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Veronica Anghel

# **Rule of Law or Rule of Norms? Informal Institutions and their Role for Democratic Resilience**

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Veronica Anghel

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## Abstract

This paper delves into the intricate interplay between formal and informal institutions in contemporary European political landscapes. It investigates the vital role of informal institutions in supplementing and at times circumventing the formal rules that define the parameters of political functioning. The study identifies four key manifestations of the ascendant influence of informal institutions within recent European dynamics. First, the encroachment of aggressive populism and extremist discourse erodes the authority of formal institutions, challenging their efficacy and integrity. Second, alternative societal and elite behaviours emerge that contest the reinforcing functions previously upheld by informal institutions, thereby prompting a reconsideration of their impact. Third, the increasing scrutiny of informal institutions perpetuating discriminatory practices aligns with the contemporary emphasis on upholding democratic values and civil rights. Fourth, the paper elucidates the role of informal institutions in the (de-)democratization of post-communist states. The study underscores the imperative to not only analyse and aim to enact formal changes but also to delve into the resilient local practices and norms that shape the political landscape.

Keywords: autocratization; Central Eastern Europe; democratization; informal institutions; rule of law

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# Rule of Law or Rule of Norms? Informal Institutions and their Role for Democratic Resilience

Veronica Anghel<sup>1</sup>

## Introduction

Informal institutions shape regimes, elite decision making and citizen behaviour. Politics — in the formal sense — would not work if informal institutions did not exist. Still, identifying informal institutions is a complicated task. Furthermore, their role in serving key functions of the state or society is difficult to grasp. Compared to formal institutions — such as parliaments, parties, elections or constitutions, informal institutions are not coded in writing. Nevertheless, constitutions, party charters, party manifestos and electoral rules are not alone in structuring people's behaviour. Individuals perpetuate unofficial but widely known patterns that also organise behaviour. These collective norms and practices generate informal institutions. Because they are unofficial and unwritten, informal institutions have a less concrete and therefore less readily observable existence. That makes them harder to study. This project aims to reopen the debate about what structures elite and public behaviour beyond formal rules.

The formal rules that generate political institutions tell us how politics is supposed to work, what is possible, and what is not. Informal institutions instruct politicians and citizens what to do in the absence of formal rules or even how to circumvent -them. Examples of informal rules that also govern politicians and citizens' behaviour may be the peaceful transition of power, civil disobedience, charity, or corruption. People know them and use them. They are useful to organize societies, but they have also been linked to slower rates of development. For this reason, informal institutions may be a problem and a solution at the same time. Think about the favours that politicians do for their constituents in return for the loyalty they expect at the ballot box. Imagine the relationships politicians have with their funders. Consider the incentives expected by bureaucrats in some systems to overcome the red-tape.

The world of informal institutions is vast and goes beyond the political realm. By acknowledging their largely overlooked influence, we can reframe many expectations associated with the creation and adoption of formal rules. In the context of European politics, this endeavour may also explain the failure of universal packages aimed at improving the quality of governance (Petrova, 2021) or democracy (Agh, 1999). We can also systemically analyse certain patterned behaviours of political elites at the local level (Kelemen, 2017),

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<sup>1</sup> Veronica Anghel is a Lecturer at the Johns Hopkins University School of Advanced International Studies, a 'Europe's Futures' Fellow at the Institute for Human Science in Vienna and a Visiting Fellow at the Robert Schuman Center – European University Institute.

national level (Klima, 2020) and supranational level (Christiansen and Neuhold, 2013), that parallel formalised institutions.

The increased concern over informal aspects of politics is timely. In the past decade, Europe has witnessed a decline in the authority of traditional formal institutions and an increase of anti-establishment sentiments (Hobolt, 2016). Political parties, parliaments and the confines of the liberal-democratic legal order have more widely experienced a dilution of authority and seeing their legitimacy being called into question by different groups of people (Anghel and Jones, 2022a). Some European politicians and members of the public found the offers of far-right groups appealing (De Jonge, 2022). Others withdrew from participation because of the inadequacy of the existing political offer (Cammaerts et al., 2014). With the advent of the COVID-19 pandemic, interactions between the legal framework, political players and the public grew even more complex and changed in unknown directions (Jones, 2020; Bohle et al. 2022; Anghel and Jones, 2022b). Governments responded to the new challenges with democratic or authoritarian innovations. And yet some organisational features of societies persist even as the efficiency of formal institutions has either been called into question or their democratizing role has been deliberately subverted by certain groups. What lies beneath the surface is the territory of informal institutions. They regularly step up to compliment, substitute or challenge formally organised structures (Lauth, 2000). This makes them extremely influential and resilient.

This paper discusses the benefits and the risks of informal institutions from the perspective of their inherent tensions with formal institutions, their efficiency, and their role under the liberal-democratic constitutional system. It continues with an overview of how formal and informal institutions interact. The second part looks at the informal institutions from the perspective of efficiency. Finally, the third investigates their nuanced role in a liberal-democratic constitutional system.

## 1. The Limitations of Formal Institutions

How do informal institutions interact with formal institutions? A recent example of differentiated outcomes under the pressure of similar formal institutions can be seen in the stalled democratization process of some Eastern European member states (Schimmelfennig and Winzen, 2017; Anghel, 2020). In the early 2000s, aspiring EU member states were considered to have made great advances in aligning national legislation to the *acquis communautaire* (Kelley, 2004; Vachudova, 2005). New members' post-accession compliance with EU law overshadowed that of older members (Sedelmeier, 2011). Beyond adopting formal rules, we can nevertheless observe a discrepancy between the behavioural norms that formal institutions should impose and the actual behaviour of individuals who make these institutions work.

In countries such as Poland, Hungary, Romania and Bulgaria the basic tenets of EU membership and national constitutions, such as the separation of powers and the independence of the judiciary are formally guaranteed, but are also subverted by informal institutions, such as corruption and clientelism. The challenges faced by states in the European Union's Eastern territory during the consolidation of formal democratic institutions has been

fuelling a now decade long debate on democratic backsliding (Cianetti et al., 2018; Vachudova, 2020; Enyedi, 2020), with authors maintaining that the EU works on a tacitly accepted rule of authoritarian equilibrium (Kelemen, 2020). Recent research has highlighted that, although certain prospective members formally committed to EU membership rules, the behaviour of decision-makers demonstrated a reduced dedication to adopting these requirements in practice (Anghel and Jones, 2021).

Countries in the Western Balkans appear to follow a similar approach to interpreting formal rules and show that multiple legislative changes are not implemented there either (Gordy and Efendic, 2019). Building on its experience with the new members, the European Commission (2020) released a new methodology on EU enlargement and emphasized credibility in *acquis* implementation as one of the core principles by which to measure progress in the region's bid to join the EU.

Such context-driven observations substantiate criticism of initial institutionalist assumptions of concurrence between the expectations of behaviour inherent within institutions and actual individual behaviour. March and Olsen (2010) summarised the need for bringing back context into institutional analysis, as the transformation of institutions is uncontrollable, based on "highly contextualized combinations of people, choice opportunities, problems, and solutions" (p. 80). Neoinstitutionalism, and in particular the rational choice institutionalist perspective, provides the opportunity to organize an analysis of the tension between formal and informal institutions. The consequence is a better identification of missing ingredients of the behaviour of individual political actors and the patterns of collective action within political institutions. This helps us make better sense of real-life observations of how individual actors react to formal and informal institutional constraints on their interests. It also encourages us to step away from the assumption that formal institutions alone can guarantee efficiency.

In the context of a state, informal institutions have functional and dysfunctional roles. While unsanctioned by the state, they do have a differentiated relationship with the state and meet different functions that, at times, overlap those of formal institutions. They may also have nuanced or different roles, depending on the point in time of democratic consolidation. In developed democracies, where the rule of law is consolidated, it has been argued that these are complimentary, substitutive or conflicting (Lauth, 2000). One of Austria's main informal rules is that the president will never dismiss the chancellor, despite a constitutional provision that allows for it, is a complementary informal institution. The Sicilian Mafia offers private protection for people, conflicting with the weak law-enforcement institutions in Italy (Buonanno et al., 2015). A substitutive informal institution is functionally equivalent with a formal one, as in the case of a religious charity doing the work of social services. Efforts to conceptualise such research have shown progress (Helmke and Levitsky 2006; Voigt 2018), and yet, empirical testing ( $n \geq 1$ ) needs to catch up with formal theory ( $n = 0$ ). The Global Encyclopaedia of Informality is a starting point to archive and categorise informality on a grand scale (Ledeneva, 2018).

## 2. The Efficiency of Informal Institutions

Once we observe the limitations of formal constraints to govern all political outcomes, the following question arises: how efficient are these informal institutions in improving the quality of citizens' lives? In the case of new democracies, informal institutions were expected to have an enhanced role during periods of transition as temporary substitutes for functional formal institutions (Elster et al, 1998). An OECD working paper justified their importance in less advanced countries because people "are often ill-served by the limited formal institutions available" (Jutting, 2003: 11). In post-communist Eastern Europe, informal institutions were enabled by non-state networks and organizations. Charity was organised through religious based social actions and worked as a substitute for social services. Entrepreneurial informal networks filled the gaps of a state bureaucracy in disarray, based on nepotism. Former communist political elites refashioned themselves as capitalist entrepreneurs, reinforcing clientelism. Political parties were an absolute necessity, but they came about as personalised networks built on loyalty to the leader rather than the formal, written rules of recruitment. In this context, forms of regulation such as party regulation had an uneven impact in shaping party (system) development outcomes (Casal Bértoa and Van Biezen, 2014). An implicit assumption of impermanence was associated with informal institutions.

However, informal institutions showed remarkable resilience in the long-run and allow us to make observations of their tense relations with state enforced behaviour. These tend to be more persistent than formal rules (North, 1990), mostly explained by the lack of a centre to direct and co-ordinate their actions (Lauth, 2000: 25). Elster et al. (1998) forecasted potential differentiated institutional outcomes using the examples of Czechia, Bulgaria, Hungary and Slovakia. Marinova (2011) used the case of ten post-socialist Central and East European countries to test the effectiveness of civil organizations as surrogates for the state in performing social welfare functions when the state is incapable of doing so. The field requires more research on the correlation between elite defections from formal rules and weakened democratic state building. Comparisons between transforming Eastern European societies and other troubled democracies such as the ones in Latin America could also shed new light on the variation in effect. Empirical investigations of the efficiency of informal institutions on the quality of governance are scarce.

Such observations of the long-running effects of informal institutions are not limited to new democracies. Writing in the wake of the *mani pulite* 1992–94 corruption scandal in Italy, Della Porta and Vannucci (1999) noted that norms of corruption were "more powerful than the laws of the state: the latter could be violated with impunity, while anyone who challenged the conventions of the illicit market would meet with certain punishment" (p. 15). By 2019, Italy (together with Greece) had continued to score lower than traditional Western democracies in the Transparency International Corruption Index. The 2019 OLAF report of the EU also highlighted that Italy and Greece had the most pending investigations of mismanaged EU funds among the member states.

The efficiency of informal institutions at the level of the European Union is another example that has occupied a centre role in recent years. The official EU rule that member states are equal under the Treaties has arguably been at odds with the informal rule of an overpowering EU core, made up of a few founding members. The EU core is an example of an informal

institution. Sticking to the example of Eastern Europe, we could argue that accepting this unspoken rule made further European integration possible. The decisional supremacy of old member states was accepted by post-communist states in exchange for membership (Anghel and Jones, 2021).

In the wake of the Euro-crisis, Greece, Italy and some new member states increasingly contested the EU core's supremacy. The informally organised Frankfurt Group (made up of European heavyweights Angela Merkel, Nicolas Sarkozy, Mario Draghi, José Manuel Barroso, Jean-Claude Juncker, Herman van Rompuy, Christine Lagarde and Olli Rehn) took control of the decision-making process over national budgets to make European governance work. How efficient this informal centralization of power was is not immediately obvious. On the one hand, the Euro survived the crisis and the EU moved forward (Jones et al., 2016). On the other hand, the EU's management of the crisis alienated some members on its periphery and fuelled Euroscepticism (Nicoli, 2017). Informal institutions may also enhance the performance of formal institutions (Weingast, 1979; March and Olsen, 2010). The electoral connection (Mayhew, 1974) that makes politicians responsive to voters' preferences, is one such example. Yet, the shared understanding of accountability is loosening: party switching is a common European practice to avoid electoral costs (Klein, 2019; Anghel, 2023), non-partisan cabinet members were appointed in the aftermath of the Eurozone debt crisis to evade government responsibility (Hopkin, 2012), and cabinets tend to have an increasingly short life-span, blurring responsibility. Assessing the effect or function of other informal institutions is more difficult, but equally challenging for researchers. The replacement of corporatism with the primacy of politics in the Netherlands (Daalder, 1996) is an example of an informal institution replacing another, the effects of which are still uncertain.

Some researchers consider that informal institutions can provide solutions to problems of social interaction and coordination (Ullman-Margalit, 1978). Consequently, we can argue that the wilting of consociationalism under the shock of far-right politics in Austria or Switzerland (Hafez & Heinisch, 2018; Helms et al., 2019) led to adverse impacts on effective representation.

### 3. Informal Institutions and Democracy

Informal institutions have primarily been conceptualized against the backdrop of failing governability, a diminished rule of law, and the failure of effective representation in Latin America (see Helmke and Levitsky, 2006) or Russia (see Ledeneva, 1998, 2006). Given the weakening authority of traditional formal institutions in Europe, analysing them is also growing importance in European studies.

The rise in power of far-right populists throughout Europe has raised some concerns about which informal rules governing democracies these politicians are willing to break. Grzymala-Busse (2010) noted that in new democracies informal institutions act to replace, undermine, support or compete with formal institutions. As we take this work further, we can also see how these institutions dilute these borders in time, changing categories from supporting, to competing, to undermining or weakening democratic rule. The case of Hungary's state capture under centralized political control opens many avenues of research (Fazekas and Tóth, 2016).



The central question that still guides the research agenda into the role of informal political institutions is whether their existence is coherent with democratic principles or whether the two collide (O'Donnell, 1996; Lauth, 2000). Further empirical investigations into their role in both established and transitional democracies are paramount. The growing relevance of informal institutions has been revealed by both democratising Eastern European states (EU members and neighbours) and traditional Western democracies. Much like ideas, informal institutions know no boundaries.

The most commonly studied forms of informal institutions are corruption and clientelism. These impede democratisation (Stockemer et al., 2013), slow growth and innovation (Rodríguez-Pose, 2015), and sustain the concentration of power in the executive at the expense of the courts and the legislature (Magyar, 2017). These informal institutions are pervasive in economically advanced and democratic states as well as in new democracies (Wachs et al., 2020). They overshadow problems in the economies of transitional democracies (see e.g. Anderson and Tverdova, 2003), and prevent the functioning of free markets in established ones (for Italy see Della Porta and Vannucci, 1999; Colazingari and Rose-Ackerman, 1998; for Greece see Trantidis and Tsagkroni, 2017).

Other informal norms may positively reinforce democratic outcomes. Their weakening provides additional reasons for concern. Despite being the heartland of parliamentary democracy, Europe has witnessed an increase in the role of the executive, weakening parliamentarianism and questioning democratic accountability (Neto and Strøm, 2006). The conceptual disentangling of parliament as the formal institution and parliamentarianism as the informal institution is not immediately obvious. However, it carries a lot of weight in how we perceive the day to day activity of democracy. Weakening parliamentarianism in favour of the executive in the context of advancing informal politics correlates with the monopolistic concentration of real power (Hale, 2011), despite the official continuation of parliamentary activity.

Civil disobedience is also an informal institution that is argued to sustain the progress of liberal democratic institutions (Rawls, 1971). A spike in the use of this tool in a wave of European mass protests from the UK, to France and to Ukraine (Wihl, 2018; Edyvane, 2020) led to controversial new formal constraints (e.g. the UK's 2015 legislation for civility, Injunctions to Prevent Nuisance and Annoyance; France's 2019 anti-riot bill, partially struck down by France's Constitutional Court; Spain's 2015 Law of Citizens' Security). Protesters challenged the unwritten rule of non-violent civil disobedience and national authorities began regulating and constraining such activities. Distrust in government institutions created a void that has been filled by informal networks of association and civil organizations (Marinova, 2011). By way of example, civil disobedience was organised through the informal networks for Fridays for Future that later became institutionalized as a trans-national NGO (Hall, 2022; Saunders, 2022).

Resistant informal norms, such as gender and racial bias practices, are also increasingly under scrutiny as they enter into conflicts with formal national and international rules. These lie at the intersection between social and political informal institutions. In Europe, they are (slowly) being tackled through the enforcement of formal rules such as gender quotas (Krook, 2006; Weeks & Baldez, 2015) or antigypsyism legislation (Sayan, 2019). Their effectiveness in

shaping behaviour and overcoming informal rules requires further research and observations. Other informal institutions, such as early marriages or elder councils as alternative systems of justice are still practiced by communities in Europe despite national legislation and international treaties banning them (Caffrey and Mundy, 1997; Timmerman, 2004; Bošnjak & Acton, 2013 also refer to the rule of virginity at marriage for girls in a study on Chergashe Roma in Serbia and Bosnia). Similarly, church etiquette structures behaviour in a myriad of ways that conflicts with law. One may consider here the 2017 conflict between the legal recognition of gender dysphoria by the Greek authorities and orthodox monks who would still only accept birth-assigned males on Mount Athos. The research into informal norms is also not restricted to the behaviour of states and supra-national structures. The private sector often supplies corruption and has a systemic role in state building.

## Conclusion

This paper has identified four main ways that revealed the growing role of informal institutions in recent European developments. First, formal institutions are weakened by aggressive forms of populism, extremist discourse and actions. Second, informal institutions that reinforced the functionality of formal institutions are challenged by alternative societal and elite behaviours. Third, informal institutions that sustain discriminatory behaviour are under scrutiny as we increasingly hold democracy and civil rights implementation to a higher standard. Fourth, as post-communist states continue to undergo democratization, there is a need to reevaluate our anticipated outcomes regarding the interplay between formal and informal rules. The paper also shows that the choice to implement democratic institutions of power sharing and checks and balances is not only a requirement of transition, but an ongoing struggle.

From a normative point of view, research on informal institutions suggests that we cannot anticipate universal effects of institution building and policy implementation. This study of informal institutions is an argument in support of taking into account resilient local practices and norms before implementing changes, or when tracing outcome variation of formalized changes already made.

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Forum Transregionale Studien e.V.  
Wallotstraße 14  
14193 Berlin  
T: +49 (0) 30 89001-430  
[office@trafo-berlin.de](mailto:office@trafo-berlin.de)  
[www.forum-transregionale-studien.de](http://www.forum-transregionale-studien.de)