions.

Generally speaking, there is no single sphere of judicial activity that can be fully protected against informal attempts to influence formal processes and their outcomes. For example, some actors may have an interest in affecting judges' careers at various points. They can target the nomination and appointment process in order to make sure that the "right people" are on the bench.¹¹² Similarly, it is also possible to use formal mechanisms of promotion and disciplining to reward or punish a judge for her performance.¹¹³ Also, the judicial decision-making process can be undermined in many informal ways. These could include, for instance, an expression of a desired

¹⁰⁶See Nino Tsereteli, *Judicial Recruitment in Post-Communist Context: Informal Dynamics and Façade Reforms*, 30 INT'L J. OF THE LEGAL PRO. 37 (2020).

¹⁰⁷See Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue.

¹⁰⁸Tsereteli, *supra* note 105.

¹⁰⁹See Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue. See also Kosař & Spáč, *supra* note 21; Samuel Spáč, Katarína Šipulová & Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia*, 19 GER. L.J. 1741 (2018).

¹¹⁰See Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, in this issue; Kosař & Spáč, *supra* note 21.

¹¹¹Kosař & Spáč, *supra* note 21; Spáč et al., *supra* note 109.

¹¹²Pozas-Loyo & Ríos-Figueroa, *supra* note 2; Spáč, *supra* note 24; Urribarri, *supra* note 5.

¹¹³See Peter H. Solomon Jr., *Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China*, 43 COMMUNIST AND POST-COMMUNIST STUD. 351 (2010); Christopher Larkins, *The Judiciary and Delegative Democracy in Argentina*, 30 COMPAR. POL. 423 (1998); Maria Popova, *Can a Leopard Change Its Spots? Strategic Behavior Versus Professional Role Conception During Ukraine's 2014 Court Chair Elections*, 42 LAW & POL'Y 365 (2020).

result by judicial¹¹⁴ and non-judicial actors,¹¹⁵ *ex parte* communications,¹¹⁶ corruption,¹¹⁷ personal relationships and networks,¹¹⁸ clientelist and patronage webs,¹¹⁹ rhetorical and personal attacks, and, in more extreme cases, threats to personal safety and assassination attempts.¹²⁰

This Article has analyzed actors of informal judicial institutions and practices. Because the aim was not to provide an exhaustive overview of all actors using informal means of action, the Article focused on two groups of actors: Individual—court presidents and chief justices, law clerks—and collective ones—judicial self-governing bodies, judicial associations, and informal platforms. The court presidents and chief justices have a unique position within the judiciary, perform many functions, and are endowed with various responsibilities, often without formal regulations clarifying the boundaries of their actions. This holds true not only for the European court presidents but for the office of a court president or chief justice in general.¹²¹ The law clerks, even if they are not the most visible actors operating at courts, have, in some jurisdictions, quite broad powers and responsibilities in the judicial decision-making process.

Nevertheless, judicial politics is not only about individuals, as the abovementioned collective bodies represent essential actors within the judiciary. In this Article it was argued that, irrespective of their formal powers and involvement in judicial politics, these actors are able to shape the way a judiciary functions. The informal influence of judicial associations in some countries illustrates that point very well. However, informality is visible not only in how these collective actors operate. Informal judicial institutions and practices can also affect what position the collective bodies have despite formally prescribed roles. In the judicial governance field in particular, informal institutions and practices could make the judicial self-governing bodies even more powerful actors.

Such an observation leads us to make two additional remarks. First, in some jurisdictions, judges might have more influence in judicial governance than we thought. Second, as there are some powerful individuals in many jurisdictions—typically court presidents or chief justices—more attention should be paid to the composition and internal functioning of the collective bodies. The functioning of these bodies can be affected by powerful individuals either directly, for example through the position of chair, various formal and informal powers, leadership qualities, or authority, or indirectly—for example, via both formal and informal influence on the composition of the judicial self-governing bodies and decision-making processes.

Anyway, more research is needed in order to fully understand why judicial actors make use of informality. In other words, it is of the utmost importance to discover why individual judicial actors engage in informal networks, institutions, or practices, and what determinants affect their motivation to do so. The literature on informal judicial institutions, practices, and networks provides possible answers in this regard, such as a motivation to increase their own

¹¹⁴POPOVA, *supra* note 2.

¹¹⁵Llanos et al., *supra* note 2; POPOVA, *supra* note 2, at 146; Alena Ledeneva, *Telephone Justice in Russia*, 24 POST-SOVIET AFFS. 324 (2008).

¹¹⁶CALLEROS-ALARCÓN, *supra* note 5; POPOVA, *supra* note 2; Varvara Andrianova, *The Everyday Experience of Russian Citizens in Justice of the Peace Courts*, in *A SOCIOLOGY OF JUSTICE IN RUSSIA* (Marina Kurkchian & Agnieszka Kubal eds., 2018).

¹¹⁷See Maria Popova, *Why Doesn't the Bulgarian Judiciary Prosecute Corruption*, 59 PROBS. OF POST-COMMUNISM 35 (2012); Llanos et al., *supra* note 2; Dakolias, *supra* note 7.

¹¹⁸See Llanos et al., *supra* note 2; Li, *supra* note 5; Yuen Yuen & Nan Jia, *Perverse Complementarity: Political Connections and the Use of Courts Among Private Firms in China*, 76 THE J. OF POL. 318 (2014); Dressel et al., *supra* note 2.

¹¹⁹See Aníbal Pérez-Liñán, Barry Ames & Mitchell A. Seligson, *Strategy, Careers, and Judicial Decisions: Lessons from the Bolivian Courts*, 68 J. OF POL. 284 (2006); Sieder & Costello, *supra* note 18; Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 J. OF LAT. AM. STUD. 705 (2000); Urribarri, *supra* note 5.

¹²⁰BOWEN, *supra* note 20; Andrea Castagnola & Aníbal Pérez-Liñán, *Bolivia: The Rise (and Fall) of Judicial Review*, in *COURTS IN LATIN AMERICA* 278 (Gretchen Helmke & Julio Ros-Figueroa eds., 2011); Sieder & Costello, *supra* note 18; Llanos et al., *supra* note 2.

¹²¹Wallace, *supra* note 22. See also Blisa & Kosař, *supra* note 23.

prestige,¹²² popularity, reputation, or public esteem,¹²³ visibility through a higher media presence,¹²⁴ or an intention to become a jurisprudential authority,¹²⁵ to name a few examples. Another promising avenue for future research can be seen in the informal influence of chief justices and court presidents on the functioning of judicial self-governing bodies, be they judicial councils, selection, promotion, or disciplinary committees. Here, two questions could be of interest. First, to what extent can judicial officials informally affect the composition of these collective bodies? Second, in situations in which the court presidents or chief justices are themselves members of collective bodies, it would be worth investigating whether their position within a judiciary somehow affects the decisional autonomy of other members of a body, or whether there are any behavioral patterns between them and other members that would reflect the chief justices' and court presidents' specific position.

Acknowledgements. I am thankful to my colleagues at the Judicial Studies Institute, Faculty of Law, Masaryk University (especially Katarína Šipulová, David Kosař and Attila Vincze) for their excellent comments and recommendations. I would also like to thank Silvia Steininger for her valuable insights and feedback.

Competing Interests. The author declares none.

Funding Statement. This article received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation program (INFINITY, grant no. 101002660).

¹²²See David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 THE J. OF LEGAL STUD. 371 (1999); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 U.S. ECON. REV. 41 (1993); Christopher C. McCurdy & Ryan P. Thompson, Student Work Note, *The Power of Posner: A Study of Prestige and Influence in the Federal Judiciary*, DUKE L. STUDENT PAPER SERIES 1 (2010); Box-Steffensmeier et al., *supra* note 50; Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135, 154 (2006); Ingram, *supra* note 50.

¹²³Posner, *supra* note 122; Dressel et al., *supra* note 2. See also Della Porta, *supra* note 20.

¹²⁴Blisa & Kosař, *supra* note 23.

¹²⁵McCurdy & Thompson, *supra* note 122 ("Every judge shapes the law, but few judges have the influence to transform the law over time and across jurisdictions"). See also Katz & Stafford, *supra* note 102; Blisa & Kosař, *supra* note 23; Ondřej Kadlec & Adam Blisa, *Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia*, in this issue.