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ARTICLE

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

Supranational Actors as Drivers of Formalization

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Abstract
This Article describes and analyzes the role that various supranational actors from the European level play in the rise of formalization in the European states of the legal framework surrounding their judiciary. It starts from the observation that those supranational actors act as a driving force towards increased formalization via a variety of recommendations, reports, or decisions. It first provides several concrete examples of where the supranational actors act as such a driving force towards more formalization. In a second step, the Article looks more generally at how the various supranational actors think about informality surrounding the judiciary and tries to discern the rationales that underlie their position. In a third step, it assesses the various advantages and disadvantages of the rise in formalization that is propagated by the supranational actors. In doing so, the Article shows how the topic of informal judicial rules and practices cannot be understood fully without having due regard to the supranational level and contributes to the literature on the relationship between formal and informal institutions.

Keywords: Informal rules and practices; formalization; supranational actors; driving force; underlying rationales

A. Introduction

In 2012, in her well-known book on judicial independence in transition, Anja Seibert-Fohr noted that there was an increasing emphasis throughout Europe on relying on formal guarantees regarding the judiciary. She pointed out two causes underlying this evolution towards increasing formalization. On the one hand, there were the changing perceptions on the nature of law and the role that judges are expected to play which affected the conceptualization of judicial independence and its necessary implementation in both civil and common law countries. On the other hand, there was the growing relevance of individual rights as a means of limiting governmental powers, which increased the role of the judiciary and highlighted the need for stronger institutional and procedural guarantees ensuring judicial independence.[1]

Ten years later, it seems that the development noted by Seibert-Fohr has only become more pronounced, with many European countries increasingly formalizing the rules that govern the

[1]Anja Seibert-Fohr, *Judicial Independence—The Normativity of an Evolving Transnational Principle*, *in* JUDICIAL INDEPENDENCE IN TRANSITION, 1312–17 (Anja Seibert-Fohr ed., 2012).

functioning of the judiciary. Several contributions in this Special Issue show that such a development is taking place in various countries.[2] This Article aims to expand further on this topic and will argue that supranational actors are an important, if perhaps not always very visible, driver behind this formalization process. Given the growing number of supranational actors that deal with issues concerning judicial governance, either explicitly via the lens of judicial independence or more indirect lenses such as corruption, transparency, or economic considerations, this supranational perspective becomes increasingly important.

In general, this Article shows how the supranational actors act as a driving force towards increased formalization via a variety of recommendations, reports, or decisions. As such, it proves that the topic of formal and informal judicial institutions cannot be fully understood without also having due regard to the supranational level. This topic is important, and not simply from an academic point of view. It has long been understood that informal judicial rules and practices are crucial for the proper functioning of the judiciary and for cultivating judicial independence. Any actor that may influence those informal rules and practices thereby affects the way the domestic judiciary functions and its ability to do so properly and is therefore worth understanding.

The influence of the supranational level on the process of formalization is an under-researched topic. Because of that, this Article purposefully adopts a broad scope. It investigates a wide variety of different types of supranational actors—advisory bodies, political bodies, and judicial bodies—each of which might very well merit a more detailed and focused study. Furthermore, no countries or substantive areas regarding judicial governance and the organization of the judiciary were excluded. All that means that this Article casts a wide net and does not claim exhaustivity. Rather, it attempts to highlight a broader and ongoing development, to give a first analysis, and to point to potential areas of future research.

In what follows this Article will first discuss examples in which supranational actors have been a driving force behind the domestic process of formalization—in Section II. Section III will then take a more general look at this development. It will examine the supranational actors' position towards informal rules and practices surrounding the judiciary and will delve into the underlying rationales that inform their position to denounce or accept such informality. Section IV will then make a first normative assessment of the development in which the formalization of the domestic judicial framework is being driven by supranational actors, pointing out its pros and cons.

B. Supranational Actors as Drivers of Formalization: National Examples

This Section provides some concrete examples of how supranational actors are operating as a driving force behind the process of formalization of the rules regarding the judiciary in European countries. It will look at instances where European countries initiated a process of formalization as a more or less direct response to a supranational actor, or where the supranational actors required or expected such formalization to take place. As was mentioned earlier, this Article discusses a rich variety of actors, ranging from bodies with an advisory function—for example, the Venice Commission and the Consultative Council of European Judges—to political—for example, the European Commission—and judicial bodies—for example, the European Court of Human Rights and the European Court of Justice. From the outset, it should be pointed out that there are large differences in the concrete power relationships that exist between these bodies and the European states. In what follows I will first address the actors that have a more advisory or recommendatory function, and then move to those bodies with a more compulsory character: The political and judicial bodies.

Before we turn to the concrete examples, three caveats are in order. First, concerning the notion of "driving force" as employed in this Article: From the above selection of supranational bodies, it can be seen that it is not understood in a strict, legally binding way.

[2]See for instance Mathieu Leloup, *Informal 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; Sophie Turenne, *Informal Judicial Institutions—The Case of the English* Judiciary, in this issue.

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A non-binding opinion by an advisory body that convinces a country to further formalize its normative framework also falls within the scope of this Article. The notion of "driving force" is thus understood rather broadly.

Second, it is equally acknowledged that it is not always straightforward to verify whether a certain supranational actor has had some hand in the process towards further formalization.[3] Direct causal links are not always easy to establish. As such, this Article will rely on a wide variety of sources as corroborating evidence in this regard, such as parliamentary preparatory works, reports by the supranational actors themselves, and academic literature. Because of this, what is suggested here is that the respective supranational actors are one of the driving factors of such a process of formalization, while not necessarily being the only one.

Third, it should be explained what is understood by "formalization." Simply put, it includes any action that makes a theretofore informal aspect more formal, by introducing a fixed structure or clear rules. It therefore includes actions that drive a certain unregulated domain to become regulated, as well as those that push informal rules and practices to become formal regulations. Because the distinction between formal and informal must be seen as a scale, rather than as a binary in nature,[4] the process of formalization must also be understood as a scale. The process of formalization itself is, moreover, neutral. That means that it is in principle of no importance whether the formal regulation, as the outcome of the process of formalization, corresponds to or contradicts the former informal rule or practice.

I. Advisory Actors

In the last decades, more supranational actors have been exercising advisory functions regarding issues of judicial governance and the functioning of the judiciary more broadly. Some clear examples are the Consultative Council of European Judges, the European Network of Councils for the Judiciary, or the Venice Commission. But less obvious actors, such as the GRECO, have also been dealing with the domestic judiciary, albeit more indirectly, through the lens of non-corruption and transparency.[5]

At times, those actors also deal with informal aspects concerning domestic judiciaries, either directly or indirectly. In that respect, one can find multiple examples of where those supranational actors, via recommendations or opinions, have nudged the European states to formalize or further specify a theretofore informal part of their judiciary. In fact, other articles in the Special Issue have already pointed to such instances.

In his article on Ireland, Patrick O'Brien has extensively discussed how some real political energy was devoted to the reform of the system of judicial discipline only after GRECO criticized it.[6] The discussions in Parliament indeed point to GRECO's critical comments as at least part of the reason why such a reform was necessary.[7] The same thing can be said for Belgium. There as well, the loosely governed system of substitute judges, despite longstanding criticism on the national level, was only amended after a critical report by the GRECO.[8] During the debates in

[3]*See generally* Wolfgang Hoffmann-Riem, *The Venice Commission of the Council of Europe—Standards and Impact*, 25 EUR. J. INT'L L. 585 (2014) (holding that "unfortunately, it is rarely examined—at least systematically—whether and to what extent the states to which VC opinions are addressed take up and implement its suggestions and recommendations.").

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

[5]More specifically in the fourth evaluation round, which focused on "[c]orruption prevention in respect of members of parliament, judges and prosecutors . . . ." GRECO, *Corruption Prevention: Members of Parliament, Judges, and Prosecutors Conclusions and Trends*, COUNCIL OF EUROPE, at 6 (2017).

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

[7]*See* 254 No. 7 Seanad Deb., Judicial Council Bill 2017: Second Stage (Nov. 22, 2017) (Ir.), https://www.oireachtas.ie/en/debates/debate/seanad/2017-11-22/12/.

[8]*See* Mathieu Leloup, *Informal Judicial Practices in the Belgian Legal Order: A Story of Incremental and Reactive Development*, in this issue. Other commentators as well have noticed that it was the GRECO that seems to have given the

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Parliament the then Minister of Justice stressed how important it was that Belgium could show GRECO some positive developments in its upcoming evaluation.[9]

Beyond these two examples, which have been discussed more extensively elsewhere in this Special Issue, two more examples can be mentioned here. The first one concerns the system of incompatibilities between legislative and judicial functions in the Netherlands. While drafting the 1983 revision of the Dutch Constitution, the government did not believe it was necessary to impose a strong incompatibility between membership of Parliament and a judicial function.[10] While the Constitution made it possible to extend the incompatibilities via ordinary legislation,[11] the legislature had not seen a reason to do so. This meant that it was possible to simultaneously be a judge and a member of Parliament. While that quite clearly creates some tension with the principle of separation of powers, there was little problem in practice. Judges who were elected to Parliament ordinarily chose to take special leave for the time of their elected mandate or resigned their judicial post.[12] In its report on the Netherlands, the GRECO nevertheless raised doubts about this system and recommended that a restriction on the simultaneous holding of the office of judge and that of member of Parliament should be clearly laid down in law.[13]

Originally, the Dutch government was hesitant to codify such an incompatibility in the law because it rarely happened in practice. Moreover, the combination of judicial and legislative mandates were advised against in guidelines and codes of conduct that the judiciary itself had drawn up a few years prior. The GRECO was, nevertheless, not convinced by those arguments and urged the Netherlands to comply with its recommendation. It recalled that it is an internationally recognized principle that the independence of the judiciary should be guaranteed by domestic standards at the highest possible level and urged the authorities to give effect to the recommendation, which called for legislation.[14] Recently, in November 2021, a legislative proposal, colloquially known as the GRECO law, was submitted which will explicitly forbid a judge from being a member of the Dutch parliament. The explanatory memorandum to the law explicitly states that the amendment stems from the GRECO evaluation report.[15]

The second example concerns the system of appointment of judges in Austria. In its compliance report, the GRECO noted its concern about the method of the selection of candidate judges by the chair of the higher judicial court and subsequently by the Minister of Justice. The system for such a pre-selection was largely informal, without the involvement of a panel, which created the risk of political interference and nepotism. Because of that, it recommended that the recruitment requirements should be increased and formalized for the pre-selection of judges.[16]

decisive push to reform the system. Paul Lemmens & Raf Van Ransbeeck, *De onafhankelijkheid van de rechter en de rechtsprekende macht in België*, *in* RECHTERLIJKE ONAFHANKELIJKHEID 12 (Tamara Trotman, Paul Bovend'Eert, Paul Lemmens, & Raf Van Ransbeeck eds., 2023).

[9]*See* Report of the Commission on Justice Affairs, Kamer 54-3523/003, 6, https://www.dekamer.be/FLWB/PDF/54/3523/54K3523003.pdf.

[10]Some specific incompatibilities have nevertheless been written into the Constitution. Article 57(2) of the Constitution dictates that a member of Parliament cannot simultaneously be a member of the Council of State or of the Supreme Court. GW. [CONSTITUTION] art. 57 (Neth.).

[11]*Id.*

[12]*See* Dutch Council of State, 36 243, nr 3, para. 2.2, https://zoek.officielebekendmakingen.nl/dossier/kst-36243-3.pdf. Though apparently there have been some judges who remained in post when they were elected to the First Chamber of Parliament (Senate), because that is not a full-time function.

[13]*See* GRECO, *Evaluation Report on the Netherlands for the Fourth Evaluation Round*, 79th Sess., Doc. No. 1 (2018).

[14]*See* GRECO, *Interim Compliance Report on the Netherlands for the Fourth Evaluation Round*, 73rd Sess., Doc. No. 10 (2016).

[15]*See* Explanatory Memorandum of November 7, 2022, 36243-3, 2, https://zoek.officielebekendmakingen.nl/dossier/kst-36243-3.pdf.

[16]*See* GRECO, *Evaluation Report on Austria for the Fourth Evaluation Round*, 73rd Sess., Doc. No. 1 (2016) para. 90. The GRECO also found that for the selection of administrative judges as well the requirements were too loose and left broad discretion to the courts at the federal or regional level to select successful candidates. However, while the Austrian government was willing to reform the appointment system for regular judges, it does not seem to have made any amendments to the appointment system for administrative judges.

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Subsequently, in its interim compliance report, the Austrian government announced that it had introduced certain mandatory recruitment criteria in the law for the pre-selection of judges. Furthermore, the authorities informed the GRECO that, in practice, candidates were heard not only by the president of the higher regional court, but that representatives of the senior public prosecutor's office and the Association of Austrian Judges were present as well. Furthermore, candidates also had to go through several other stages of training and monitoring, so the president of the higher regional court was not alone in the process of assessing candidates.

While the GRECO welcomed the express introduction into law of the recruitment criteria, it reiterated that, formally, the decision-making power remained in the hands of only one person, namely the president of the relevant high court. It stated that the appointment decision should preferably be preceded by a proposal by some sort of panel.[17] In the second interim compliance report, the Austrian government informed the GRECO that the practice of having other people present at the hearing was to be formalized in the law, and that appointment decisions were to an extent going to be transferred from the presidents to so-called external senates. The GRECO noted that it would need to see the legislative provisions to determine whether they conformed to the recommendation.[18]

II. Political Actors

Let us now move away from the advisory bodies and turn to actors with a more political mandate, particularly the European Commission. When we look at the Commission as a driver of formalization, we can first point to the requirements that are imposed on countries that want to accede to the Union, the so-called Copenhagen criteria.[19] It has been noted by many others that these criteria often require far-reaching judicial reforms, in which priority is given to the building of new institutions and strengthening of formal rules.[20]

More recently, the yearly Rule of Law Reports have also offered some interesting insights into the way the European Commission looks at informality concerning the judiciary. Again, reference can be made to Patrick O'Brien's article for an example. In it, he discussed the changes that were made regarding a new system of appointment of judges. Whereas the original bill left unrestricted power to the government to pick the candidate that was ultimately to be appointed, the new bill required the government to choose from among three names recommended to it for each post. The reason for that change seemed to be the EU Rule of Law Report, in which the Commission stressed "that it is important that this reform takes into account Council of Europe recommendations relating to the need for the executive power to follow in practice the recommendations by independent authorities."[21] In this sense, as noted by Patrick O'Brien, it appears that the EU report made the Irish government quietly abandon a decades-long unshakeable position that the Irish Constitution requires unfettered discretion by the government over judicial appointment decisions.[22]

[17]*See id.* at para. 31.

[18]*See* GRECO, *Second Interim Compliance Report on Austria for the Fourth Evaluation Round*, 89th Sess., Doc. No. 19 (2021) para. 52–53.

[19]It should be pointed out that the effectiveness of these conditionality criteria has long been the subject of strong criticism. *See generally* Dimitry Kochenov, EU Enlargement and the Failure of Conditionality (2008) (discussing recent depictions of how the EU-led changes in the judiciary have actually opened the door for informal control over the judiciary in Turkey and North Macedonia). *See also* Islam Jusufi, *How the EU-Induced Institutional Changes Facilitated Patronage over and Capture of Judiciary in North Macedonia*, 24 J. Balkan & Near E. Studs. 836 (2022); Digdem Soyaltin-Colella, *How to Capture the Judiciary Under the Guise of EU-Led Reforms: Domestic Strategies of Resistance and Erosion of Rule of Law in Turkey,* 22 Se. Eur. & Black Sea Studs. 441 (2022).

[20]*See* Romana Coman, *Central and Eastern Europe: The EU's Struggle for Rule of Law Pre- and Post-Accession*, *in* The Routledge Handbook of Justice and Home Affairs Research (Ariadna Ripoll & Florian Trauner eds., 2017).

[21]*2021 Country Chapter on the Rule of Law Situation in Ireland*, COM (2021) 700 final (July 20, 2021).

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

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The Parliamentary Assembly of the Council of Europe provides another case in point. During the periodic review of the honoring of the obligations by Iceland, the rapporteur found that, while Iceland is in general a well-functioning democracy, because of the size and relatively homogenous makeup of its society it often relied on informal rules and arrangements in society, rather than on clear and codified legal norms. According to the rapporteur, that led to vulnerabilities in the functioning of democratic institutions, especially regarding checks and balances.[23] As a result, in its final report the PACE called on the Icelandic authorities to reform its democratic institutions with a view to addressing these vulnerabilities, either through rekindling the constitutional reform process or through common law.[24]

III. Judicial Actors

Let us turn, finally, to the judicial actors, specifically the ECJ and the ECtHR. While their case law is almost never discussed in terms of informal judicial institutions,[25] they are nevertheless of high relevance for the topic of this Article. Over the course of the last few years both Courts have drastically increased their reach over issues of domestic judicial organization and judicial governance via a broad understanding of the right to an independent court, the right to a tribunal previously established by law, and the right of access to a court.[26] This has two closely connected consequences. First, informal judicial practices increasingly fall within the material scope of fundamental rights law, and as such come within the reach of both Courts.[27] Second, the high standards that these Courts impose concerning those rights in terms of transparency and legality also has a general effect of leading to more formalization regarding the domestic judiciaries in the European states.[28] This is most clearly the case for the topics of judicial appointments and case assignment.

As far as the topic of judicial appointments is concerned, both Courts have recently indicated that a proper appointment procedure, based on merit and objective reasons, is a requirement under the right to a tribunal established by law.[29] What is of crucial importance is that the substantive conditions and procedural rules that govern the appointment process are, as far as

[23] *See* Roger Gale, The Progress of the Assembly's Monitoring Procedure (January–December 2018) and the Periodic Review of the Honouring of Obligations by Iceland and Italy para. 5.6 (2019), https://pace.coe.int/en/files/25238.

[24] *See* Parliamentary Assembly, *The Progress of the Assembly's Monitoring Procedure (January–December 2018) and the Periodic Review of the Honouring of Obligations by Iceland and Italy*, 8th Sess., Doc. No. 2261 (2019).

[25] *But see* Case C-597/18P, Council v. K. Chrysostomides et al., ECLI:EU:C:2020:1028 (Dec. 16, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-597/18. *See* Giacomo Rugge, *The Euro Group's Informality and Locus Standi Before the European Court of Justice: Council v. K. Chrysostomides & Co. and Others*, 81 Heidelberg J. Int'l L. 917 (2021) (discussing the judgment and the Court's reasoning concerning the Eurogroup's informal character).

[26] *See* Mathieu Leloup, *Not Just a Simple Civil Servant: The Right of Access to a Court of Judges in the Recent Case Law of the ECtHR*, 4 Eur. Convention on Hum. Rts L. Rev. 23 (2023); *see also* Haukur Logi Karlsson, *The Emergence of the Established "By Law" Criterion for Reviewing European Judicial Appointments* 23 German L.J. 1051 (2022).

[27] For example, there is a practice in the Dutch *Hoge Raad* [Supreme Court] of having judges that belong to the chamber that heard a certain case, without being part of the bench of three or five judges appointed to decide that case, participate in the deliberations. That practice has recently been brought before the ECtHR for alleged violation of the right to a tribunal previously established by law. *See* Kuijt v. Netherlands, App. No. 19365/19 (Apr. 15, 2020), https://hudoc.echr.coe.int/?i=001-202804.

[28] *See* Sébastien Van Drooghenbroeck & Cécilia Rizcallah, *Nomination des juges et « tribunal établi par la loi » Confirmation, évolution et révolution en marge de l'arrêt Guðmundur Andri Ástráðsson c. Islande de la Cour européenne des droits de l'homme*, 30 J. des Tribunaux 573, 580 (2021) (discussing two Belgian commentators pointed to this part of the judgment to cast doubts on the viability of the current appointment system of the Constitutional Court, one that is founded on a representative distribution of seats according to the weight of political parties, and where half of its members are nominated for their parliamentary experience and do not necessarily need a law degree).

[29] *See* Guðmundur Andri Ástráðsson v. Iceland, App. No. 26374/18 (Dec. 1, 2020), https://hudoc.echr.coe.int/fre?i=002-12371; Joined Cases C-542 & C-543/18, Erik Simpson & H.G. v. Council of the EU & Eur. Comm'n, ECLI:EU:C:2020:232 (Mar. 26, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-542/18.

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possible, couched in unequivocal terms,[30] in order for them not to give rise to reasonable doubts in the minds of individuals as to the imperviousness of the judge concerned to external factors.[31] While neither Court requires the European countries to establish a judicial council,[32] both are clearly generally in favor of such a body because it makes the appointment process more objective by circumscribing the leeway available to the political branches in the appointment decision.[33] Finally, both Courts have indicated that the appointment decision should be amenable to judicial review.[34] In doing so, both Courts are clearly nudging the states towards a detailed appointment procedure surrounded with procedural safeguards that leaves little room for informality.[35]

As regards the topic of case assignment, the case law of both Courts has also developed considerably over the last decade. At this point in time, both Courts make a clear connection between the topic of case assignment and the right to an independent tribunal established by law.[36] Both Courts stress that the assignment or reassignment of cases should be governed by clear, objective, and foreseeable rules of a general nature, and that it should not be left to the discretion of a particular actor, such as a court president.[37] Whereas some margin of discretion may be accepted for certain situations, like reassignment due to illness or the workload of a judge,[38] this discretion should be sufficiently circumscribed by rules of a general nature to prevent arbitrariness. This case law clearly also has the effect of driving states towards a more formalized system of case assignment. A case in point can be found in the judgment in *DMD Group*.[39] After the ECtHR found a violation of Article 6(1) ECHR because the law left considerable latitude to the court president as to case assignment, the Slovak government amended the legislation and introduced a new, electronic system that randomly assigns cases to a specific judge.[40]

IV. Indirect Driving Force by the Supranational Actors

The above gave examples of cases in which European countries initiated a process of formalization as a more or less direct response to a supranational actor or where the supranational actors required or expected such formalization to take place. Yet, to have a complete image of the role that these supranational actors may play towards increased formalization, due account should also be given to the indirect driving force that their instruments may exert. While the reports, opinions,

[30]*See Guðmundur Andri Ástráðsson v. Iceland*, App. No. 26374/18, at para. 120.

[31]*See* Joined Cases C-585, C-624, & C-625/18, A.K. et al. v. Sąd Najwyższy, ECLI:EU:C:2019:551, (Nov. 19, 2019), paras. 134–35, https://curia.europa.eu/juris/liste.jsf?num=C-585/18; Case C-824/18, A.B. et al. v. Krajowa Rada Sądownictwa et al., ECLI:EU:2021:153, (Mar. 2, 2021), para. 123, https://curia.europa.eu/juris/liste.jsf?num=C-824/18.

[32]*See* Grzęda v. Poland, App. No. 43572/18 (Mar. 15, 2022), https://hudoc.echr.coe.int/?i=001-216400.

[33]*See* Case C-896/19, Repubblika v. -II–Prim Ministru, ECLI:EU:C:2021:311, (Apr. 20, 2021), para. 66, https://curia.europa.eu/juris/liste.jsf?num=C-896/19.

[34]*See* Gloveli v. Georgia, App. No. 18952/18 (Apr. 7, 2022), https://hudoc.echr.coe.int/?i=001-216686.

[35]See the concurring opinion of Judges Ravarani and Mourou-Vikstrom to the judgment of the ECtHR in Alonso Saura v. Spain, App. No. 18326/19 (June 8, 2023) (Concurring Ravarani, J. & Mourou-Vikstrom, J.), https://hudoc.echr.coe.int/fre?i=001-225037. They suggest assigning a coefficient to each criterion used during the appointment process, which would make the process more objective.

[36]In older case law of the ECtHR the Court held that case assignment did not fall within the scope of Article 6(1) ECHR. Lindner v. Germany, App. No. 32813/96 (Mar. 9, 1999), https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=0014545.

[37]*See* Miracle Europe KFT v. Hungary, App. No. 57774/13 (Jan. 12, 2016), https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-159926; Case C-791/19, Eur. Comm'n v. Poland, ECLI:EU:C:2021 596 (Jul. 15, 2021), https://curia.europa.eu/juris/liste.jsf?num=C-791/19.

[38]*See* Iwanczuk v. Poland, App. No. 39279/05 (Nov. 17, 2009), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-96168.

[39]*See* DMD Group v. Slovakia, App. No. 19334/03 (Oct. 5, 2010), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-100883.

[40]See the execution report for the DMD Group judgment on the HUDOC Execution website. *Status of Execution*, DMD Grp., A.S. v. Slovakia, App. No. 19334/03 (Oct. 5, 2010), https://hudoc.exec.coe.int/?i=004-8145.

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or decisions may be addressed to a specific country, the standards that are enshrined in them must normally be understood to be of a more general scope and to apply to all state parties. In this sense, the *erga omnes* effect of the case law of both the ECtHR and the ECJ has long been accepted.[41]

States may then also decide to conform to those—more formalizing—standards set out by the supranational actors autonomously, rather than as a direct response to recommendations or decisions that were addressed to them directly. It is that kind of voluntary acceptance that is referred to here as indirect driving force. The reasons for such behavior may vary. The national actors may be "keen to show their European credentials,"[42] they may simply agree with the standards set out in the supranational instruments, or they may want to prevent a future slap on the wrist by the supranational actors. Such an indirect force may be especially strong for countries that are very open to international and European law.[43]

Just as one small example, one can point to the strong criticism that was recently voiced about the Dutch system of case assignment.[44] This criticism argues that the current system, which puts the decision regarding case assignment in the hands of informal, extra-legal bodies, can no longer be maintained in light of the principles of the rule of law and judicial independence, and in light of the case law of the ECtHR. Thus, while there has never been a case against the Netherlands before the ECtHR on the topic of case assignment, Dutch legal scholarship nevertheless relies on the case law of the ECtHR to argue that that system must be formalized.[45]

It is worth stressing this point. It makes clear that the standards that are set by the various supranational actors and which, as has already been shown, may push states to further formalize the rules governing the judiciary, also have a broader, more indirect driving force. As such, the consequences that the various instruments by the supranational bodies may entail, as driving forces towards more formalization, also expand.

V. The Interaction Between the Various Actors

That last point becomes even more important when we highlight the interaction that exists between the various supranational actors. Indeed, when one reads the various reports, opinions, and judgments, the cross-references and mutual inspiration are difficult to miss. Reference can simply be made to some examples that have already been used. The GRECO's argument that the Netherlands should codify the incompatibility between judicial and legislative mandates in formal legislation was made with reference to a recommendation by the Council of Europe's Committee of Ministers.[46]

In the same sense, the EU Commission's rule of law report on Ireland mentioned that it is important that its judicial reform considers the Council of Europe recommendations relating to the need for the executive power to follow the recommendations by independent authorities, also with reference to that same Recommendation by the Committee of Ministers.[47] The examples do

[41] *See* Oddný Mjöll Arnardóttir, *Res Intepretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights,* 28 Eur. J. Int'l L. 819 (2017); *see also* Jacques Pertek, Le renvoi préjudicielle. Droit, liberté ou obligation de coopération des juridictions nationales avec la CJEU (2021).

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

[43] One particularly good example would be Belgium. On this, see the chapter on Belgium in this issue. *See also* Sarah Lambrecht, *Belgium: The EU Charter in a Tradition of Openness*, *in* The EU Charter of Fundamental Rights in the Member States (Michal Bobek & Jeremias Adams-Prassl eds., 2020).

[44] *See* Paul Bovend'eert, *De regeling van toedeling van zaken aan rechters. Onvoldoende wettelijke verankering en onvoldoende onafhankelijkheidswaarborgen*, 20 Nederlands Juristenblad 1598 (2022).

[45] *See* Tamara Trotman & Paul Bovend'eert, *Rechterlijke onafhankelijkheid in Nederland: stevige waarborgen, maar ook kwetsbaarheden*, *in* Rechterlijke Onafhankelijkheid 120 (Tamara Trotman, Paul Bovend'Eert, Paul Lemmens, & Raf Van Ransbeeck eds., 2023).

[46] *See* Comm. of Ministers, *Recommendation on Judges: Independence, Efficiency and Responsibilities*, 120th Sess., Doc. No. 12 (2010).

[47] *See* Eur. Comm'n., *2021 Country Chapter on the Rule of Law Situation in Ireland*, COM (2021) 715 final (July 20, 2021).

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not stop there. The Venice Commission often refers to the CCJE and, vice versa,[48] many of the GRECO's arguments rely on other sources to gain some normative backing, and the EU Commission falls back on the reports by the GRECO and other Council of Europe instruments in essentially every other sentence.

This practice of cross-referencing is, in other words, rather widespread. That has at least two important consequences. First, it might create the illusion that the standards that are found in those documents are more generally accepted than they truly are. Second, this cross-referencing amps up the pressure on the European states to comply with the nudges towards formalization that appear therein. Whereas it might be rather easy for a state to disregard the non-binding opinion of one supranational actor, that clearly becomes more difficult when a variety of supranational actors—potentially belonging to different supranational legal orders—all suggest the same thing.[49] This is especially the case when non-binding standards are later incorporated by actors with a more binding nature,[50] especially the ECtHR and ECJ.[51] Put differently, this practice of cross-referencing creates a kind of self-reinforcing effect.

C. Supranational Actors and Informal Judicial Rules and Practices

The previous Section gave examples of how various supranational actors may—directly or indirectly—urge, convince, or simply require European states to further formalize the rules governing the judiciary.[52] Furthermore it showed that these supranational actors often refer to and rely on each other's texts, which amps up the pressure on the states and increases the reputational costs of non-compliance. In general, it showed that supranational actors, even when they have a non-binding, advisory mandate, can drive states to further formalize and thus change aspects of their judicial system. That observation highlights that the topics of informal judicial institutions, the process of their formalization, and the relationship between formal and informal rules cannot be fully understood without having due regard to the supranational level.

This means, in turn, that it is important to take a closer look at how these actors understand informal judicial rules and practices. It is that exercise that the following Section will attempt to conduct. First, it will take a closer look at the various reports, opinions, and decisions to analyze how the supranational actors think about informal rules and practices surrounding the domestic judiciary. It concludes that, while they are generally in favor of increased formalization, it is not always a simple one-way street. In certain contexts, the supranational actors value and even require informal judicial rules and practices. Second, this Section will take a closer look at the rationales underpinning the supranational actors' position.

[48]*See* Venice Comm'n, *Republic of Moldova—Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on the Supreme Court of Justice*, 132d Sess., Doc. No. 24 (2022) para. 27; Venice Comm'n, *Report on the Independence of the Judicial System. Part 1: The Independence of Judges*, 84th Sess., Doc. No. 6 (2010).

[49]For example, parallel to the GRECO's evaluation reports on the Irish judicial reforms, the PACE urged it to intensify its efforts and expressed its expectations that the Judicial Council Bill would swiftly be adopted "in line with the recommendations made by GRECO." Cesar Florin Preda, REPORT ON THE PERIODIC REVIEW OF THE HONOURING OF OBLIGATIONS BY IRELAND (2017), https://pace.coe.int/en/files/24265.

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

[51]One important recent development in this sense is the fact that the European Commission requires candidate countries for the EU, such as Ukraine, to comply with the suggestions set out in the opinions of the Venice Commission. Such a requirement essentially makes those opinions—which at times set out aspirational guidelines rather than minimum requirements—binding upon those states.

[52]See also the recent study of judicial independence in the Belgian legal order. The two authors mention in their conclusion that since 2014 the GRECO has started to get involved with the Belgian courts and tribunals, though only from the perspective of measures to combat corruption and assure transparency. That involvement has led to further clarifications, elaborations and adjustments. Paul Lemmens & Raf Van Ransbeeck, *De onafhankelijkheid van de rechter en de rechtsprekende macht*, *in* RECHTERLIJKE ONAFHANKELIJKHEID 62 (Tamara Trotman, Paul Bovend'Eert, Paul Lemmens, & Raf Van Ransbeeck eds., 2023).

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I. Formal or Informal: Not Just a One-Way Street

This Section of the Article aims to give a more general account of the supranational actors' position towards informal rules and practices which surround the judiciary. It moves beyond the particular examples that were addressed above and aims to come to a more general analysis.

A starting point for that exercise can be found in the often repeated basic premise that the foundational principles of judicial independence should be enshrined in the Constitution or in ordinary legislation.[53] That basic premise is further concretized in many other supranational instruments. For example, according to the ECJ, the principle of irremovability requires that the dismissal of members of a court or tribunal should be determined by specific rules, via means of express legislative provisions, which should be specified as clearly and exhaustively as possible.[54] When it comes to disciplinary proceedings against judges, the Venice Commission,[55] as well as the ECJ[56] and the ECtHR,[57] has been very clear that the grounds for discipline as well as the possible sanctions should be detailed and extensively laid down in the law.[58] Several supranational actors have made similar arguments regarding the procedure for appointing judges.[59] In the same sense, arguments have been made that the system of remuneration of judges should be laid down in the Constitution or in law.[60]

Such an explicit preference for a more formalized system becomes even more pronounced in certain other cases. For example, in one opinion the Venice Commission was asked to assess the new procedure for appointing Supreme Court judges in Cyprus. While the appointment decision was formally at the discretion of the President and the Vice President of the Republic, the Commission noted that in practice a convention had taken shape in which all presidents so far had, before exercising that power, consulted the judges of the Supreme Court and, almost without exception, followed their recommendation. Later in its opinion, it welcomed the fact that the Cypriot authorities had decided to codify that unwritten convention, which led to depoliticization of the appointment decision, in the law.[61] Thus, even when the informal practice can be

[53] *See* Consultative Council of Eur. Judges, *Opinion No. 1 on Independence of Judges*, 2d Sess., Doc. No. 1 (2001); Comm. of Ministers, *supra* note 46; Venice Comm'n, *Rule of Law Checklist*, 106th Sess., Doc No. 3 (2016).

[54] *See* Case C-274/14, In re Banco de Santander, ECLI:EU:C:2020:17, para. 60 (Jan. 21, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-274/14; Case C-203/14, Consorci Sanitari del Maresme v. Corporació de Salut del Maresme i la Selva, ECLI:EU:C:2015:664, para. 20 (Oct. 6, 2015), https://curia.europa.eu/juris/liste.jsf?num=C-203/14. The fact that there is a practice to not remove judicial members does not seem to suffice, as opposed to the case law of the ECtHR, which is discussed *infra*. *See in re Banco de Santander*, Case C-274/14, at para. 25.

[55] *See* Venice Comm'n, *France—Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Superior Council of Magistracy and the Status of the Judiciary as Regards Nominations, Mutations, Promotions and Disciplinary Procedures*, 135th Sess., Doc. No. 15 (2023) para. 56; Venice Comm'n, *Lebanon—Opinion on the Draft Law on the Independence of Judicial Courts*, 131st Sess., Doc. No. 20 (2022) paras. 94–95.

[56] *See* Case C-791/19, Eur. Comm'n v. Poland, ECLI:EU:C:2021:596, para. 61 (July 15, 2021), https://curia.europa.eu/juris/liste.jsf?num=C-791/19; Case C-817/21, Inspecția Judiciară, ECLI:EU:C:2023:391, para. 48 (May 11, 2023), https://curia.europa.eu/juris/liste.jsf?num=C-817/21.

[57] *See Oleksandr Volkov v. Ukraine*, App. No. 21722/11, paras. 173–85 (Jan. 9, 2013), https://hudoc.echr.coe.int/fre?i=002-7385.

[58] *See also* Consultative Council of Eur. Judges, *Opinion No. 3 on Ethics and Responsibility of Judges*, 3d Sess., Doc. No 3 (2002) para. 68 ("The CCJE considers that the procedures leading to the initiation of disciplinary action need greater formalisation. It proposes that countries should envisage introducing a specific body or person in each country with responsibility for receiving complaints, for obtaining the representations of the judge concerned upon them and for deciding in their light whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action, in which case it would pass the matter to the disciplinary authority.").

[59] *See* Venice Comm'n, *supra* note 53, at para. 66; Committee of Ministers, *supra* note 46; *see also A.K. et al. v. Sąd Najwyższy*, Joined Cases C-585, C-624, & C-625/18, ECLI:EU:C:2019:551, (Nov. 19, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-585/18&language=EN and *A.B. et al. v. Krajowa Rada Sądownictwa et al.*, Case C-824/18, ECLI:EU:2021:153.

[60] *See* Eur. Network of Councils for the Judiciary, Distillation of ENCJ Principles, Recommendations and Guidelines 2004–2017 (2017); Committee of Ministers, *supra* note 46.

[61] *See* Venice Comm'n, *Cyprus—Opinion on Three Bills Reforming the Judiciary*, 129th Sess., Doc. No. 43 (2021) paras. 28–35.

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understood to have positive effects—at least not any clear negative ones—the Commission is still a proponent of formalization.[62]

The same position can also be found for other supranational actors, especially GRECO. Above, it was already set out how GRECO was hammering on the formalization into law of an existing practice in which several representatives were present during hearings for the recruitment of judges.[63] Similarly, in a report about Norway, it indicated that while there seemed to be little problem in practice with the largely informal system of allocation of cases, in the interest of transparency a more foreseeable system should be established.[64]

The above shows how the supranational actors are, as a rule, proponents of a clear, formalized legal framework surrounding the judiciary. However, this does not also mean that those actors do not allow any kind of informality and simply require everything to be formalized. One prominent example in the case law of the ECtHR—and one in which it deviates clearly from the case law of the ECJ[65]—is the fact that, according to the Court, the absence of formal recognition in the law of the principle of irremovability does not in itself imply a lack of independence, provided that it is recognized in fact and that other necessary guarantees are present.[66]

In the case of *Morris*, for example, the Court found no violation because, even though there was no written guarantee against premature removal of permanent presidents, there was no record of a permanent president ever having been removed from office.[67] In similar fashion, the Court also found no violation of Article 6(1) ECHR on the basis of an allegedly improper system to summon the parties to attend the hearing in the Belgian Court of Cassation. The most important reason for the Court to come to that conclusion was the fact that there existed an informal practice in which the parties and their counsel could request the registry of the Court of Cassation to inform them in writing of the date of the hearing, or to obtain the relevant information by telephone. It considered that it was not unreasonable to require the applicants to avail themselves of such additional arrangements.[68]

In the same way, some advisory actors also leave room for informal practices and rules. This is most clearly the case in the fields of the evaluation of judges and of the ways to keep domestic jurisprudence uniform. As to the former, the CCJE argues that the decision whether, and if so how, to evaluate judges is inextricably linked to the way in which the judicial structures in the various states have developed. In states where judges are generally appointed after successful careers as lawyers, a more informal evaluation system may be more appropriate than in a system where judges are appointed soon or immediately after finishing their legal education.[69] Similarly, when it comes to mechanisms to safeguard the uniform application of case law, the CCJE and Venice Commission make a distinction between formal, semi-formal, and

[62]A similar point of view can be found in the Commission's opinion concerning the process of selection of the Macedonian Inquiry Commission. Here it held that, while the proposed model seems to comply, to the extent possible with the constitutional precepts, it would be advisable to describe in more detail the process of selection of the members of the commission. *See* Venice Comm'n, *"The Former Yugoslav Republic of Macedonia"—Opinion on the Law Amending the Law on the Judicial Council and on the Law Amending the Law on Courts*, 118th Sess., Doc. No. 8 (2019) paras. 25–26.

[63]*See* GRECO, *supra* note 18.

[64]*See* GRECO, *Evaluation Report on Norway for the Fourth Evaluation Round*, 74th Sess., Doc. No. 12 (2016) para. 111.

[65]*See*, *In re Banco de Santander*, Case C-274/14; *Consorci Sanitari del Maresme v. Corporació de Salut del Maresme i la Selva*, Case C-203/14.

[66]*See* Xhoxhaj v. Albania, App. No. 15227/19, para. 298 (Feb. 9, 2021), https://hudoc.echr.coe.int/?i=001-208053.

[67]*See* Morris v. United Kingdom, App. No. 38784/97, para. 68 (Feb. 26, 2022), https://hudoc.echr.coe.int/?i=001-60170.

[68]*See* Wynen & Centre Hospitalier v. Belgium, App. No. 32576/96, para. 35 (Nov. 5, 2002), https://hudoc.echr.coe.int/?i=001-60725; *see also* Commission Bricmont v. Belgium, App. No. 10857/84 (July 15, 1986), https://hudoc.echr.coe.int/?i=001-57611.

[69]*See* Consultative Council of Eur. Judges, *Opinion No. 17 on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence*, 15th Sess., Doc. No. 2 (2014) para. 21.

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informal mechanisms.[70] Both actors acknowledge the value of the more informal mechanisms as well and even seem to prefer such informal mechanisms in certain instances.[71]

Clearly, such examples are anything but exhaustive and one should avoid using them as a basis for drawing sweeping conclusions. Differences between the various actors clearly exist, both in scope and in mandate, and further research should be done on this issue.[72] Nevertheless, the above examples allow us to draw some cautious observations.

First, on the most basic level, they show that various supranational actors are aware of the existence of informal practices and of the important effects those can have in practice when they interact with the formal legal framework.[73] In one opinion, the Venice Commission explicitly recommended that, in the Lebanese context, where informal mechanisms often supersede formal rules it would be appropriate to introduce a so-called sunset clause, which provides for a formal review of the working of the new mechanism.[74] Such a consideration shows that the Commission is aware of the substitutive effect that informal practices may have.

In another opinion, the Commission addressed the composition of the prosecutorial council in Bulgaria. Whereas the law dictated that some of the council's members should be lay members, at that point in time all people appointed as lay members were former prosecutors or investigators. According to the Commission, such a state of affairs was clearly undesirable because the presence of lay members should ensure a pluralistic composition, whereas in Bulgaria it only represented the prosecutorial corporation.[75] It recommended the Bulgarian authorities to modify the law in order to ensure that lay members in the prosecutorial chamber should represent other professions. In doing so, it seems to have made suggestions to prevent a competing informal practice from undercutting the intention of the legal framework. In the same sense, the abovementioned case law of the ECtHR regarding irremovability would indicate that it took the complementary effect of informal rules and practices into consideration in concluding that there had been no violation of the right to a fair trial.[76]

Second, and closely related to it, the above shows that the supranational actors do not see the relationship between formal and informal rules as a one-way street in which they continuously push for more formalization. Even though it seems safe to conclude that they are generally in favor of a detailed, extensive legal framework, the above examples indicate that in certain circumstances they do value, sometimes even require, informal practices.[77] A very recent opinion by the Venice Commission on the legal safeguards of the independence of the judiciary in the Netherlands confirms that conclusion. In its opinion the Commission started by acknowledging that informal norms and practices are crucial in sustaining the rule of law and states should strive to establish such informal norms and practices supporting the rule of law in

[70] *See* Venice Comm'n, supra note 48, at para. 16; Consultative Council of Eur. Judges, *Opinion No. 20 on the Role of Courts with Respect to Uniform Application of the Law*, 18th Sess., Doc. No. 4 (2017) paras. 15–19.

[71] *See* Venice Comm'n, *Republic of Moldova*, *supra* note 48, at para. 27; Consultative Council of Eur. Judges, *supra* note 70, at para. 24.

[72] From the material that was gathered for this Article, it would appear, for example, that the GRECO leaves much less room for informal rules and practices than other supranational actors.

[73] *See* Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSP. ON POL. 725 (2004).

[74] *See* Venice Comm'n, *Lebanon—Opinion on the Draft Law on the Independence of Judicial Courts*, 131st Sess., Doc. No. 20 (2022) para. 24.

[75] *See* Venice Comm'n, *Bulgaria—Opinion on Draft Amendments to the Criminal Procedure Code and the Judicial System Act, Concerning Criminal Investigations Against Top Magistrates*, 132d Sess., Doc. No. 32 (2022) para. 27.

[76] *See Wynen & Centre Hospitalier v. Belgium*, App. No. 32576/96 and *Commission Bricmont v. Belgium*, App. No. 10857/84.

[77] *See* Venice Comm'n, *Revised Report on Individual Access to Constitutional Justice*, 125th Sess., Doc. No. 1 (2020) para. 171; *see also* Anne Sanders, *Report on the Individual Evaluation of Judges in Albania*, COUNCIL OF EUROPE (2014), https://rm.coe.int/eu-coe-support-to-efficiency-of-justice-sej-a-joint-project-between-th/168078874d.

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their democratic and legal cultures. Yet, it immediately followed that those informal norms should complement and support, and not substitute formal safeguards altogether.[78] On that basis, it urged the Dutch government in several parts of its opinion to amend or update its formal legal framework and thus to formalize some of those hitherto informal practices. The above examples, together with this recent opinion of the Venice Commission, immediately show that the understanding of the supranational actors on the relationship between formal and informal judicial practices is more complex than might appear at first glance. This, in turn, raises the question about the rationales that underpin that understanding. It is to that issue that I now turn.

II. The Underlying Rationales

The above has shown that in some cases the supranational actors pushed hard for extensive formalization of the rules that govern the judiciary. In other areas that was much less the case and those actors encouraged, or even required, certain informal rules and practices. This raises questions as to the rationales that underlie the reasoning of the supranational actors and the normative arguments that inform the way in which they look at the relationship between formal and informal judicial rules and practices.

From the outset, it becomes apparent that that is not an easy exercise, because the various supranational actors vary significantly in their mandates. Not only do they look at similar issues through different lenses, they also perform very different roles. GRECO, for example, makes recommendations concerning domestic judiciaries from the angle of the fight against corruption. The ECtHR and ECJ rather produce legally binding judgments that expound on the minimum requirements to safeguard the fundamental right to effective judicial protection by an independent and impartial court previously established by law. The Venice Commission, differently, provides more aspirational opinions on draft legal reforms from the perspective of the basic principles of European constitutional heritage: Democracy, human rights, and the rule of law. The World Bank, as another totally different example, has for several decades now been assisting countries in legal and judicial reforms, on the basis of the argument that the rule of law and judicial independence promote economic growth and reduce poverty.[79] Given the proliferation of the number and type of bodies that are engaged with questions on the functioning of the domestic judiciary, it can only be expected that the understanding of their own task shapes and informs their views on informality and the arguments they employ in their respective instruments.

Yet, when one reads the various recommendations, reports, and decisions it becomes clear that the supranational actors only rarely provide any kind of explicit normative justification for their position. The underlying rationales often remain unspoken.[80] The prevailing basic sentiment simply seems to be that a more formalized legal framework is more legitimate than informal practice, and as such preferable.[81] To be clear, there are some exceptions to be found. The Venice

[78]Venice Comm'n, *The Netherlands—Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Legal Safeguards of the Independence of the Judiciary from the Executive Power*, 136d Sess., Doc. No. 29 (2023) paras. 9–10.

[79]*See* Gretchen Helmke & Elena V. McLean, *Inducing Independence: A Strategic Model of World Bank Assistance and Legal Reform*, 31 CONFLICT MGMT. & PEACE SCI. 383 (2014); World Bank, *Legal and Judicial Reform: Strategic Directions*, DOC. NO. 26916 (Jan. 2003), https://documents1.worldbank.org/curated/en/218071468779992785/pdf/269160Legal0101e0also0250780SCODE09.pdf.

[80]*See* Parliamentary Ass., *Report on the Progress of the Assembly's Monitoring Procedure*, 8th Sess., Doc. No. 2261 (2019) para. 106 (Jan. 13, 2020) (arguing that "it would be importance to codify this practice clearly," but with no further explanation).

[81]*See* Ulrich Sedelmeier, *Political Safeguards Against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure*, 24 J. EUR. PUB. POL'Y 337, 346 (2016); *see also* Olga Schwartz & Elga Sykiainen, *Judicial Independence in the Russian Federation*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 971, 1000 (Anja Seibert-Fohr ed., 2012).

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Commission, for example, stipulated that informal norms that ensure coherence in the court system are necessary to avoid legal uncertainty through inconsistent decisions.[82]

The underlying rationale there is thus one of legal certainty. The exacting standards laid down by the ECtHR and the ECJ regarding the appointment of judges and case assignment in light of the right to a tribunal previously established by law are also predicated on the paramount importance of the rule of law, which calls for particular clarity of the rules applied and for clear safeguards to ensure objectivity and transparency.[83] Yet, in many other instances, such rationales are not brought forward or expounded upon.

Nevertheless, the fact that various actors with such widely different mandates are all dealing with issues concerning the domestic judicial system and generally all seem to favor increasing formalization suggests that such rationales must exist. That is a broad question the answer to which may differ depending on the supranational actor in question, and one which deserves deeper consideration than can be provided in the remainder of this Article. This Article will suggest three separate yet interrelated factors.

First, perhaps self-evidently, supranational actors simply consider a formalized legal system to provide the most stable and foreseeable framework in order to protect judicial independence and prevent informal practices which undercut or supersede the legislative framework, and which, in turn, contributes to maintaining public confidence in the judiciary.[84] Formal norms support important values for the national judicial system such as stability, foreseeability, and transparency, which in turn aid the enforceability of those norms.[85] A clear and extensive formal legal framework is then understood to be most conducive to respect for the rule of law,[86] with judicial independence and foreseeability as two of its core elements.[87] In its recent opinion on the Netherlands, the Venice Commission indeed pointed in that direction by stating that, even though the informal norms in the Dutch legal system were evidence of a strong culture for the rule of law the Netherlands, those norms should not substitute formal legal safeguards altogether. The Commission had offered proposals and advice on rule of law safeguards that should be integrated in the legislation, mostly as a preventive measure to protect it against possible political threats to the independence of the institutions examined in the opinion, which may arise in the future if the current political, societal and legal culture happened to change.[88]

Second, one should keep in mind the context in which some of the supranational instruments have been adopted. A significant number of the abovementioned instruments address transitioning and backsliding countries or target failures of the judiciary in each country. Similarly, some of the abovementioned examples should be understood as a response to constitutional backsliding in a contracting state.[89] In such circumstances, the supranational push for increased formalization can be understood as a reactive development to the ongoing struggles in the Member States, and as a consequence of the growing role that supranational institutions are playing in overseeing national judiciaries.

Third, is the role that the supranational institutions play. Whereas, as was said, there are significant differences between the mandates of the institutions, they all conduct some form of oversight. In doing so they generate standards that apply to the various contracting parties, and

[82]*See* Venice Comm'n, *supra* note 77, at para. 171; *see also* Consultative Council of Eur. Judges, *supra* note 70, at paras. 1, 5.

[83]*See DMD Group v. Slovakia*, App. No. 19334/03, at para. 66.

[84]*See also* Oktay Alkan v. Turkey, App. No. 24492/21, para. 58 (June 20, 2023), https://hudoc.echr.coe.int/?i=001-225320.

[85]*See* Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1106 (1986).

[86]*See also* Petra Bárd & Viktor Zoltán Kazai, *Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study*, 14 HAGUE J. ON RULE L. 165 (2022).

[87]*See* Case C-817/21, Inspecția Judiciară, ECLI:EU:C:2023:55 (May 11, 2023) at para. 48, https://curia.europa.eu/juris/liste.jsf?num=C-817/21.

[88]*See* Venice Comm'n, *supra* note 78, paras. 83–84.

[89]By way of example, the heightened standards that we can see in the case law of the ECtHR and ECJ under the right to a tribunal established by law when it comes to the appointment of judges is a direct response to the crisis in Poland.

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which should, generally, be understood to improve the quality of the judicial system. Such a narrative is, however, conducive to increasing formalization, for at least two reasons. First, as informal rules and practices are difficult, if not impossible, to transplant from one legal system to another because of how context-dependent they are,[90] it is much more straightforward to focus on formal rules. Second, a more formalized legal framework allows one to easily assess compliance and provide follow-up opinions or reports.

To conclude, this Section has attempted to dig a little deeper into the way in which the supranational actors look at informal judicial rules and practices. The conclusion in this regard must be that they are not very clear in this respect and that a nuanced normative framework and principled position seem to be lacking, at least in the texts of the instruments themselves. What has been shown is that, while the supranational actors generally favor formalization, it is not a simple one-way street, and in some cases informal practices are valued or even required. Yet, the normative arguments that inform their position are opaque and the underlying rationales are rarely, if ever, made explicit, which makes it difficult to assess their position. This Section has pointed to three factors that help explain why supranational actors push for increased formalization.

D. Pros and Cons of the Drive Towards Formalization

The two previous Sections of this Article have given examples of how supranational actors may act as a driving force towards more formalization of rules governing the judiciary and have taken a more general look at the way in which those actors perceive informal judicial practices. This final substantive Section will switch the focus once more and aims to give a normative assessment of the developments that were addressed in this Article. To do so it will investigate the advantages and disadvantages of such a European-inspired move towards more formalization. Given the topic of the Article, the focus of this analysis will lie on the drive towards formalization by supranational actors, rather than on the evolution towards increased formalization in and of itself. The aim of this Section is not to give a complete and final normative assessment, but rather to point to some pros and cons to frame any future debates on the matter.

I. Pros

A simple but undeniable advantage of the supranational actors' push for increased formalization surrounding the judiciary is that it contributes to increased legal certainty and transparency and helps provide a necessary framework establishing the fundamental aspects protecting judicial independence. Recent examples both inside and outside Europe—such as Poland and Israel[91]—have shown that the independent position of the judiciary can come under attack and that a strong, institutional framework that protects that independence is no luxury.[92] A strong recognition in parliamentary legislation or even the Constitution of the basic tenets underpinning judicial independence, which, as was shown, is strongly advocated by the supranational actors, then contributes to the protection of the judiciary and enhances the democratic and transparent character of the legal framework surrounding it.

In this respect, the supranational actors, as drivers of such formalization, may provide an important incentive to the European states to shore up part of their legislative framework. Take the abovementioned example of the rules regarding incompatibilities in the Netherlands. Even though the lack of a specific prohibition on combining both a legislative and judicial function had

[90]*See* Hubert Smekal, *Informality as a Virtue: Exploring Positive Informal Judicial Institutions*, in this issue.

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

[92]Though, of course, these very same examples have also shown that a formal legal framework is not necessarily enough to protect the judiciary.

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been met with stark criticism,[93] it was only after GRECO had repeatedly issued its concerns that the Dutch government undertook legislative action. By nudging the Netherlands to introduce this legislation, GRECO contributed to providing a legislative foundation to solidify an already existing practice that would outlaw something that is generally understood to go against the principle of the separation of powers. Earlier, this Article pointed to similar examples in Belgium and Ireland.[94]

Closely related to that point is the fact that supranational actors provide an external avenue for national actors to challenge informal aspects of the judiciary, which may not always be easy or even possible in the domestic legal setting. In the abovementioned case of *Kuijt v. the Netherlands*, for example, the applicant challenged an informal practice in the Dutch Supreme Court which allowed judges who were not members of the bench hearing a case to be present during the deliberations.[95] In that case, the applicant believed such a practice violated the right to an independent and impartial tribunal previously established by law and had submitted a request for the judges of the Supreme Court to recuse themselves, which had been dismissed.

Those considerations show that supranational actors, because of their specific position, may persuade or force countries to make changes for which there is little political momentum or will. Especially for countries that like to be perceived as European-friendly, they may make certain difficult reforms more palatable, or offer politicians a convenient, external reason why such reforms are taking place.

II. Cons

While the above has pointed to important advantages of the increased formalization that the various supranational actors are pushing for, that same development also comes with some significant risks and drawbacks.

A first point is the risk that supranational actors may apply similar standards to different countries, regardless of their specificities. While some supranational institutions are showing increasing awareness of national circumstances and are tailoring their instruments to that context,[96] the standards they impose are—almost by nature—applicable to all contracting states. Yet, imposing and enforcing such supranational standards that apply to all European countries may prove to be insensitive to the particularities of the various legal systems.[97] In his article, O'Brien sharply criticized the poor quality of the European reports and the fact that they seldom, if ever, demonstrate any awareness about the cultural distinctiveness of common law systems.[98]

Moreover, the rules governing the judiciary are often part of a more complex network of—formal and informal—checks and balances that operates as a whole, which may be highly context-dependent.[99] The supranational actors may then push for changes that they argue are in line with

[93] *See* Trotman & Bovend'Eert, *supra* note 45, at 94.

[94] *See* 254 No. 7 Seanad Deb., *supra* note 7; Leloup, *supra* note 8 (and accompanying text); Lemmens & Van Ransbeeck, *supra* note 8 (and accompanying text); Report of the Commission on Justice Affairs, *supra* note 9.

[95] *See* Kuijt v. Netherlands, App. No. 19365/19 (Apr. 15, 2020).

[96] See in such sense also the former President of the Venice Commission who argued that, when distinguishing between older and new democracies, the Venice Commission adopts a more flexible approach than other international institutions, because an important place is reserved for legal traditions and constitutional culture. *See* SERGIO BARTOLE, THE INTERNATIONALISATION OF CONSTITUTIONAL LAW: A VIEW FROM THE VENICE COMMISSION 76 (2020); Venice Comm'n, *Lebanon—Opinion on the Draft Law on the Independence of Judicial Courts*, 131st Sess., Doc. No. 20 (2022) para. 24. Here, the Commission mentions "the specific Lebanese context, where informal mechanisms often supersede written rules."

[97] *See* Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe* 15 GERMAN L.J. 1257 (2014) (detailing a similar argument); *see also* Hubert Smekal, *Informality as a Virtue: Exploring Positive Informal Judicial Institutions*, in this issue.

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

[99] *Cf.* Hubert Smekal, *Informality as a Virtue: Informality as a Virtue: Exploring Positive Informal Judicial Institutions*, in this issue.

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European best practices, but which may not fit well within the specific institutional and functional setting of a specific country.

A telling example can be found in a recent debate in the Netherlands about the appointment procedure for judges for the Supreme Court. Currently, the Dutch Constitution states that those judges are formally appointed by the King, who has to choose from a list of three candidates proposed by Parliament.[100] Recently, some voices have suggested amending this system and establishing a commission to propose a candidate for the King to appoint.[101] That proposal has been mentioned approvingly in both rule of law reports by the European Commission, which stated that the aim of the amendment is to limit the role of the executive and legislative branches in the appointment of Supreme Court judges, which is consistent with Council of Europe recommendations.[102] However, the Council of State has been very critical of this suggestion. One of the reasons for this criticism was that it ignores the constitutional importance of the current system and changes the current equilibrium of mutual checks and balances that exist between the legislative and judicial branches without a compelling justification.[103] After this opinion and a rather negative reaction by the Supreme Court itself, the Dutch Government decided to abolish the reform.[104]

Another risk relates to the information that the supranational actors are working with. The various contributions in this Special Issue have made abundantly clear that informal rules and practices are sometimes difficult to spot and that having a clear view of the existence of such informal rules in each jurisdiction requires an intimate understanding of the workings of the judicial system in question. That is a high bar for supranational institutions to clear.[105] While they often work together with national interlocutors to gather specific information, they may not always be aware of important informal practices and may as such formulate their decisions or recommendations based on an incomplete understanding of how the legal system functions. One could find an example of that in the GRECO's fourth evaluation regarding Spain. In its report, the GRECO acknowledged that the Spanish recruitment system is said to be one of the toughest across Europe, but overall seems to evaluate it positively. Yet, in their article, Sara Iglesias Sánchez and Rafael Bustos Gisbert have pointed to the brutal preparation system that has developed there and the widespread knowledge of some of the unsavory practices by the coaches of those that were preparing to take the judicial exam.[106]

A further, closely related point concerns the risks of problematic interaction between the existing informal judicial practices and institutions and the more formalized legal framework that the supranational actors are pushing for. The supranational actors may, for example, not be aware of the important, positive effects that some informal rules and practices may have. As has been discussed elsewhere,[107] informal rules and practices may also have undeniably positive effects and contribute to the smooth functioning of the judicial system or aid respect for judicial independence.[108]

[100]GW. [Const.] art. 118.

[101]See the report by the Staatscommissie Parlementair Stelsel, https://www.parlement.com/9353000/1/j4nvih7l3kb91rw_j9vvknrezmh4csi/vlkhhz5wanzd/f=/eindrapport_lage_drempels_hoge_dijken.pdf.

[102]*See* Eur. Comm'n, *2020 Country Chapter on the Rule of Law Situation in the Netherlands*, at 3, COM (2020) 580 final (Sept. 30, 2020); Eur. Comm'n, *2021 Country Chapter on the Rule of Law Situation in the Netherlands*, at 4, COM (2021) 700 final (July 13, 2022). Both texts with clear reference to Committee of Ministers Recommendation CM/Rec(2010)12.

[103]*See* Council of State, *Verandering in de Grondwet van de bepaling inzake de benoeming van de leden van de Hoge Raad der Nederlanden*, Overheid (June 16, 2022), https://www.raadvanstate.nl/adviezen/@123791/w01-20-0485/.

[104]*See* Eur. Comm'n, *2023 Country Chapter on the Rule of Law Situation in the Netherlands*, at 3, COM (2023) 800 final (July 5, 2023).

[105]*Cf.* Ondřej Kadlec & David Kosař, *Romanian Version of the Rule of Law Crisis Comes to the ECJ: The AFJR Case is Not Just About the Cooperation and Verification Mechanism*, 59 Common Mkt. L. Rev. 1823, 1843 (2022).

[106]*See* Sara Iglesias Sánchez & Rafael Bustos Gisbert, *What Does It Take to Become a Judge in Spain? An Informal First Step into a Formal World*, in this issue.

[107]*See* the article by Hubert Smekal, *Informality as a Virtue: Exploring Positive Informal Judicial Institutions*, in this issue.

[108]*See* Simon Shetreet, *Judicial Independence, Liberty, Democracy, and International Economy*, *in* The Culture of Judicial Independence: Rule of Law and World Peace 16 (Simon Shetreet ed., 2014).

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A view such as that of the supranational bodies, that focuses predominately on the importance of formal safeguards, may overlook such informal practices with positive effects. Moreover, the legal reforms may disregard the existence of strong competing informal judicial institutions and practices which undermine their effectiveness, especially if the relevant actors do not identify with those reforms.[109] A change in formal legal framework will not be able to fundamentally change the situation on the ground if those rules and their underlying values are not sufficiently accepted and internalized by the relevant actors.[110] In general, strong reliance on formal rules risks overlooking the fact that informality cannot be wiped out and may even diminish or outlaw important informal pressures in the judicial system.[111] In the long run this may lead to a decoupling of the formal institutional framework and the prevailing informal rules and practices.[112]

E. Conclusion

This Article has shown that the topic of informal judicial rules and practices cannot be properly understood without having due regard to the supranational level and its various actors. Given the proliferation of supranational actors that are dealing with questions concerning the functioning and governance of the domestic judiciary—all from their own angles and in light of their specific mandates—an increasing number of reports, judgments, and recommendations are coming out that may affect the informal judicial rules and practices in the European states.

This Article has sought to show that these supranational actors are an important, albeit often overlooked, driving force behind a general development towards increased formalization of the rules governing domestic judiciaries. In a first step it has given some concrete examples of this. Then, the Article has delved deeper into the way the supranational institutions look at informal judicial rules and practices and concluded that, while they generally favor a formalized framework, it is not a simple one-way street. Yet, they very rarely indicate the underlying rationales for this position. Finally, this Article pointed to some pros and cons of the supranational actors as a driving force towards more formalization.

While this Article could not provide a definite answer for all those issues within its limited space, it has opened up new avenues for future research. Specific questions that deserve further attention in this respect are, among others, whether the various supranational actors differ significantly in their views of informal rules and practices, whether these views change depending on the kind of practice that is at stake, and whether they apply different standards to different countries. Furthermore, a better view is necessary of the rationales that underlie those views. Given the impact that supranational actors have been shown to have on the informal rules and practices in the domestic judicial systems, it is important we get a clearer understanding of such issues.

[109]Compare to the situation in Georgia: Nino Tsereteli, *Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia*, in this issue. There is a rich and growing literature on this issue, for example showing that the EU's focus on formal institutional changes has opened a window of opportunity for the consolidation of informal patronage networks within the judicial system. *See* Jusufi, *supra* note 19; Soyaltin-Colella, *supra* note 19; *see generally* Arolda Elbasani & Senada Šelo Šabić, *Rule of Law, Corruption and Democratic Accountability in the Course of EU Enlargement*, 25 J. Eur. Pub. Pol'y 1317 (2018).

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

[111]*See* Sophie Turenne, *Informal Judicial Institutions—The Case of the English Judiciary*, in this issue (discussing the changes made to the institution of Lord Chancellor); *see also* Samuel Spáč, Katarína Šipulová, & Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia*, 19 German L.J. 1741 (2018).

[112]*See* Sinisa Marcic, *Informal Institutions in the Western Balkans: An Obstacle to Democratic Consolidation* 17 J. Balkan and Near E. Studs. 1 (2015); Tanja Börzel, *When Europeanization Hits Limited Statehood. The Western Balkans as a Test Case for the Transformative Power of Europe*, *in* European Integration and Transformation in the Western Balkans: Europeanization or Business as Usual? (Arolda Elbasani ed., 2013).

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