German Law Journal (2023), **24**, pp. 1503–1519
doi:10.1017/glj.2023.90

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

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

Constitutional Conventions Concerning the Judiciary beyond the Common Law

David Kosař[1] and Attila Vincze[1]

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

(Received 31 October 2023; accepted 06 November 2023)

Abstract
Constitutional conventions are traditionally understood as socially binding, usually unwritten, rules of constitutional importance based on precedent which cannot be enforced before courts. This traditional approach has several limitations, because it debates the normative quality of conventions rather than how to find them and where the real power lies. By doing so it is disconnected from scholarship on informal institutions in social sciences. Moreover, scholarship on constitutional conventions focuses predominantly on common law countries and conventions concerning political branches. This article pushes the boundaries in both directions. It shows how constitutional conventions can be conceptualized in civil law jurisdictions, and also identifies informal practices and constitutional conventions governing the judiciaries. On a broader level, it argues that constitutional conventions as a normative concept can help to filter the informal practices and differentiate between simple repetitive behavior on the one hand and conventions as a subset of informal institutions on the other.

Keywords: Constitutional conventions; unwritten law; informal institutions; settled practice; constitutional reason; courts; judges; civil law systems

A. Introduction

Informality is a somewhat alien concept to lawyers because they mainly focus on written norms.[1] Since Dicey,[2] the way constitutional lawyers in common law countries have usually thought about informality is[3] through the prism of constitutional

[1]*But see* David Pozen, *Self-Help and the Separation of Powers,* 124 YALE L.J. 2 (2014); AILEEN KAVANAUGH, THE COLLABORATIVE CONSTITUTION (2023); András Jakab, *Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary*, 68 AM. J. COMPAR. L. 76 (2020); Nino Tsereteli, *Judicial Recruitment in Post-Communist Context: Informal Dynamics and Façade Reforms*, 30 INT'L J. LEGAL PRO. 37 (2020); 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. CENT. & E. EUR. L. 167 (2022).

[2]ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 292–97 (1st ed. 1885). Actually, his predecessors also played with the idea of conventions. *See* O. Hood Phillips, *Constitutional Conventions: Dicey's Predecessors*, 29 MOD. L. REV. 137 (1966).

[3]Note that conventions are not regarded in the same way, nor valued to the same degree, across all common law systems. For instance, in the United States, conventions have struggled to gain recognition, prominence, and respect in law and politics. *See* Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 UNIV. ILL. L. REV. 1847 (2013); Adrian Vermeule, *Conventions in Court*, 38 DUBLIN UNIV. L.J. 283 (2015). *But see* Neil Siegel, *Political Norms,*

conventions.[4] They consider such conventions—the typically unwritten rules that inform, guide, and curtail the actions of constitutional actors—an essential part of the constitutional architecture[5] and have devoted significant attention to them.[6]

In contrast, the modern civil law tradition is rather hostile towards constitutional conventions and unwritten law more generally.[7] According to a standard view, law must be formally created and published. It cannot simply evolve from practice. Nonetheless, conventions and customs are the products of some spontaneous behavior mirroring the contemporary concerns of a society,[8] and the legal doctrine in civil law countries does not and cannot prevent informalities from emerging simply because legal rules are incomplete.[9] So, if formal amendments of anachronistic provisions are politically too costly, these obsolete provisions are not observed, and, as a result, the text is being gradually adapted to the needs of society.[10] In this regard, one speaks of zombie provisions,[11] constitutional atrophy,[12] or even desuetude.[13] Recent scholarship in civil law countries reflects this development and seems to acknowledge the existence of constitutional conventions,[14] albeit civil law countries might use different labels for this concept.

Constitutional Conventions, and President Donald Trump, 93 IND. L.J. 177 (2018); Josh Chafetz & David Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430 (2018).

[4]*See, e.g.*, GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY (1987); Joseph Jaconelli, *Do Constitutional Conventions Bind*, 64 CAMBRIDGE L.J. 149 (2005); Nicholas W. Barber, *Laws and Constitutional Conventions*, 125 L. Q. REV. 294 (2009); Andrew Heard, *Constitutional Conventions: The Heart of the Living Constitution*, 6 J. PARLIAMENTARY & POL. L. 319 (2012); Farrah Ahmed, Richard Albert & Adam Perry, *Judging Constitutional Conventions*, 17 INT'L J. CONST. L. 787 (2019).

[5]Andrew Harding, *Conventions and Practical Interpretation in Westminster-Type Constitutional Systems*, 20 INT'L J. CONST. L. 1914 (2022).

[6]*See infra* Part B. But note that there is some variability in how much attention conventions get. They get more in countries like the United Kingdom and New Zealand with less of a written constitution, but far less in the United States (*see supra* note 3) or Canada, where there is more in the way of a written constitution and the modern parts, like the Charter of Rights, get a lot of attention.

[7]Note that even common law countries differ regarding what are the unwritten parts to the legal constitution. While some jurisdictions treat constitutional conventions as non-law and accept only constitutional principles as a source of unwritten constitutional law, others recognize constitutional conventions as a source of law.

[8]MALCOLM N. SHAW, INTERNATIONAL LAW 54 (8th ed. 2017). See also Monika Hakimi, *Making Sense of Customary International Law*, 118 MICH. J. L. R. 1487 (2020).

[9]Katharina Pistor & Chenggang Xu, *Incomplete Law*, 35 N.Y.U. J. INT'L L. & POL. 931 (2003).

[10]David S. Law, *The Myth of the Imposed Constitution*, *in* THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 247 (Denis J. Galligan & Mila Versteeg eds., 2013).

[11]*Id.* at 248–50.

[12]Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL STUDS. 421 (2012).

[13]Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMPAR. L 641 (2014).

[14]Greg Taylor, *Convention by Consensus: Constitutional Conventions in Germany*, 12 INT'L J. CONST. L. 303 (2014); Attilla Vincze, *Shaping Presidential Powers in Hungary: Convention, Tradition and Informal Constitutional Amendments*, 46 REV. CENT. & E. EUR. L. 307 (2021); Adam Bosiacki, *Shaping Constitutional Conventions in the Past of Poland and the Practice of the Third Polish Republic (Since 1989)*, *in* UNCODIFIED CONSTITUTIONS AND THE QUESTION OF POLITICAL LEGITIMACY (Łukasz Perlikowski ed., 2022); Miloš Brunclík, *Three-Fold Gap: Researching Constitutional Conventions in the Czech Republic*, 28 POLITOLOGICKÝ ČASOPIS—CZECH J. POL. SCI. 20 (2011); Miloš Brunclík & Michal Kubát, *Constitutional Conventions in Central Europe: Presidents in Government Formation Process*, *in* 70 PROBLEMS OF POST-COMMUNISM 42 (2023); Lukáš Hájek, *Idiotic or Columbo's Wife? Constitutional Conventions in the Czech Republic*, 37 E. EUR. POL. & SOC'YS 1425 (2023); MILOŠ BRUNCLÍK, MICHAL KUBÁT, ATTILA VINCZE, MILUŠE KINDLOVÁ, MAREK ANTOŠ, FILIP HORÁK & LUKÁŠ HÁJEK, POWER BEYOND CONSTITUTIONS: PRESIDENTIAL CONSTITUTIONAL CONVENTIONS IN CENTRAL EUROPE (2023).

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

Constitutional conventions are thus an essential part of constitutional architecture in any constitutional system.[15] They affect all branches of government, including the judiciary.[16] The existing legal literature on constitutional conventions suffers from several drawbacks, though. It still focuses predominantly on common law countries.[17] In addition, analysis of constitutional conventions tend not to include those conventions that concern relations between the judiciary and other arms of government.[18] The focus is generally on the conventions concerning the monarch, executive, and legislature.[19] This Article fills this dual gap by focusing on constitutional conventions concerning the judiciaries also in jurisdictions outside of the common law systems.

The aim of this Article is three–fold. First, it identifies informal practices and constitutional conventions concerning judiciaries, which are understudied in comparison to conventions affecting political branches. Second, it clarifies the understanding of constitutional conventions and other forms of unwritten law in civil law countries more generally. Finally, it shows that constitutional conventions are a specific type of a broader class of informal institutions[20] and brings largely disconnected debates on constitutional conventions in legal literature together with the scholarship on informal practices and institutions in social sciences.

This Article proceeds as follows. Section B shows how constitutional conventions and adjacent concepts are conceptualized in the common law as well as civil law jurisdictions. Section C identifies informal practices and constitutional conventions concerning judiciaries in both civil law and common law worlds. Section D situates constitutional conventions within the triad of informal acts/practices/institutions and explains the specific features of constitutional conventions. Section E concludes.

B. Conceptualization of Constitutional Conventions in Common Law and Civil Law Worlds

Constitutional conventions are a subset of a broader class of informal institutions[21] that emerge from the practical workings of a constitution and prescribe certain actions that are generally not enforced via official channels.[22] They are social rules that possess a constitutional significance, are usually unwritten, and have a normative quality.[23] Defining a constitutional convention is notoriously difficult though. According to the standard Jennings test, which is contested but still widely applied, in order for practice to qualify as a constitutional convention one needs to find historical precedents for it, a belief that the rule is binding, and a reason for its existence.[24] The major disagreement concerns the normative quality of conventions. Under the traditional understanding, they are not

[15]*See* PIERRE AVRIL, LES CONVENTIONS DE LA CONSTITUTION: NORMES NON ÉCRITES DU DROIT POLITIQUE (1997); Peter Badura, *Verfassungsänderung, Verfassungswandel, Verfassungsgewohnheitsrecht*, *in* HANDBUCH DES STAATSRECHTS: BAND XII: NORMATIVITÄT UND SCHUTZ DER VERFASSUNG 595–96 (Josef Isensee & Paul Kirchhof eds., 2014); CHRISTIAN TOMUSCHAT, VERFASSUNGSGEWOHNHEITSRECHT?: EINE UNTERSUCHUNG ZUM STAATSRECHT D. BUNDESREPUBLIK DEUTSCHLAND (1972); HEINRICH AMADEUS WOLFF, UNGESCHRIEBENES VERFASSUNGSRECHT UNTER DEM GRUNDGESETZ (2000).

[16]Scott Stephenson, *Constitutional Conventions and the Judiciary*, 41 OXFORD J. LEGAL STUD. 750 (2021).

[17]*See supra* Whittington, *supra* note 3. Vermeule, *supra* note 3; Siegel, *supra* note 3; Chafetz & Pozen, *supra* note 3; MARSHALL, *supra* note 4; Jaconelli, *supra* note 4; Barber, *supra* note 4; Heard, *supra* note 4; Ahmed et al., *supra* note 4; Harding, *supra* note 5.

[18]For the same lament, see Stephenson, *supra* note 16.

[19]*See* Whittington, *supra* note 3; Vermeule, *supra* note 3; Siegel, *supra* note 3; Chafetz & Pozen, *supra* note 3; MARSHALL, *supra* note 4; Jaconelli, *supra* note 4; Barber, *supra* note 4; Heard, *supra* note 4; Ahmed et al., *supra* note 4; Harding, *supra* note 5; Taylor, *supra* note 14; Vincze, *supra* note 14; Bosiacki, *supra* note 14; Brunclík, *supra* note 14; Brunclík & Kubát, *supra* note 14; Hájek, *supra* note 14; BRUNCLÍK et al., *supra* note 14; AVRIL, *supra* note 15.

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

[21]Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, *in* 2 PERSPS. ON POL. 725, 727 (2004).

[22]Nicholas Barry, Narelle Miragliotta, Zim Nwokora and Haig Patapan, *New Research Directions in Constitutional Conventions, in* NEW RESEARCH DIRECTIONS IN CONSTITUTIONAL CONVENTIONS (Nicholas Barry et al. eds., forthcoming 2024).

[23]*See* Jaconelli, *supra* note 4, at 151–52.

[24]IVOR JENNINGS, THE LAW AND THE CONSTITUTION 136 (5th ed., 1959); *see also* MARSHALL, *supra* note 4.

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

enforced by courts,[25] but by the public opinion, political criticism, or peer pressure,[26] and their binding force thus stems from some kind of political, ethical, or moral authority.[27]

Yet, while these traditional definitions, building on the classical Diceyan view, capture most of the important qualities of conventions, they have been increasingly questioned. Newer scholarship has persuasively challenged the view that constitutional conventions cannot be recognized and enforced by courts.[28] The fact that the Supreme Court of India found some constitutional conventions justiciable and enforced them,[29] that some courts in transitional countries have employed them as a hopeful bulwark against excessive formalism,[30] and the recent litigation of constitutional conventions in Israel[31] show that this theoretical debate also has practical implications.

Other scholars have shown that conventions do not necessarily need to be unwritten[32] and can arise not only "bottom–up", but also "top–down", which brings them quite close to soft–law instruments.[33] All of this must be understood in the broader context of renewed attention to an invisible constitution[34] and unwritten law more generally.[35]

This vibrant debate in common law countries shows an increasing divergence in conceptualizing and approaching conventions. Some scholars in fact identify three views on constitutional conventions—the "modern Commonwealth view", the "classical Diceyan view," and the "incorporationist view".[36] Nevertheless, in the common law world, constitutional conventions are generally accepted as an essential part of the constitutional architecture.[37] This

[25]Ahmed et al., *supra* note 4; Nicholas W. Barber, *Laws and Constitutional Conventions*, 125 L. Q. Rev. 294 (2009); Albert Venn Dicey, Introduction to the Study of the Law of the Constitution 292–97 (1885); Samuel E. Finer, *The Individual Responsibility of Ministers*, 34 Pub. Admin. 377 (1956); Michael Plaxton, *The Caretaker Convention and Supreme Court Appointments*, 72 Sup. Ct. L. Rev. 455 (2016).

[26]Anthony W. Bradley & Keith D. Ewing, Constitutional and Administrative Law 24 (2007); Finer, *supra* note 25; Ian Killey, Constitutional Conventions in Australia (2014); Vermeule, *supra* note 3; Adam Perry & Adam Tucker, *Top-Down Constitutional Conventions,* 81 Mod. L. Rev. 765, 771–72 (2018).

[27]*See* Heard, *supra* note 4, at 331; Joseph Jaconelli, *The Nature of Constitutional Convention,* 19 Legal Studs. 24, 43–45; Jennings, *supra* note 24. On the categorization of authority, see, e.g., Fabian Wendt, Authority (2018).

[28]Vermeule, *supra* note 3; Farrah Ahmed, Richard Albert & Adam Perry, *Enforcing Constitutional Conventions*, 17 Int'l J. Const. L. 1146 (2019); Harding, *supra* note 5; Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions*, 11 Oxford Univ. Commonwealth L.J. 29 (2011); Fabien Gelinas & Leonid Sirota, *Constitutional Conventions and Senate Reform*, 5 Revue Québécoise de Droit Constitutionnel 107 (2013) (Can.).

[29]Ahmed et al., *supra* note 4.

[30]Brunclík & Kubát, *supra* note 14; Hájek, *supra* note 14; Brunclík, *supra* note 14.

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

[32]Vermeule, *supra* note 3.

[33]Perry & Tucker, *supra* note 26, at 771–72.

[34]Richard Dixon & Adrienne Stone, The Invisible Constitution in Comparative Perspective (2018).

[35]Killey, *supra* note 26; Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 Dublin Univ. L.J. 387 (2015); Gabrielle Appleby, *Unwritten Rules*, *in* The Oxford Handbook of the Australian Constitution 209 (Cheryl Saunders & Adrienne Stone eds., 2018); Richard Albert, Ryan C. Williams & Yaniv Roznai, Amending America's Unwritten Constitution (Richard Albert, Ryan C. Williams & Yaniv Roznai eds., 2022); Nicholas Barber, *Constitutionalism: Negative and Positive*, 38 Dublin Univ. L.J. 249 (2015); Lorenzo Cuocolo, *Constitutional Conventions and the Economic Crisis: The Italian Paradigm*, 38 Dublin Univ. L.J. 265 (2015); Vermeule, *supra* note 3; Oran Doyle, *Conventional Constitutional Law*, 38 Dublin Univ. L.J. 311 (2015); Andrew Heard, *Constitutional Conventions and Written Constitutions: The Rule of Law Implications in Canada*, 38 Dublin Univ. L.J. 331 (2015); Joseph Jaconelli, *The Proper Roles for Constitutional Conventions*, 38 Dublin Univ. L.J. 363 (2015); Garrett Barden, *Law and Constitutional Conventions*, 38 Dublin Univ. L.J. 419 (2015); Eoin Carolan, *Conventions as Claims?*, 38 Dublin Univ. L.J. 419 (2015);David Kenny, *Conventions in Judicial Decision-Making: Epistemology and the Limits of Critical Self-Consciousness*, 38 Dublin Univ. L.J. 432 (2015); David Prendergast, *The Conventionality of Constitutional Law*, 38 Dublin Univ. L.J. 441 (2015); Scott Stephenson, *When Constitutional Conventions Fail*, 38 Dublin Univ. L.J. 447 (2015); Julien Sterck, *Conventional Constraints*, 38 Dublin Univ. L.J. 465 (2015); M. Patrick Yingling, *Judicial Conventions: An Examination of the US Supreme Court's Rule of Four*, 38 Dublin Univ. L.J. 477 (2015).

[36]Vermeule, *supra* note 3.

[37]Harding, *supra* note 5.

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

applies not only to the "unwritten" British constitution or a Westminster model, but also to those of the United States, Canada, and other Commonwealth countries.[38]

In contrast, in civil law countries, the position of constitutional conventions, unwritten law, and informality is far more contested. To be sure, even in civil law countries lawyers are too close to politics and ordinary life to ignore the informal practices. They thus know that informal rules and practices exist but for many reasons, they usually leave them alone. For most practicing lawyers, informality evokes irrelevance because they cannot use it in crafting a persuasive *legal* argument accepted by the legal community. Policy–makers consider it something that should not be spoken too much about, at least not publicly, as informality is often connected to under–the–counter dealings, which are considered reprehensible.[39] Finally, doctrinal legal scholarship, which still prevails in most civil law countries, tends to consider the informal practices as simple facts without any normative relevance, and therefore—at least from a normative perspective—they are no more interesting than gossip.

This understanding is particularly strong in the German legal tradition. In terms of a Kelsenian pure theory of law something is either legal or not, and, because standard behavior does not influence legality itself, it is of little or no concern from a normative point of view.[40] Constitutional convention is an unfamiliar term, precisely because law is supposed to be positively enacted and published.[41] If the German constitutional scholarship speaks of unwritten constitutional law, it mainly means some principles, maxims, or precepts of constitutional law, rather than rules of a customary nature.[42] Interestingly, these principles are often quintessential expressions of the practice and tradition going back to monarchical times,[43] and hence are indeed rooted in historical precedents.

The usual practice is typically understood either as a simple fact or as evidence of past behavior but nothing more, and is excluded from being a source of law. This is most probably a consequence of the idea of modern codification relying on the fiction[44] of all–encompassing and systematic legal regulation leaving no space or need for customary law. The settled [*ständige Staatspraxis*] or undisputed praxis [*unbeanstandet gebliebene Staatspraxis*] have therefore only an ancillary or explanatory role in legal interpretation but no normative force, and therefore they must not contradict the black letter of the law [*praeter legem*].[45] The blurriness of the division between conventions and settled practice is also apparent from the Czech constitutional practice, as Justices Pavel Holländer and Vladimír Jurka, in a concurring opinion,[46] described constitutional conventions as some *praeter legem* interpretation established by routine and expressly mentioned the German case law on settled practice. In doing so, they simply did not realize that conventions in common law countries are more than repetition and have a normative element, namely some reason or rationale justifying their binding force.

[38]*See* Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges (Brian Galligan & Scott Brenton eds., 2015); Benjamin Berger, *White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text*, 3 J. Compar. L. 249, (2008); Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 Mich. L. Rev. 1361 (2022); Harding, *supra* note 5.

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

[40]Axel Hopfauf, *Einleitung, in* Grundgesetz-Kommentar Nr. 218 (Bruno Schmidt-Bleibtreu, Franz Klein, Hans Hofmann, Hans-Günter Henneke eds., 2021).

[41]Ulrich Hufeld, *Urkundlichkeit und Publizität der Verfassung, in* 12 Handbuch des Staatsrechts Bd. XII: Normativität und Schutz der Verfassung 189 (Josef Isensee & Paul Kirchhof eds., 2014).

[42]Wolff, *supra* note 15.

[43]Alexander Blankenagel, Tradition und Verfassung: neue Verfassung und alte Geschichte in der Rechtsprechung des Bundesverfassungsgerichts (1987).

[44]Pistor & Xu, *supra* note 9.

[45]Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] May 13, 1986, 72 BVerfGE 175189–90 (Ger.); Peter Rädler, *Verfassungsgestaltung durch Staatspraxis, Ein Vergleich des deutschen und britischen Rechts*, 58 ZaöRV 611, 620–34 (1998); Tomuschat, *supra* note 15.

[46]Ústavní soud 20.06.2001 (ÚS) [Constitutional Court], ÚS Pl. 14/01, 285/2001 Sb (concurring Jurka, J. and Holländer, J.) (Czech).

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

Informal practices and institutions are therefore often a taboo in a modern codified legal system. One does not speak much of it and one does not really know how to talk about it. Customs sound like pre–modern, anachronistic, or nostalgic reminiscences,[47] and if they are applicable at all, then only to a very limited extent.[48] Not surprisingly, if a civil law system's legal system exhaustively defines the sources of law in the Constitution,[49] then it often formally excludes conventions and customs from the constitutional "rule of recognition".[50] So, the Austrian scholarship declines the normativity of usages and customary law,[51] and the German one recognizes them strictly as supplementary or explanatory sources of law.[52]

There are various expressions and labels to describe divergence between facts and norms in civil law countries, depending on the perspective and ideological position. Some describe the discrepancy between normativity and factuality disapprovingly as some sort of violation or bending of the constitutional order [*Verfassungsdurchbrechung*].[53] *Verfassungswandel*,[54] to the contrary, refers to some sort of constitutional innovation or constitutional reflection of societal changes, and the narrative is much closer to informal constitutional changes[55] stressing that the actual meaning of an expression or institution might change as time passes.

Furthermore, court practice and scholarship recognize some autonomy in public bodies to adopt and *in situ* adjust internal rules and practices if the Constitution is silent on an issue.[56] These rules and informal practices lower transaction costs and uncertainty, and boost cooperative behavior whereby violations are punished by sinking prestige, unreliability, and higher future costs

[47]Shaw, *supra* note 8, at 54.

[48]Conventions or customs might be referred to if the codified law allows them to be. *See, e.g.*, Allgemeines bürgerliches Gesetzbuch [ABGB] [Civil Code] § 10 (Austria); Handelsgesetzbuch [HGB] [Commercial Code], § 346 https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html (Ger.); Badura, *supra* note 15 at 595–96; Tomuschat, *supra* note 15. Customary law requires, for example, in Germany to wear a gown at court. *See* Landgericht Augsburg [LG] [Augsburg Regional Court] June 30, 2015, 31 O 4554/14 https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=LG%20Augsburg&Datum=30.06.2015&Aktenzeichen=31%20O%204554/14 (Ger.).

[49]For example, see Tekst Konstytucji Rzeczypospolitej Polskiej ogłoszono w Dz.U. 1997, NR 78 poz. 483, Art. 87, Rozdział I [Article 87 Chapter 1 of the 1997 Polish Constitution as published in the Official Gazette volume 78, Item No. 483]; Piotr Tuleja, *Grundlagen und Grundzüge staatlichen Verfassungsrechts: Polen*, *in* 1 Handbuch Ius Publicum Europaeum Band I 473–75 (Armin von Bogdandy, Pedro Cruz Villalón & Peter M. Huber eds., 2007); Magyarország Alaptörvénye [The Fundamental Law of Hungary], Art. T; Ludwig Adamovich, Bernd-Christian Funk, Gerhard Holzinger, et al., 1 Österreichisches Staatsrecht, Band 1: Grundlagen 47–48 (2011); Gerhard Muzak, *Nochmals: Gewohnheitsrecht als Rechtsquelle des B-VG*, 18 Österreichische Juristen-Zeitung 539.

[50]H. L. A. Hart, The Concept of Law (Penelope Bulloch & Joseph Raz eds., 2d ed. 1997); *see also* Scott J. Shapiro, *9. What Is the Rule of Recognition (And Does It Exist)?*, *in* The Rule of Recognition and the U.S. Constitution 235, (Matthew Adler & Kenneth Einar Himma eds., 2009). For an excellent description of Hart's theory, see generally Joseph Raz, Practical Reasons and Norms 49–58 (1992).

[51]Adamovich et al., *supra* note 49; Muzak, *supra* note 49.

[52]Badura, *supra* note 15; Tomuschat, *supra* note 15.

[53]The term means technically the adoption of an act with the necessary majority for amending the constitution but not formally amending the constitution. *Cf.*, Horst Ehmke, *Verfassungsänderung und Verfassungsdurchbrechung [Constitutional Amenedment and Constitutional Breach]*, 79 Archiv des öffentlichen Rechts 385 (1953) (Ger.); Ulrich Hufeld, Die Verfassungsdurchbrechung (1997). The term has some (but rather unfounded) negative connotations because it was also used by Carl Schmitt. *See* Carl Schmitt, Verfassungslehre 107–09 (1928). The expression is used for constitutional conventions in Slovakia. Ladislav Orosz & Vladimír Volčko, *Ústavné zvyklosti a ich vplyv na interpretáciu, aplikáciu a zmenu práva*, *in* Zmena práva 114 (Eduard Bárány ed., 2013).

[54]Alexnader Roßnagel, *Verfassungsänderung und Verfassungswandel in der Verfassungspraxi [Constitutional Amendment and Constitutional Change in Constitutional Practice]*, 22 Der Staat 551 (1983) (Ger.); Andreas Voßkuhle, *Gibt es und wozu nutzt eine Lehre vom Verfassungswandel? [Is There and What Is the Use of A Doctrine of Constitutional Change?]*, 43 Der Staat 450 (2004) (Ger.); Michael Lothar, *Die Verfassungswandelnde Gewalt [The Constitution-Changing Violence]*, 5 Rechtswissenschaft 426 (2014) (Ger.); Miluše Kindlová, *Formal and Informal Constitutional Amendment in the Czech Republic*, 4 Law. Q. 512, 520–22 (2018).

[55]Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions (2019).

[56]Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Mar. 6, 1952, 1 BVerfGE 144, 153 (Ger.) https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=06.03.1952&Aktenzeichen=2%20BvE%201%2F51.

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

of cooperation.[57] These often remain outside the radar of legal scholarship precisely because of the lack of binding force in the legal sense of the word.[58]

The discrepancy between law in books and law in action is thus obviously not limited to common law countries. The doctrinal approach of civil law countries is, however, a rather descriptive one. It simply explains the deviations from written law as some kind of evolution or regression, but seldom offers a more nuanced explanation. Only if the practice can be absorbed by constitutional principles, maxims, or precepts, may it transform itself into a more normative concept. Otherwise, a *cordon sanitaire* remains between law and non–law. This is absolutely understandable for the sake of avoiding arbitrariness. If soft–law instruments are capable of later being hardened into legally somewhat binding ones,[59] then the guarantees of law–making serving to protect individual freedom can easily be watered down.[60] Nevertheless, this approach does not capture reality. In the next Section, we will show concrete examples that suggest that constitutional conventions exist also in civil law countries.

C. Examples of Constitutional Conventions and Informal Practices Concerning the Judiciary

In the previous section we showed that constitutional conventions are discussed thoroughly primarily in the common law world, but they exist also in civil law jurisdictions. In this Section, we will move from abstract conceptualizations of constitutional conventions to specific examples. We will first identify the best–known informal practices and constitutional conventions concerning the judiciary in the common law world. Subsequently, we will show that similar informal practices and institutions exist also in civil law countries, albeit often labeled differently than constitutional conventions.

We intentionally broaden our inquiry to cover not only recognized constitutional conventions, but also informal practices that may not meet the threshold for constitutional conventions. The reason behind this inclusiveness is four–fold. First, it is very difficult to observe a point when informal practice becomes a constitutional convention. It is thus important to study also constitutional conventions that have been contested. Second, for many examples of informal practices it is impossible to indisputably conclude that the number of precedents is sufficient, that there is a clear opinion iuris—a belief that the rule is binding—and that there is a generally accepted constitutional reason behind the rule. Third, there is not a universally shared understanding of what a constitutional convention is as some of its definitional features, such as non–enforceability before courts, are fiercely contested. Finally, we intentionally included some examples of informality to problematize the relationship between constitutional conventions, on the one hand, and informal practices, on the other hand.

I. Common Law Countries

Many unwritten rules and constitutional conventions concern the process of the selection of judges. For instance, the Justices to the Supreme Court of Canada,[61] for the High Court of

[57]Martin Morlok, *Leistungsgrenzen des Verfassungsrechts. Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung? [Performance Limits of Constitutional Law. Informalization and De-Parliamentarization of Political Decisions as Threats to the Constitution?]*, 62 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 37, 48–49, 52–53 (2002).

[58]But see Morlok, *supra* note 57.

[59]*See* Albrecht von Graevenitz, *Wider die Verrechtlichung von soft law der Europäischen Kommission [Against the Juridification of Soft Law by the European Commission]*, 52 Zeitschrift für Rechtspolitik 75 (2019) (Ger.); Giud. Pace, 4 Aprile 2008, Foro it. 2010, I, 1, 146 (It.); EJC, Joined Cases C-189/02 P, C-202/02 P, C-205-208/02 P & C-213/02 P, Dansk Rørindustri and Others v Commission, ECLI:EU:C:2005:408 (Judgment on June 28, 2005), -https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62002CJ0189.

[60]Tristan Barczak, *Krise und Renaissance der Handlungsformenlehre [Crisis and Renaissance of the Theory of Forms of Action]*, 77 Juristenzeitung 981 (2022).

[61]Adam Dodek & Rosemary Cairns Way, *The Supreme Court of Canada and Appointment of Judges in Canada*, *in* The Oxford Handbook of the Canadian Constitution, 211, 217 (Peter Oliver, Patrick Macklem, & Nathalie De Rosiers eds., 2017).

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

Australia,[62] or for the Supreme Court of India[63] are to be appointed by regional and demographic proportions in order to reflect the federal structure of those countries and the diversity of their society. There is often an unwritten duty to consult the judiciary before an appointment is made,[64] and conventional rules govern several aspects of the procedure and content of the confirmation hearing of the US Supreme Court justices in the Senate.[65]

Sometimes, such unwritten rules are even more detailed. For instance, in India, although the Constitution requires the President to consult with the Judges of the Supreme Court on any appointment of a new judge to that court, it does not specify which incumbent judges must be consulted. Eventually, a new informal rule emerged. This rule stipulates that the Chief Justice has to take into account the views of their colleagues and the Chief Justice's recommendation is not binding if the recommendation is opposed by the other members of the Supreme Court collegium.[66] In Israel, the nomination of the Selection Committee is binding by convention because its balanced membership promotes judicial independence and accountability.[67]

Specific informal rules may also apply to chief justices. A typical example of such rule is the so–called principle of seniority, according to which the most senior justice of the Supreme Court becomes a Chief Justice. This convention of seniority operated in India until the time of Prime Minister Indira Gandhi. According to this convention, the most senior puisne justice was appointed a Chief Justice.[68] After the Supreme Court of India ruled against Gandhi and established in *Kesavananda Bharti* that constitutional amendments could not alter the Constitution's "basic structure,"[69] Ghandi broke the seniority convention. She appointed the pro–government Justice A.N. Ray ahead of three senior justices who had ruled against the government in *Kesavananda*.[70] After the end of Ray's tenure, Gandhi again passed over the most senior justice at the time (Justice Khanna), who had opposed several of her initiatives, in order to select the pro–government nominee, M.H. Beg, as the Chief Justice of India.[71]

A similar rule has emerged in Israel, where the President of the Supreme Court is selected by the Committee for the Selection of Judges. Informally, a "rule of seniority" prevails, which serves

[62]Stephen Donaghue, *Authority of the High Court of Australia*, *in* The Oxford Handbook of the Australian Constitution, 449, 462 (Cheryl Saunders & Adrienne Stone eds., 2018).

[63]Abhinav Chandrachud, The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India (2020).

[64]Nicholas Owens, *The Judicature, in* The Oxford Handbook of the Australian Constitution 668 (Cheryl Saunders & Adrienne Stone eds., 2018); Peter McCormick, *Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada*, 7 J. App. Prac. & Process 1 (2005); Adam Dodek, *Reforming the Supreme Court Appointment Process, 2004–2014: A 10-Year Democratic Audit*, 67 Sup. Ct. L. Rev. 111 (2014); Dawn Oliver, *Politicians and the Courts*, 41 Parliamentary Affs. 13, 15 (1988); Denis Steven Rutkus, Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate (2010); Burton Atkins, *Judicial Selection in Context: The American and English Experience* 77 Ky. L.J. 577, 591 (1988).

[65]James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 Buff. L. Rev. 645, 681–85 (1992).

[66]Rangin Pallav Tripathy, *Unveiling India's Supreme Court Collegium: Examining Diversity of Presence and Influence*, 18 Asian J. Compar. L. 179 (2023).

[67]Lurie, *supra* note 31.

[68]*See* Baskar Narayan Suchindran, *From Kania to Sarkaria: Judicial Appointments from 1950 to 1973*, *in* Appointment of Judges to the Supreme Court of India: Transparency, Accountability and Independence (Arghya Sengupta & Ritwika Sharma eds., 2018), 3-17; and Arun Jaitley, *The Judicial Collegium: Issues, Controversies, and the Road Ahead*, *in* Appointment of Judges to the Supreme Court of India: Transparency, Accountability and Independence 45–55 (Arghya Sengupta & Ritwika Sharma eds., 2018).

[69]Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, 316-317 (India).

[70]Granville Austin, Working a Democratic Constitution 278–83 (2000).

[71]*Id.* at 435–36; *see also* Rehan Abeyratne & Surbhi Karwa, *A Perfect Storm: The Institutional Failures of India's Chief Justice in the Age of Modi*, Int'l J. Const. L. (forthcoming 2024).

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

judicial integrity and independence against external political encroachments.[72] Some authors have argued that that this "rule of seniority" has become a constitutional convention.[73]

In several countries there are also informal practices and constitutional conventions affecting other aspects of judicial governance. For instance, several scholars have argued that the number of judges at the US Supreme Court has been settled by practice and that it has materialized as a constitutional convention against "court packing."[74] The security of the tenure as an aspect of the independent judiciary is also a conventional reading of the Constitution.[75] Other conventions concern the inherent powers of Superior Courts in Canada[76] or the integrity of state courts in Australia.[77]

Another interesting example is the 2013 Concordat between the Supreme Court of the United Kingdom and the Ministry of Justice. This concordat sets out the division of responsibilities among the Lord Chancellor, President of the Court, and Chief Executive of the Court. It touches upon several judicial governance issues as it makes provisions for consultation and exchange of information on appointments and remuneration, among other matters. Some scholars treat the Concordat as a constitutional convention, despite the fact that it has not been grounded in practice, because it is a "top-down" convention.[78]

Besides judicial governance, in many Commonwealth countries, the executive has a conventional duty to defend the judiciary against attacks from media and other sources.[79] The *sub judice* rule also prevents parliamentary discussion of cases that are awaiting decision by the courts.[80] The same rule applies also to the executive, that cannot use its power to make statements on a case presently before the courts that would prejudice the outcome of that case.[81] Moreover, many aspects of judicial integrity are subject to a code of conduct, like membership in organizations or extra-judicial activities,[82] and there are several informal techniques for responding to judicial misbehavior[83] or enhancing accountability.[84]

[72]*See* Lurie, *supra* note 31; *see also* Yaniv Roznai & Shani Shnitzer, *Navigating the Ship in Stormy Waters: President Esther Hayut and the Israeli Constitutional Crises 2018-2023*, Int'l J. Const. L. (forthcoming 2024).

[73]*See* Suzie Navot, *The Seniority System as a Constitutional Convention*, Int'l Soc'y Pub. L. Isr. (Jan. 16, 2017) [Hebrew]; Roznai & Shnitzer, *supra* note 72.

[74]Justin Crowe, *The Constitutional Politics of the Judiciary*, *in* The Oxford Handbook of the U.S. Constitution 199 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015); Stephenson, *supra* note 16; Vermeule, *supra* note 12, at 426; Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 Geo. L.J. 255 (2017).

[75]Dodek & Way, *supra* note 61, at 233; Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 Vand. L. Rev. 465 (2018).

[76]Dodek & Way, *supra* note 61, at 237.

[77]The so-called Kable doctrine prevents state parliaments from making certain laws that adversely affect the integrity of state courts. *Kable v Director of Public Persecutions* (1996) 189 CLR 51 (High Court) (Austl.). More specifically, it prevents state parliaments from abolishing their Supreme Court and from giving functions to state courts that would undermine the "institutional integrity" of those courts as part of the Australian judicial system. *See* Greg Taylor, *Conceived in Sin, Shaped in Iniquity*—the Kable Principle as Breach of the Rule of Law*, 34 Univ. Queensl. L.J. 265 (2016).

[78]Perry & Tucker, *supra* note 26, at 776 (2018).

[79]Stephenson, *supra* note 16.

[80]Oliver, *supra* note 64, at 16; Shimon Shetreet & Sophie Turenne, Judges on Trial: The Independence and Accountability of the English Judiciary 102–78 (2013); Stephenson, *supra* note 16.

[81]Stephenson, *supra* note 16.

[82]Admin. Office of the U.S. Cts., Code of Conduct for United States Justices (Mar. 12, 2019); U.K. Supreme Ct., Guide to Judicial Conduct (2019); Austl. Inst. of Jud. Admin., Guide To Judicial Conduct (3d. Eds. Feb. 2023.); Shetreet & Turenne, *supra* note 80 at 102–78.

[83]Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 Univ. Pa. L. Rev. 243 (1993).

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

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

Another area where unwritten rules and conventions have permeated the functioning of the judiciary is actual judicial decision-making. Some unwritten rules govern the selection of cases for hearing,[85] like the involvement of law clerks,[86] the so–called "rule of four,"[87] or the courtesy fifth vote at the US Supreme Court,[88] the number of justices on a panel at the UK Supreme Court.[89] Sometimes, such rules as the "maiden speech" of new justices at the Australian High Court can be rather symbolic.[90] Other conventions internal to the judiciary concern judges' freedom of speech. For instance, in some jurisdictions there is a rule that judges do not, in general, make public comments on political matters.[91]

II. Civil Law Countries

Despite their lacking theoretical underpinning, one might find several examples of unwritten rules in civil law countries regarding the judiciary as well. Many such informal rules again affect the selection of judges. The best–known example is the election of the Justices of the German Federal Constitutional Court, which is proverbially less democratic than that of the Pope. It is dominated by party politics and has followed an unwritten scheme dividing the posts between the two big parties that, more recently, have been taking the smaller coalition parties also into account. This has so far resulted in a rather harmonious and smooth way of selecting the proper candidates.[92]

Similarly, in Austria, despite the justices being formally nominated by the Government, there has been a largely unwritten political memorandum of nomination ensuring the proportional share of the two big parties—similarly to other public offices—but this has been breached several times.[93] Because conventional rules have no place in Austrian legal terminology, it was hard to conceptualize the violations of these practices. Interestingly, at the Mexican Supreme Court there is unwritten rule, albeit a contested one, that there must be a balance between candidates with a long career within the Federal Judiciary (the "insiders"), and those with other professional profiles such as academia or the Bar (the "outsiders").[94]

[85]H.W. Perry, Deciding to Decide: Agenda Setting in the United States Supreme Court 85 (1991); Ryan C. Black & Christina L. Boyd, *Selecting the Select Few: The Discuss List and the U.S. Supreme Court's Agenda-Setting Process,* 94 Soc. Sci. Q. 1124 (2012).

[86]Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment,* 58 DePaul L. Rev. 51, 52 (2008); Lorne Sossin, *The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada*, 30 U.B.C. L. Rev. 279, 289 (1996); Brice Dickson, *The Processing of Appeals in the House of Lords*, 123 L. Q. Rev. 571 (2007).

[87]Black & Boyd, *supra* note 85; Joan Maisel Leiman, *The Rule of Four*, 57 Colum. L. Rev. 975 (1957). Yingling, *supra* note 35.

[88]A courtesy fifth vote allows to postpone an execution in death row cases and hear the merits of the case even if only four justices could be convinced by the motion. So, a justice who, although he believes the defendant's petition lacks merit, nonetheless offers the crucial fifth vote temporarily to block the execution. *See* Joan Biskupic, *The Secret Supreme Court: Late Nights, Courtesy Votes and the Unwritten 6-Vote Rule*, CNN (Oct. 17, 2021), https://edition.cnn.com/2021/10/17/politics/supreme-court-conference-rules-breyer/index.html.

[89]Panel Numbers Criteria, Sup. Ct. of the U.K., https://www.supremecourt.uk/procedures/panel-numbers-criteria.html.

[90]Kcasey McLoughlin, "*A Particular Disappointment?" Judging Women and the High Court of Australia*, 23 Feminist Legal Studs. 273 (2015).

[91]Stephenson, *supra* note 16.

[92]Uwe Kischel, *Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective*, 11 Int'l J. Const. L. 962 (2013); *see also* Silvia Steininger, *Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the Bundesverfassungsgericht*, in this issue.

[93]Tamara Ehs, *Der VfGH als politischer Akteur. Konsequenzen eines Judikaturwandels [The Constitutional Court as a Political Actor. Consequences of a Change in Jurisprudence]*, 44(3) Österreichische Zeitschrift für Politikwissenschaft 15, 17–18 (2015).

[94]Andrea Pozas-Loyo,, *Sobre Importancia de las Normas Constitucionales No Escritas en Contextos de Polarización*, IberICONnectBlog (Apr. 19, 2022), https://www.ibericonnect.blog/2022/04/sobre-importancia-de-las-normas-constitucionales-no-escritas-en-contextos-de-polarizacion/.

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

In Belgium, the members of the Constitutional Court are elected by applying not only the rules explicitly stipulated in the Belgian Constitution concerning linguistic division and professional background, but also conventional rules concerning political diversity. More specifically, judges of the Belgian Constitutional Court as a whole need to represent the political landscape. This means that for each vacancy it is known in advance which political party is "at bat" to select the new judge. The informal practice is that each party tries to choose a judge that will be acceptable for the other parties and that the other political parties then just do not complain. Ignorance of this conventional rule would most probably lead to public uproar.[95] In contrast, in the neighboring Netherlands, a conventional rule of co–optation has emerged regarding appointments to the Supreme Court, narrowing down the legally broad powers of Parliament and Government.[96]

Constitutional conventions have emerged also in Central Europe. For instance, the Hungarian unwritten rule that the President of the Supreme Court is elected from among the sitting judges of the Supreme Court has relied on historical precedent and required to choose from candidates with the necessary judicial reputation.[97] In Poland, a practice has been established that the judges on the National Council of the Judiciary are to be elected by the judges as their representatives. This was, however, not explicitly stated but was understood in that way as an emanation of judicial independence.[98] After Poland's illiberal turn, this was amended by the legislature, and the political branches of government were enabled to dominate the National Council of the Judiciary.[99] The judicial association, Iustitia, reacted by boycotting the newly elected Council and by excluding any judge agreeing to be a candidate for the Council.[100]

In addition, the Polish presidents have also been trying to expand their powers on judicial appointments by interpreting their power to appoint judges as including the power to refuse an appointment.[101] This practice was accepted to some extent if the refusal was based on information received after the nomination and hence was not known to the National Council of the Judiciary at the time of the assessment. Nonetheless, President Duda has gone a step further and decided to give no specific reason for turning down a candidate, which has been understood as a violation of the Constitution rather than informally developed powers.[102]

The abovementioned informal rules in Poland and Hungary initially emerged in a democratizing context but were subsequently altered or broken by the populist regimes of Jarosław Kaczyński and Viktor Orbán. Although Czechia has not so far witnessed a similar democratic backsliding, and it has been therefore a less hostile environment for constitutional conventions, constitutional conventions concerning the judiciary met with staunch opposition from political actors. For instance, the Czech Supreme Administrative Court recognized a constitutional convention that if a candidate for the judicial office met all the legal requirements and was duly selected and nominated by the Government, the President is obliged either to appoint them or provide reasons for their rejection.[103] The then President, Václav Klaus,

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

[96]Geerten Boogaard, *Bipolar Constitutionalism in The Netherlands and Its Consequences for the Independence and Accountability of the Judiciary*, *in* EUROPEAN YEARBOOK OF CONSTITUTIONAL LAW 114 (Ernst Hirsch Ballin et al. eds., 2019).

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

[98]WOJCIECH SADURSKI, POLAND CONSTITUTIONAL BREAKDOWN 100–01 (2019).

[99]*Id.* at 101–02.

[100]*Id.* at 102.

[101]MIROSŁAW GRANAT & KATARZYNA GRANAT, THE CONSTITUTION OF POLAND 92 (2019).

[102]*See* Aneta Łazarska, *Czy precedens prezydenta Dudy zablokuje sądy? [Refusal to Appoint Judges—Will President Duda's Precedent Block the Courts?]*, RZECZPOSPOLITA (Aug. 31, 2016), https://www.rp.pl/opinie-prawne/art10958071-odmowa-powolania-sedziow-czy-precedens-prezydenta-dudy-zablokuje-sady.

[103]Rozsudek Nejvyššího správního soudu ze dne 27.4.2006 (NSS) [Judgment of the Supreme Administrative Court of Apr. 27, 2006], čj. 4 Azs 3/2005-35 (Czech); *see also* Michal Bobek, *The Administration of Courts in the Czech Republic—In Search of a Constitutional Balance*, 16 EUR. PUB. L. 251, 262 (2010).

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

nonetheless, refused to implement this judgment, as he did not appoint the judicial candidate and he did not provide any formal justification for not doing so.[104] The following President, Miloš Zeman, adopted the same position and, later on, when pushed to follow constitutional conventions in other contexts called this concept "idiotic" and made it clear that he would not let himself be bound by unwritten rules.[105]

Some political scientists also claim that there is another constitutional convention concerning the Vice–President of the Czech Supreme Court. While the Czech Constitution stipulates that the Czech President appoints "Vice–*Presidents* of the Supreme Court" in the plural,[106] a constitutional convention limits his power to appointing only one Vice–President.[107] Otherwise, the president could pack the court with additional vice–presidents, which would interfere with judicial independence and the separation of powers. However, lawyers disagree with this view, since the Constitutional Court, when it decided on this issue, did not refer to constitutional conventions at all and instead based its reasoning on the systematic interpretation of the Czech Constitution.[108] Moreover, there have been two vice–presidents of the Constitutional Court since 1993 and thus the very rule of having two vice–presidents at an apex court has not been contested generally.

Similar practices can also be found in civil law countries outside Europe. In Japan, there is an informal practice ensuring the Chief Justice's influence over the appointment of Justices. Although formally the Cabinet decides on these matters, in practice the Chief Justice submits to the Prime Minister a list of suitable candidates, and no Prime Minister is known to have rejected those names. This is no surprise, taking into account that the list is the result of informal negotiations between the offices of the Prime Minister and the Chief Justice.[109] And there is also an observed tradition that the Chief Justice can choose their own successor.[110] Moreover, albeit there is no such explicit rule, the seats in the Court are also allocated among representatives of the different legal professions.[111] Very interestingly, temporary judicial appointments have also developed in Japan contrary to the formal legal provisions and on the expectation that the appointees will "voluntarily resign" from their posts after the time for which they were appointed has expired. Compliance with that rule relies purely on a culture of not causing trouble.[112]

As in common law countries, the rule of seniority in selecting a chief justice has emerged in several civil law countries too. For instance, Brazil operates a peculiar system of rotating chief justices, in which a chief justice is elected by their peers for a short term of two years.[113] In this environment the Brazilian Supreme Court has developed an informal institutional practice by which the most senior Supreme Court Justice who has not yet presided over the Court is always selected to be the Chief Justice.[114] Interestingly, the second most senior is elected as Vice–President, which is the sequential pathway to becoming the next Chief Justice.[115] Therefore, the principle of seniority applies to both the Chief Justice and the Vice–President of the Brazilian Supreme Court.

[104]Bobek, *supra* note 103.

[105]*See* Lukáš Werner & Jan Wirnitzer, *'Pojem Ústavní Zvyklosti je Idiotský, Řekl Zeman. Němcové Nechal Naději' [The Concept of Constitutional Convention Is Idiotic, Zeman Said. He Left Hope to Němcová*], iDNES.cz (July 11, 2013), https://www.idnes.cz/zpravy/domaci/zeman-sance-na-vladu-pro-cssd-a-byvalou-koalici.A130711_071534_domaci_wlk.

[106]*See* Ústavní zákon č. 62(f) Sb., Ústava České Republiky [Constitution of the Czech Republic].

[107]*See* Hájek, *supra* note 14, at 15–16.

[108]Ústavní soud České republiky (ÚS) [Judgment of the Czech Constitutional Court] sp.zn. III. ÚS 87/06. For further details, see Bobek, *supra* note 103; 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 Euro. Const. L. Rev. 96 (2017).

[109]David S. Law, *The Anatomy* of a *Conservative Court*: *Judicial Review in Japan*, 87 Tex. L. Rev. 1545, 1550–51 (2009).

[110]*Id.* at 1590.

[111]*Id.* at 1568.

[112]Law, *supra* note 10 at 250.

[113]Daniel Bogea & Livia Guimaraes, *Rotating Chief Justices in a Democracy Under Stress: The Brazilian Supremo Tribunal Federal Under Bolsonaro (2019–2022),* Int'l J. Const. L. (forthcoming 2024).

[114]*Id.*

[115]*Id.*

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

Informal practices sometimes also permeate the relationship between courts and the media. A typical example is the relationship between the German Federal Constitutional Court and the *Justizpressekonferenz*,[116] a registered association of journalists with privileged access to fresh decisions of the German Federal Constitutional Court. Informal practice, followed for decades, gave only those journalists organized in the *Justizpressekonferenz* the access to the press release on the day before the announcement of the Court's judgment. It was supposed to ensure the "high–quality and accurate reporting" necessary in a democratic society. However, the lack of transparency of this informal practice and the selective access to information was increasingly challenged as a confidentiality cartel creating discrimination among journalists, and eventually abandoned.[117]

Constitutional conventions and informal practices concerning actual judicial decision-making are less discussed in civil law countries. Yet, many aspects of judicial decision-making in these jurisdictions, like in their common law counterparts, are not codified. For instance, many constitutional courts lack detailed voting protocols that affect crucial issues such as the voting order, deliberation style, outcome versus issues voting and tie-breaking rules. This results in informal practices. When a chief justice or other actor decides to breach such informal norms, it leads to a controversy. A typical example is the recent strategic breach of the Mexican Supreme Court voting protocol in the AI 64/2021 case.[118]

Others show some signs of normativity and are expected to be observed. Nonetheless, the question of their normativity is rarely addressed, and the expression of constitutional convention seems to be used rather unreflectively. Does it help to label them as conventions? Is there any added value in transferring a term of common law thinking to civil law jurisdictions? We suggest that the answer is yes for both questions. Conventions as an intellectual concept can filter various facets of informality and differentiate between informal acts and practices—sometimes referred to in legal literature imprecisely as habits, usages, or policies—on the one hand, and conventions as a subset of informal institutions on the other hand. The former are nothing more than simple repetitive behavior, but the latter have some normative character. Moreover, constitutional conventions are a specific type of informal institution with several peculiar features, which we discuss in the next Section.

D. Constitutional Conventions as a Specific Subcategory of Informal Institutions

The previous section showed that informal practices and constitutional conventions concerning the judiciary exist both in common law and civil law countries. Some of these examples are a routinized type of behavior, such as informal practices, whereas others have been institutionalized and may have reached the status of a constitutional convention.[119] This section will clarify the relationship between constitutional conventions and informal institutions and identify the specific features of constitutional conventions. By doing so, it will also contribute to general debates on constitutional conventions.

While there is not a universally shared understanding of what a constitutional convention is, there is a general agreement that constitutional conventions can be understood as a specific type of informal institution—by which we mean sets of rules that are considered binding and that are accepted as a social fact, and practices carried out on the basis of them.[120] However, constitutional

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

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

[118]Mauro Arturo Rivera León, *Voting Protocols as Informal Judicial Institutions* (forthcoming).

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

[120]Brunclík & Kubát, *Constitutional Conventions in Central Europe*, *supra* note 14, at 44; Nicholas Barry et al., *supra* note 22; *see also* David Kosař, Katarína Šipulová & Marína Urbániková, *Informality and Courts: Uneasy Partnership*, in this Special Issue.

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

conventions have several specific features that distinguish them from other informal institutions.[121] Here we will look deeper at three of them and show each of these features on practical examples.

First, constitutional conventions operate on the constitutional level and thus concern constitutional issues only. This means that only those informal institutions that have constitutional significance and involve constitutional actors are constitutional conventions.[122] For instance, unwritten rules about which judge sits in which seat at the Irish Supreme Court[123] concern the judiciary, but do not have the necessary constitutional significance. The same applies to a TV Channel, "Canal Judicial"—later rebranded as "Justicia TV"—at the Mexican Supreme Court, which opened its deliberation to the public in 2005 and screens them on regular basis on TV.[124] Yet another example is practice of the Hungarian Supreme Court, which has launched a YouTube channel called "Kúria Média," which presents and broadcasts high–profile cases and scholarly conferences organized with the obvious aim of influencing public discussion and probably also the judges. In both cases, it is an official public relations activity of the supreme court. However, even if running a YouTube channel would be initiated by a group of supreme court judges informally, it would not be an institution of constitutional importance and thus could not be treated as a constitutional convention. Likewise, constitutional conventions may emerge only between constitutional actors. For instance, informal meetings between oligarchs—who do not hold any constitutional function—to discuss who should be a judge of the supreme court cannot qualify as a constitutional convention, even if these meetings meet all requirements for informal institutions.

Of course, what is of constitutional significance is context dependent and may vary from one country to another. The standard understanding is that for being constitutional, the norm must be fundamental to the polity—rather than solely to the government of the day—in some respect.[125] In theory, a polity may well decide to treat any norm as constitutional.[126] This means that same norm may be constitutional in one polity, and a matter of ordinary policy in another. However, we do not need to delve into these abstract debates. We just wanted to show that certain informal institutions concerning the judiciary may be constitutional conventions in one country but not in another. One example suffices. Within the context of the judiciary, the standard issue of constitutional significance in virtually every country is judicial independence. Therefore, if an informal institution affects judicial independence,[127] which for instance the abovementioned seating order at the Irish Supreme Court[128] does not, it is likely a constitutional convention. Other matters concerning the judiciary, such as judicial diversity, may have become an issue of constitutional significance in some jurisdictions, while not in others.

Identifying constitutional actors is usually easier, because they are defined in the constitutional text, and in those few countries with unwritten constitutions there is a general consensus who the constitutional actors are. Nevertheless, even here there might be disagreements. Some might, for instance, question whether the so–called *Justizpressekonferenz convention* of providing press releases of the forthcoming judgments of the German Federal Constitutional to the selected journalists the day before the public delivery of the judgments[129] is a *constitutional* convention

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

[122]*See also* Perry & Tucker, supra note 26, at 768 (2018).

[123]Doyle, *supra* note 35, at 317.

[124]Francisca Pou Giménez, *Changing the Channel: Broadcasting Deliberations in the Mexican Supreme Court*, *in* JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE 209 (Richard Davis & David Taras eds., 2017).

[125]For a recent discussion, see Tarun Khaitan, *Guarantor Institutions*, 16 ASIAN J. COMPAR. L. S40, S50–S53 (2021).

[126]*Id.*

[127]We are aware that there are significant disagreements over the content of the principle of judicial independence in constitutional theory as well as a changing approach to judicial independence of both European *supra*national courts, but we leave these debates aside here.

[128]*See* Doyle, *supra* note 35, at 317.

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

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

because it concerns a convention between a constitutional actor, the court, and a non–constitutional actor, a journalist.

Second, constitutional conventions are usually considered legitimate by the relevant constitutional actors, which is not necessarily the case for all informal institutions. While constitutional conventions can be contested, they cannot arguably consist of a genuinely criminal or pathological behavior such as corruption,[130] nepotism,[131] or clientelist networks.[132] They are thus by default positive informal institutions.[133] What is criminal or pathological is again context dependent and may change over time. Our point is that there must always be a legitimate reason behind the conventional rule if we want to speak of a constitutional convention.

This brings us to the third feature which is that there must be a constitutional reason behind the rule enshrined in the constitutional convention. This requirement of a constitutional reason for the existence of a constitutional convention distinguishes constitutional conventions from informal practices and informal institutions as well as from "non–constitutional" conventions. While also informal practices and even routines have some reasons behind them, as we do things routinely for some reason, not all of these reasons qualify as a constitutional reason. We will show the specifics of a constitutional reason and its dynamics on several examples.

Constitutional actors recognize and abide by constitutional conventions because these rules, in the past, proved to be acceptable and they gradually started to believe that the conventional rule is binding. This historical precedent, the behavioral element, and constitutional actors' acceptance that the rule is binding, the attitudinal element, are a strong presumption for following the rule later. Nonetheless, historical precedents for the rule, and an acceptance that the rule is binding, are only two, undoubtedly important, elements of a constitutional convention. There must also be a reason for the existence of the rule.[134] It cannot be any reason, but a constitutional reason. The constitutional reason is a value loaded element, the rationale hidden behind the constitutional convention, which should explain and justify why that conventional rule should be observed also in the present. Do we share the same basic assumptions and values guiding our predecessors as they created the historical precedent and accepted them as binding? If yes, the rule should be followed. If, however, the justification does not sound convincing anymore, the convention either ceases to exist or needs to be modified to meet current requirements. Some examples will shed more light on that.

The United States' constitutional convention against court–packing, for example, took some time to take shape, and its content has also been changed, but it basically prevents the majority of Congress from amending the Court's membership and, in doing so, influencing or even dominating judicial decision–making.[135] It was not the tinkering with the number of justices that created the constitutional crisis during Roosevelt's presidency because that had also happened earlier.[136] The clear intention to directly influence the court, which is contrary to the separation of powers, was viewed as problematic, and this is the underlying rationale which explains why the historical experience created a binding convention.

The very sophisticated scheme for selecting the Justices of the German Federal Constitutional Court serves to achieve political equilibrium and to foster consensus–oriented decision–making. The unique mixture of law professors and career judges on the one hand and a nuanced political representation of the main parliamentary parties on the other hand increases the need to find a

[130]Maria Popova, *Why Doesn't the Bulgarian Judiciary Prosecute Corruption?*, 59 PROBS. POST-COMMUNISM 35 (2012).

[131]Samuel Spáč, *The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia*, 69 PROBS. POST-COMMUNISM 528 (2022).

[132]Alena Ledeneva, *Blat and Guanxi: Informal Practices in Russia and China*, 50 COMPAR. STUDS. SOC'Y & HIST. 118 (2008).

[133]On positive informal institutions, see Hubert Smekal, *Informality as a Virtue: Exploring Positive Informal Judicial Institutions*, in this special issue.

[134]JENNINGS, *supra* note 24; MARSHALL, *supra* note 4; Perry & Tucker, *supra* note 26, at 767–70.

[135]Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71 (2022).

[136]Peter G. Fish, *Justices, Number of*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 550 (Kermit L. Hall et al. eds., 2d ed. 2005).

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

balanced outcome. This contributes to the acceptance of judgments, because a majority decision requires a compromise, which is by and large more acceptable to society as a whole. As long as this underlying rationale meets with the societal expectations, the rule should be binding.

This kind of legitimacy as a broader underlying value may also explain why in 2008 the failed election of Horst Dreier, an esteemed professor of constitutional law, did not undermine the whole system. He expressed a somewhat relaxed position on the admissibility of torture, which was perceived rather negatively by the general public, and hence his election could have undermined the legitimacy of the court.[137] Nonetheless, this affair did not challenge the right of the nominating party to propose an alternative candidate,[138] and—because the nominating party did not retaliate—showed that party affiliation is not the sole yardstick and that there might be other factors as well. These other criteria are acceptable if they facilitate consensus and broad societal support.[139] This also explains why the extremist parties—right or left—are barred from nominating constitutional justices, because that undermines the model based on consensus.[140] This is, of course, contested because the nomination relies on an assumption that the parties of the political center dominate the arena, and if that fails the whole procedure is on shaky ground.

The Belgian conventional rule for selecting candidates for the Constitutional Court, which contributes to the acceptance and democratic legitimacy of that body by reflecting the political landscape,[141] plays a very similar role. The Israeli rule of observing the opinion of the Selection Committee is deemed to be binding because that serves judicial independence.[142] The Dutch rule of co–optation is based on a conviction that judges know each other best and hence are best suited to select and appoint new ones.[143] Similarly, the Hungarian unwritten rule that the President of the Supreme Court is elected from among the sitting judges of the Supreme Court has served to ensure the necessary reputation for the Chief Justice. The conventional nature of the rule came to light as its violation caused an uproar and was perceived as an interference with judicial independence.[144] The bewilderingly complex rules of selection and nomination of candidates to the Japanese Supreme Court serve to uphold some sort of harmony between the political and the judicial branches.[145] The Polish practice that the judiciary elected its own representatives to the National Council of the Judiciary—albeit that that was not explicitly stated in the Constitution—was perceived as a guarantee of judicial independence.

The German *Justizpressekonferenz*[146] facilitated privileged access to fresh decisions of the *Bundesverfassungsgericht*, which was not simply a decades–long practice but also supported the "high–quality and accurate reporting" necessary in a democratic society. It was also more than routine and relied on a rationale perfectly fitting into the pattern of conventions. Nonetheless, as this rationale lost ground and access to information was seen as a confidentiality cartel creating discrimination among journalists, it became a liability and was therefore abandoned.[147] This again shows that simple practice without proper justification cannot create a binding convention.

[137]Kischel, *supra* note 92 at 965.

[138]*Id.* at 965.

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

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

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

[142]Lurie, *supra* note 31.

[143]Boogaard, *supra* note 96.

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

[145]Law, *supra* note 109.

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

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

https://doi.org/10.1017/glj.2023.90 Published online by Cambridge University Press

So, if one takes a closer look, all the mentioned examples seem to intuitively accommodate the definition of constitutional conventions. Unwritten rules are observed as constitutional conventions if there is a consolidated historical practice, if the constitutional actors believe that they are bound by it, and if there is a legitimate constitutional reason behind the practice. These constitutional reasons are not always expressly stated, and in many cases the political actors often are not aware of them at all. Therefore, one needs to drill into the deeper structures of the legal system to unveil them, but one can find them.

E. Conclusion

This Article showed that constitutional conventions concerning the judiciary exist not only in common law world, but also in civil law jurisdictions. The fact that constitutional conventions are not discussed in civil law jurisdictions with similar vigor nor the fact that they are often given different labels can change that. Even in civil law jurisdictions, constitutional conventions thus shape the functioning of the judiciary as well as inter–branch relations. They are often hard to grasp, but if we want to understand the constitutional architecture holistically, we need to embrace and study them.

On a more general level, it also brought largely disconnected debates on constitutional conventions in legal literature together with the scholarship on informal rules and institutions in social sciences. It showed that constitutional conventions are a subcategory of a broader class of informal institutions,[148] but they are specific species among informal institutions. We argue that at least three features distinguish constitutional conventions from informal practices, informal institutions, and "non–constitutional" conventions. First, constitutional conventions must concern issues of constitutional significance and must involve constitutional actors, which not all informal institutions do. Second, constitutional conventions are usually considered legitimate by the relevant constitutional actors, which is again not necessarily the case for all informal institutions. This means that constitutional conventions are by default positive informal institutions.[149] Finally, there must be a constitutional reason behind the rule enshrined in the constitutional convention.

Acknowledgments. We are grateful to our colleagues at the Judicial Studies Institute, to Patrick Casey Leisure, Vanessa MacDonnell, Andrea Pozas-Loyo and Silvia Suteu for their insightful comments and ideas.

Competing Interests. The authors declares none.

Funding Statement. The research leading to this article (since all other articles you lowercase a) has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation program. (INFINITY, grant agreement no. 101002660).

[148] *See supra* David Kosař, Katarína Šipulová & Marína Urbániková, *Informality and Courts: Uneasy Partnership*, in this Special Issue (providing our understanding of informal institutions).

[149] On positive informal institutions more generally, see Hubert Smekal, *Informality as a Virtue: Exploring Positive Informal Judicial Institutions*, in this issue.

Cite this article: Kosař D, Vincze A (2023). Constitutional Conventions Concerning the Judiciary beyond the Common Law. *German Law Journal* **24**, 1503–1519. https://doi.org/10.1017/glj.2023.90