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ARTICLE

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

The Italian System of Judicial Governance: An Arena of Confronting Informal Practices and the Push Towards Formalization

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Abstract

There is general agreement that in Italy the establishment of a judicial council ensured an overall higher degree of independence. Nevertheless, this self-governance template was criticized for propping up an accountability imbalance and a certain degree of inefficiency. In order to understand this assessment, this article delves into the relevance of informal rules and practices in the operation of the Italian judicial council. More specifically, it focuses on the activities relating to appointments of court presidents and professional assessment. Based on this analysis, it makes some observations on the factors shaping informal practices and questions their impact on judicial values and the quality of Italian democracy. I argue that informal institutions have amplified the corporatist character of the Italian judiciary, but it would be wrong to portray them in negative terms only, because the operation of the Italian judicial council and judicial system also benefits from a healthy dose of informality, which allows for enduring legitimacy in a polarized society.

Keywords: Judicial governance; judicial council; court presidents; professional assessment; informal rules

A. Introduction

It is commonly thought that the Italian system of judicial governance (or at least some of its elements) served as an export model[1] to implement the principle of the rule of law in countries transitioning from authoritarian rule. Whatever the reason for this influence might be, one cannot but observe with disappointment the results of this legal transfer in securing a good balance between judicial independence and accountability. To be fair, the cause does not lie in the model itself, but rather probably has something to do with the timing of its incorporation and with its prioritization against other crucial dimensions outside the competence of the judicial council, such as training and recruitment.

Yet, such model has its own weaknesses, and even in Italy, while ensuring an overall higher degree of independence, it has been questioned for propping up an accountability imbalance and a certain degree of inefficiency. Also, the "Palamara affair," which sparked off in spring 2019, took the lid off a web of across-the-board groups of magistrates, politicians, businessmen, and members

[1]Simone Benvenuti & Davide Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model*, 19 GERMAN L.J. 1641, 1642–43 (2018).

of the judicial self-governance body.[2] At its core, this affair concerned informal talks between two members of Parliament, a former president of the National Association of Magistrates, and three judicial members of the Italian judicial council (*Consiglio superiore della magistratura*, hereinafter C.S.M.) relating to the appointment of the heads of the Perouse and Rome prosecution offices. This in turn greatly reduced trust in the judiciary and exposed a transparency deficit.

In order to highlight the risks inherent in a system where a body composed of a majority of judges (or magistrates where this applies) holds strong governance powers, this article delves into the informal dimension unveiling the actual dynamics with regard to the Italian case study.[3] Only an understanding of the informal dimension is indeed able to account for those hidden details that are very much specific to a given legal system, beyond the abstract and fictitious standardization of formal rules. In the Italian case, informal institutions have amplified the corporatist effects stemming from the numerical prevalence of magistrates within the C.S.M.: At least, this is a common view that the present analysis confirms. Yet, this conclusion is only partial, and it would be wrong to portray informal institutions in negative terms only. This article actually argues that the operation of the C.S.M. and the overall legitimacy of the judicial system also benefit from other informal institutions at play.

In order to account for the negative effects of some informal institutions in terms of increased corporatism in the operation of the C.S.M., but also of the positive role other informal institutions play in partly countering such effects, the article unfolds as follow. Section B delves into the operation and the organization of the C.S.M., looking at informal institutions involving the main actors on the stage: Its president and vice-president, its steering committee, its judicial and non-judicial members, and its administrative technostructure. This allows for a proper understanding of the nature of the main judicial self-governance body and of the role the relevant actors play. Section C discusses the informal rules and practices in relation to a judicial career, and, in particular, appointments of court presidents and professional assessment. Here, the contrast between a highly formalized setting and its distortion through informal practices is underlined, as well as the attempt to correct this distortion through further formalization. Section D makes some observations on the relevance of informality and the factors shaping it, articulating the answer to the question about the effect of informal institutions on the judiciary, judicial values, and the quality of Italian democracy.

When referring to informal institutions, the article relies on the existing literature according to which these are "socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels."[4] For the purpose of this article, these are understood more precisely as non-codified practices among judicial or non-judicial actors, or rules affecting judicial governance or judicial decision-making.[5] I do not elaborate here on the distinction between rules and practices. A few notes are, however, necessary to delimit the notion of "non-codified" in relation to the case under consideration.

Clearly, codified (or formalized) rules are those set in constitutional documents, acts of Parliament, Government decrees, and regulations. They are also those set in the instruments that express the normative power of the C.S.M.: Its Internal Rules, but also so-called *circolari*, *direttive,* and *risoluzioni* through which the C.S.M. regulates the exercise of its own powers, or regulates the duties of other judicial actors (candidates for appointments, local judicial councils, court presidents).[6] As a matter of fact, the C.S.M. resorted to these legal instruments to broaden the scope of its

[2]Mauro Volpi, *Il Consiglio superiore della magistratura: snodi problematici e prospettive di riforma*, *in* 1 La Rivista "Gruppo di Pisa" 31 (2021).

[3]Since Italian courts are organized in distinct systems, the focus of this article is on the ordinary judiciary dealing with civil and criminal matters, leaving aside the administrative and the constitutional judiciary.

[4]Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 4 Persp. on Pol. 725, 727 (2004).

[5]*See* David Kosař & Katarina Šipulová, *Informal Judicial Institutions and Democratic Decay*, The European Consortium For Political Research (2021).

[6]*See* Federico Sorrentino, *I poteri normativi del C.S.M.*, *in* Magistratura, C.S.M. e principi costituzionali 37–48 (B. Caravita ed., 1994); Alessandro Pace, *I poteri normativi del C.S.M.*, 2 Rassegna parlamentare 369 (2010); Angelo

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competence, encroaching on the powers of Parliament and its reserved legislative domain. This resulted in an established practice that was not contradicted by Parliament and was even conceptualized by some as a constitutional convention but has been criticized by others as *contra legem*.[7] It is therefore debated—and the discussion is not settled within Italian legal scholarship—whether the legal rules encroaching on the power of Parliament are a formal source of law or just reflect a practice filling a legal vacuum. While there seems to be a tendency to consider the relevant rules a *de facto* or administrative practice from a domestic perspective, within the framework of the comparative research endeavor, it is fair to approach it as formal, codified rules.[8]

B. The System of Judicial Governance and the Operation of the C.S.M.

According to formal rules,[9] the system of judicial governance in Italy is based on a major competence-sharing between the C.S.M. and the Ministry of Justice. The former—a collegial, executive-independent, mixed-composition body—is in charge of carrying out the functions relating to recruitment, appointments, and transfers, promotions, and disciplinary measures.[10] The latter, the Minister of Justice, bears responsibility for the organization and functioning of those services involved with the administration of justice.

One of the distinctive features of the C.S.M., justifying its creation back in 1946-1947,[11] is its balanced composition. The C.S.M. is presided over by the President of the Republic—a neutral authority in the Italian system of government—and consists of the First President and the General Prosecutor of the Court of Cassation and of (currently 30) elected members. Of these, two thirds are elected from among ordinary judges by their peers (judicial members: *togati*) and one third by Parliament from among university professors of law and lawyers with 15 years of practice (non-judicial, lay members: *laici*).[12] The Council elects a Vice-president from the pool of members designated by Parliament.

The rationale of this composition is to achieve a reasonable balance[13] to avoid both politicization and corporatism, with the Head of State playing a moderating role. The justification of such arrangement is the existence, as for any accountability arrangement aiming at greater independence, of a "system of checks and balances [. . .] which prevents any principal from taking control of the majority of the accountability mechanisms."[14] In order to ensure such a balance, the organization of the C.S.M. is highly regulated by law[15] and by the C.S.M.'s Internal Rules. The need for regulation—which is a characteristic of the Italian legal culture—is grounded on the premise of the impossibility of relying solely on the goodwill of the relevant actors. Nevertheless, legal rules have gaps and ambiguities that allow for some variance in the actual power relations

Caputo, *Le funzioni del Consiglio superiore della magistratura tra riserva di legge e poteri normativi*, 1 F. DI QUADERNI COSTITUZIONALI 222, 227–247 (2020).

[7]This seems to be the position, criticized by the legal scholarship, of the supreme administrative jurisdiction. *See* Giovanni Serges, *Un ragionevole punto di partenza per recuperare il ruolo costituzionale del C.S.M.*, 4 POLITICA DEL DIRITTO 691, 695 (2021).

[8]Helmke & Levitsky, *supra* note 4, at 739 (these rules are indeed written and sanctioned through official channels).

[9]Arts. 105, 107 COSTITUZIONE [Cost.] (It.).

[10]I refer only to judges, even though the Italian judiciary is composed of prosecutors too, who enjoy the same institutional safeguards of independence that judges do.

[11]This was the period when the articles of the Italian Constitution providing for the establishment of the C.S.M. were drafted. However, the law establishing the C.S.M. would be enacted only in March 1958.

[12]Elected members of the Council remain in office for four years and cannot be immediately re-elected. They may not, while in office, be registered in professional rolls, nor serve in Parliament or on a Regional Council.

[13]*See* Simone Benvenuti, *The Politics of Judicial Accountability in Italy: Shifting the Balance*, 14 EUR. CONST. L. REV. 369, 391 (2018); Paolo Ridola, *La formazione dell'ordine del giorno fra poteri presidenziali e poteri d'assemblea*, *in* MAGISTRATURA, C.S.M. E PRINCIPI COSTITUZIONALI 68 (B. Caravita ed., 1994).

[14]DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES 410 (2016).

[15]Legge 24 marzo 1958, n. 195, G.U. Mar. 27, 1958, n.75 (It.).

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among the different actors *within* the C.S.M., while the inherent flexibility of the institutional arrangement opens the way to informal dynamics.[16]

In the next sections, the question I address is: How do informal institutions affect such rationale of a "rule-of-law authority" grounded on a delicate "accountability balance"?[17] To address this question, to which I will return in the concluding paragraph, I consider three dimensions. The first one relates to the steering of the C.S.M., and therefore to the informal rules and practices relating to its President and Vice-president and to the Steering Committee. The second one relates to the fundamental dynamics in the decision-making process, mostly focusing on the role and status of elected judicial and lay members of the C.S.M. Then, the third dimension concerns the informal rules and practices regarding the C.S.M.'s administrative technostructure—a dimension almost completely neglected in the literature on judicial councils.[18] As it hopefully appears from the analysis, the common thread of these three dimensions is the interplay between the major influence of judicial actors and the "resistance" by other actors against such influence.

I. Steering the C.S.M.

Literature on judicial councils and supranational policy documents[19] often emphasize councils' overall composition, ignoring their institutional steering arrangements.[20] This is, however, a relevant dimension for the Italian C.S.M., governed by the interplay of (1.) its President, (2.) its Vice-president, and (3.) its Steering Committee. The actual role of these three actors becomes apparent only when one looks at the relevant practices and relativizes the straightforward view of a purely corporatist system.

1. Who Chairs the C.S.M.? The Invisible Presence of the Head of State

The Constitution assigns to the Head of State the role of President, and the role of Vice-president to a lay member chosen by the C.S.M. Since the very beginning, it has become a practice for the Vice-president to replace the President at most of the meetings, due to the actual impossibility for the Head of State to engage in the C.S.M.'s daily activities. This practice was not against the rules; still such replacement was in principle meant to be an exception, but soon became an established practice. With the notable exception of Antonio Segni (1962–1964), Heads of State have never participated in the daily functioning of the C.S.M., with a sharp decrease in chaired meetings in the last 30 years especially. They do so on extremely relevant or symbolic occasions only.[21]

Features in Table 1 do not reflect the actual influence of the Head of State on the functioning of the C.S.M. though. The Head of State, who is constantly informed about the C.S.M.'s activities and

[16]Benvenuti, *supra* note 13, at 391; *see also* Nino Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 Am. J. Compar. L. 103, 130 (2009) (discussing the flexibility of the judicial council model).

[17]Kosař & Šipulová, *supra* note 5, at 8. In doing so, I thus deal in a rather direct way with the "informal institutions that reshape the formal contours of constitutional structures and the regulation of the judiciary, and that affect the quality of the democracy," which is the specific interest of the INFINITY project. To this a second question could be added, that I do not address directly though: How do informal practices and rules affect competence-sharing between such authority and a fully political body (the Minister of justice)?

[18]*See* Antoine Vauchez, *The Strange Non-Death of Statism: Tracing the Ever Protracted Rise of Judicial Self-Government in France*, 19 German L.J. 1613, 1632 (2018) (discussing C.S.M.'s administrative technostructure).

[19]*See* Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 German L.J. 1257, 1263 (2014); *see also Judicial Self-Government in Europe*, 1567 German L.J. 2188 (2018).

[20]*See* David Kosař, *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe*, 19 German L.J. 1567, 1590 (2018) (discussing the importance of who presides over the judicial self-governance bodies).

[21]*See* Daniela Piana & Antoine Vauchez, Il Consiglio superiore della magistratura 158 (2012).

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Table 1. Number of C.S.M. meetings chaired by the Head of State (1959-2022)[22]

Head of State	Period	No. of plenary meetings chaired by the President	Average per year chaired by President
Giovanni Gronchi	1959-1962	21	7
Antonio Segni	1962-1964	38	19
Giuseppe Saragat	1964-1971	29	4.1
Giovanni Leone	1971-1978	27	3.8
Sandro Pertini	1978-1985	31	4.4
Francesco Cossiga	1985-1992	21	3
Oscar Luigi Scalfaro	1992-1999	18	2.6
Carlo Azeglio Ciampi	1999-2006	10	1.4
Giorgio Napolitano	2006-2015	12	1.3
Sergio Mattarella	2015-2022	15	1.8

agenda (on which he has a power of assent),[23] intervenes through other means, such as press releases,[24] letters addressed to the Vice-president of the C.S.M.,[25] or more hidden practices such as informal contacts.[26] He influences the C.S.M. mostly at an informal level through a thick web of agreements aimed at harmonizing conflicting views achieved in the context of confidentiality. In doing so, the Head of State safeguards the proper functioning of the C.S.M. and its relations with other constitutional bodies. He can take an active stance in patrolling the respective institutional boundaries, warning about trespassing.[27] This is crucial, especially in a context of polarization (with strong conflicts setting the judiciary and sectors of the political elite against each other) that characterized the Italian political landscape from the mid-1980s onward.

Tellingly, the relevance of the informal dimension on the smooth functioning of the system was explicitly acknowledged by the Constitutional Court in 2013.[28] The Court had to rule on a competence dispute ("*conflitto di attribuzione*") between the Head of State and the Prosecutor's office of the Palermo court in relation to investigation activities where the Head of State ended up being indirectly and occasionally wiretapped. For the Court, to carry out his tasks the Head of

[22]*See Portale storico della Presidenza Della Repubblica*, Archivio storico della Presidenza della Repubblica, https://archivio.quirinale.it/.

[23]*See* S. Erbani, *Il Presidente della Repubblica quale presidente del C.S.M.*, *in* La riforma della legislazione sul Consiglio superiore della magistratura 39–44 (R. Balduzzi ed., 2022) (reporting recent practice); Francesca Biondi, *Sessant'anni ed oltre di governo autonomo della magistratura: un bilancio*, 1 Quaderni costituzionali 13, 22 (2021) (discussing the staff of the Head of State scrutinizing the agenda for the meetings).

[24]*See* Press Release, Giorgio Napolitano, President of the Republic, Dichiarazione in qualità di Presidente del Consiglio superiore della magistratura sulla richiesta per l'apertura di una pratica inerente l'ispezione disposta dal Ministro della Giustizia presso la Procura della Repubblica di Trani (Mar. 17, 2010).

[25]*See* Giorgio Napolitano, Sulla giustizia: Interventi del Capo dello Stato e Presidente del Consiglio superiore della magistratura 2006-2011 117–30 (2011).

[26]*See* Giuseppe Di Federico, Ordinamento giudiziario: Uffici giudiziari, C.S.M. e governo della magistratura 277 (2019).

[27]For instance, a certain activism could be detected during the presidencies of Oscar Luigi Scalfaro (1999-2006) and Giorgio Napolitano (2006-2015), with the first rather oriented to the defence of the C.S.M., and the second more attentive to ensuring a balance and stressing the limits of the C.S.M.'s activity.

[28]Corte cost., 4 dicembre 2012, n. 1/2023, (It.).

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State must be granted "the broadest freedom of action and confidentiality" because some of his activities "do not have a formalized character."[29]

It is therefore necessary that the Head of State

> besides his formal powers, expressed through specific acts explicitly envisaged by the Constitution, carefully relies on what has been defined "persuasive power," essentially consisting in informal activities that can precede or follow the adoption of specific measures by him or by other constitutional bodies – both for assessing preventively their institutional appropriateness and for testing subsequently their impact on the system of relations between the State powers. Informal activities are therefore inextricably linked to formal ones.[30]

Interestingly, in an *obiter dictum* the Court extends the relevance of informality to all constitutional bodies, which the C.S.M. is, in performing their functions.

The exceptional involvement of the Head of State in C.S.M. activities and this second layer of informality through which the Head of State exercises his influence avoid the risks of direct involvement in the daily functioning of the C.S.M., which might obscure his role as a safeguard of the proper functioning of the institution, and shields the judiciary from contingent struggles.[31] Nevertheless, between 1985 and 1992 the Head of State *directly* and harshly confronted the C.S.M. and its Vice-president.[32] One could see the many episodes during that seven-year period as a violation of the informal rule requiring the Head of State to be active but rather "invisible," in order to avoid strains on the judiciary. In turn, the further "moving away" of the Head of State from the C.S.M. in the following years (which again, does not reflect his actual involvement which is still significant) can be seen as a reaction to the violation referred to.[33]

2. The Impartial Chairmanship of the Vice-President

As a substitute for the Head of State, the Vice-president of the C.S.M.—who is elected by the C.S.M. from among its lay members selected by Parliament—convenes and chairs the plenary meetings of the C.S.M., has the power to enact decisions delegated by the President, and is endowed with soft powers of coordination, stimulus, check, and persuasion regarding the collegiate body. According to formal rules, his role is strictly connected to the safeguard of the institutional balance within the C.S.M.[34] At the time it was envisaged, this was considered an optimal solution, given the conditions. Indeed, it was not regarded as a good idea to endow either

[29]*Id.* at para. 1.2.

[30]*Id.* at para. 8.3.

[31]*Id.* As, once again, the Constitutional Court puts it in the above-cited decision, the Head of State performs "functions of connection and balance, which do not imply the assumption, in its daily activity, of political decisions but require him to connect all the representatives of the main institutions". On the role of the Head of State as a president of the *see also* Stefano Sicardi, *Il Presidente della Repubblica come presidente del C.S.M.*, *in* MAGISTRATURA, C.S.M. E PRINCIPI COSTITUZIONALI 49–65 (B. Caravita ed., 1994).

[32]In 1985 the Head of State deployed an anti-riot unit of the *Carabinieri* in front of the C.S.M. building in order to prevent its members from discussing one of the points on the agenda of the meeting on some controversial statements by then Prime Minister, Bettino Craxi. This then entailed mass resignations by the members of the C.S.M. as a protest against the Head of State. It is useful to remind that Cossiga also broke another informal rule according to which the Head of States presides over the meeting of the C.S.M. for the election of the Vice-President but does not vote. On March 11, 1986, not only did the Head of State resort to his (only formal) right to vote, but his vote was crucial for the outcome of the election.

[33]Biondi, *supra* note 23, at 24.

[34]Rules on the Steering Committee, which are included in the Internal Rules of the CSM, are partly ambiguous as to its real powers and are characterized by "openness" and "porosity", because they are able to "absorb the concrete reality to which they have to adapt, to be filled with content depending on the actual power relations within the CSM, to be nurtured by and at the same time to conform to reality and power relations", Nicolò Zanon, *Brevi note sull'evoluzione della "forma di governo" del Consiglio superiore della magistratura, alla luce del ruolo del Comitato di presidenza*, *in* 5 QUADERNI COSTITUZIONALI 1–5 (2015).

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the Ministry of Justice or the head of the Supreme Court with the role of Vice-president. Yet, it placed the elected Vice-president in a delicate position.

The Vice-president's impartial role is reflected in the formal rule providing that election is by secret ballot.[35] Otherwise, it stems largely from informal institutions. For instance, it is a practice that the Head of State does not cast his vote in the election of the Vice-president, even though this happened in 1986, determining the outcome of the election. This generated huge controversy and remained an exception to the established practice. It is also an informal practice not to have official nominees, because any *laico* can in principle be elected to this position. But, to have a structured election process, there are informal talks on unofficial "candidates" and normally—as is explained *infra*—unofficial candidates (or *the* official candidate) happen to be identified at an earlier stage, when the Parliament elects the *laici*.

Furthermore, the practice is well established of not holding any debates among C.S.M.'s members about the Vice-president election. The idea is that they should not bring with them or implement a "political" agenda: The Vice-president is rather a safeguard of the internal equilibria within the C.S.M. Nevertheless, the Internal Rules of the C.S.M. are silent in this regard and do not explicitly forbid a debate. The resilience of this informal institution is testified to by the attempts made every now and then, yet without success, to introduce such a debate, based on the idea that the Vice-president has an active role to play.[36]

Interestingly, the recently appointed Vice-president of the C.S.M., even though it was expected that he would be elected, stated that he did not prepare any after-election speech because this would not be respectful towards the members of the C.S.M. Also, if a politician, the Vice-president surrenders their party membership when elected.[37]

The Vice-president is elected by a majority of C.S.M. members, yet there is a recognizable trend to identify potential Vice-presidents well before elections take place; at the moment of the selection of the *laici* by the Parliament. At that point, political parties represented in Parliament by way of informal talks, "identify" the potential Vice-president among the *laici* they elect. Talks take place not just among the parties but also involve *togati*, because *togati* are the majority and thus essential in electing the future Vice-president.[38] The aim of this practice is to allow the C.S.M. to achieve a consensual election after just one ballot.[39] This supposedly increases the Vice-president's impartiality and legitimacy.[40]

In the last 20 years in particular, the position of Vice-president has been fulfilled by fully-fledged politicians, while earlier the profile was that of a legal professional with some political experience. If one looks at Table 2 below, one can detect three periods: An initial one (1959–1976) where there was a practice of electing politically marked Vice-presidents, a second period (1976–2002) where the Vice-president had a more professional profile, and a third period (2002–now) where political profiles come to the fore again (Table 2). In any case, whether a politician or a personality with a more professional profile is elected, whether a consensual or a non-consensual election takes place, the "candidate" has to appear both sufficiently impartial and

[35]Presidential Decree No. 916 Art. 3 of 16 Sept. 1958. [hereinafter *C.S.M. Internal Rules*].

[36]Biondi, *supra* note 23, at 25. This happened, for instance, in July 1981, but the Head of State rejected the request based on the lack of any reference to a debate in the Internal Rules. In January 1986, the Head of State opposed any amendment of the Internal Rules for that purpose. In August 1994, the Head of State postponed the election of the Vice-president for a few days to allow mutual "familiarization" among the C.S.M. members (in other words: Informal talks) but reminded them that the Internal Rules rule out formal debate. Again, in 2010 a member of the C.S.M. reiterated the demand for a pre-election debate, but the proposal was soon dropped.

[37]This happened, e.g., when David Ermini was elected in 2018.

[38]This is possible because *togati* are usually elected before *laici*.

[39]Aniello Nappi, Quattro anni a Palazzo dei Marescialli: Idee eretiche sul Consiglio superiore della magistratura 150 (2014).

[40]This is not always the case though. Consensual voting did not happen in 2018 and 2023, when the Vice-president was elected by only a few votes after more than one ballot. This is considered by some to be a deviation from what should be the acceptable practice, but there is no consensus on that. Non-consensual election took place also in 1976, when Vittorio Bachelet was elected with two more votes than Giovanni Conso.

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Table 2. Profile of C.S.M. Vice-presidents (1959-2022)[41]

Vice-President	Period	Profile
Michele De Pietro	1959-1963	Politician (MP, Minister)
Ercole Rocchetti	1963-1967	Politician (MP, Vice-minister)
Adolfo Salminci	1967-1968	Lawyer
Alfredo Amatucci	1968-1972	Politician (MP, Vice-minister)
Giacinto Bosco	1972-1976	Politician (MP, Minister)
Vittorio Bachelet	1976-1980	Law Professor
Ugo Zilletti	1980-1981	Law Professor
Giovanni Conso	1981	Law Professor
Giancarlo De Carolis	1981-1986	Politician (MP)
Cesare Mirabelli	1986-1990	Law Professor
Giovanni Galloni	1990-1994	Politician (MP, Minister)
Piero Alberto Capotosti	1994-1996	Law Professor
Carlo Federico Grosso	1996-1998	Lawyer
Giovanni Verde	1998-2002	Law Professor
Virginio Rognoni	2002-2006	Politician(MP, Minister)
Nicola Mancino	2006-2010	Politician (MP, Minister)
Michele Vietti	2010-2014	Politician (MP)
Giovanni Legnini	2014-2018	Politician (MP, Vice-Minister)
David Ermini	2018-2022	Politician (MP)
Fabio Pinelli	2022-	Lawyer

experienced in political subtleties in order to entertain informal contacts within and outside the judiciary.

3. The Expanding Role of the Steering Committee

In order to fulfil his daily tasks, the Vice-president is assisted by a Steering Committee (*Comitato di presidenza*). This committee (mentioned only in the law but not in the Constitution) is composed of the Vice-president himself, the President of the Supreme Court, and the Prosecutor general, and enjoys some relevant powers. Some of those powers also broadened through practice. Thus, the Steering Committee decides on the rotating composition of the permanent committees, acts as catalyst for the C.S.M.'s activity, implements C.S.M. decisions, and also manages the budget and appoints members of the C.S.M.'s administrative structure.

The Steering Committee does not exercise these powers alone. Informal communication with all members of the C.S.M. (and the *togati* especially) takes place in the form of co-decision-making. Nevertheless, in the last 15 years, the Committee has acquired a more assertive role. This new role, allowing it in some instances to counter the dominance of council groups in the decision-making process,[42] is still controversial and is criticized at times.

[41]Table based on Piana & Vauchez, *supra* note 21, at 164 f.

[42]*See infra* § 2.2.

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One example of such controversies relates to the practice of "agreeing" on the composition of permanent committees or the appointment of the head of the C.S.M.'s Research Department, where *togati* recently reproached the Vice-president for not holding informal talks in advance in order to achieve a consensual approach. To which the Vice-president bluntly replied: "I do not intend to agree on committees and on the direction of the Research Department with the council group leaders, who no longer exist. This was a practice that I started, but I stopped it. This must be clear to everyone."[43]

Furthermore, the role of the Steering Committee extends to areas where the relevant responsibility is debatable, such as the external representation of the C.S.M. In 2011, the members of the Steering Committee were summoned to a parliamentary committee hearing during the discussion on the reform of the judicial system. On that occasion the C.S.M. approved a document—drafted by the Vice-president—containing the main lines the Vice-President would follow during his hearing before the parliamentary committee, acting as a representative of the C.S.M.[44] Still, it cannot be said at present whether or not we are witnessing the development of an established practice.[45]

Another example relates to so-called "*interventi a tutela*" (themselves an informal practice developed by the C.S.M. since the 1960s and formalized in the Internal Rules in 2009).[46] These are resolutions to protect individual judges or prosecutors or the judiciary as a whole, if the behavior (declarations, acts, etc.) of judicial or non-judicial actors is detrimental to the prestige and independent exercise of the judicial function. While, according to the Rules, it is the plenary that approves such a resolution, in 2011, during a plenary meeting, the Vice-president delivered a statement labeling a rally organized by a political party outside of a courthouse where an important trial was being held as a threat to judges' and prosecutors' independence. While not being technically a resolution of the C.S.M., this statement was meant to replace it due to the lengthiness of the relevant procedure. Seemingly, this practice is becoming increasingly frequent with the tacit and almost unanimous consent of the members of the C.S.M.[47]

To sum up, it appears that established practices involving the Vice-president shape an impartial role that is able to boost the overall legitimacy of the system. This goes together with the Steering Committee's inclusive approach to decision-making. Nevertheless, recent trends witness the partial erosion of these practices (based mostly on willingness to counter the grip of council groups), even though it is still not possible to talk about their replacement with new practices.

II. Togati *and* Laici *in the Daily Operation of the C.S.M.*

After having explored informal practices involving the President, the Vice-president of the C.S.M., and the Steering Committee, I now switch to those involving its elected members who are more directly involved in the C.S.M.'s daily functioning. As mentioned, one-third of them are university professors of law and lawyers with 15 years of practical experience elected by Parliament by a three-fifths majority (*laici)*, and two-thirds are ordinary judges and prosecutors elected from among and by their peers (*togati*). I will show in particular how informal rules and practices: i) create an "undue" connection between the *togati* and the judicial associations they are affiliated to,

[43]*Csm, alta tensione per la nomina del direttore dell'Ufficio Studi*, Il Dubbio, Jan. 13, 2022, https://www.ildubbio.news/carcere/csm-alta-tensione-per-la-nomina-del-direttore-dellufficio-studi-un0qh4pj. According to article 12 of the Internal Rules of the C.S.M., the head of the Research Department is appointed by the Council on the proposal of the Steering Committee after hearing the competent committee. As for the composition of permanent committees, the influence of council groups is widely documented. *See, e.g.*, Erbani, *supra* note 23, at 38 (listing the proposals to re-formalize the relevant powers).

[44]Nappi, *supra* note 39, at 100–102.

[45]Zanon, *supra* note 34, at 3.

[46]C.S.M. Internal Rules, *supra* note 35, at art. 21bis.

[47]Nappi, *supra* note 39, at 103 ff. In one case the Steering Committee resorted to a highly controversial press communiqué.

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and ii) increase their influence on the C.S.M.'s functioning, furthering the imbalance between the *togati* and the *laici*.

1. The Grip of Judicial Associations on the C.S.M.

According to the law,[48] elected members fulfil their functions independently and impartially. This is an important specification because the election mechanism naturally brings with it the risk of dependence and partiality. Notwithstanding, the set of rules regulating the duties and behavior of the C.S.M.'s elected members is still mostly informal. This issue was indeed targeted only in 2019 by an amendment to the ethical code, while in 2010 the C.S.M. clarified that its elected members should directly and independently deal with any pending issue, and not act as bearers of "the positions of political groups or individual politicians, judicial associations or individual magistrates, due to loyalties or electoral support."[49]

As regards the *togati*, this is one of the core issues today,[50] especially concerning their relation with judicial associations. Such associations, which are also called "*correnti,*" are groups of magistrates sharing common institutional and broadly speaking ideological views, originally gathered together on the basis, among other things, of their specific understanding of the role of the judiciary in society and of the reform agenda concerning the judiciary. The huge majority of Italian judges are members of a judicial association, and for any judge to be elected as a C.S.M. member, the backing of the relevant judicial association is essential.[51] This creates a direct link between *togati* and judicial associations.

In this regard, the practice of establishing "council groups" (*gruppi consiliari*) within the C.S.M. is notable. These are groupings of *togati* sharing membership of the same judicial association, similarly to parliamentary parties gathering together senators or deputies belonging to the same party. In that sense, they might be seen as the projection of judicial associations within the C.S.M. Council groups are created informally for coordination purposes at the first meeting of a newly elected C.S.M. For instance, in the current C.S.M. the judicial members belong to four judicial associations[52] and thus four council groups were established. These council groups do not enjoy any formal recognition either in the law or in the C.S.M.'s Internal Rules. More importantly, they play a prominent function in structuring the decision-making process. This is done through weekly meetings at which each group establishes (by majority) common stances on given issues to be discussed in the C.S.M.'s committees and the plenary.

The *togati* are expected to follow their group positions, and the practice of group decision-making is enforced through informal sanctions. In 2012, one *togato* was expelled from his group after he violated the loyalty duty by voting differently in the C.S.M.'s plenary meeting from the way the group had agreed upon.[53] On that occasion, the group even officially announced his expulsion during a plenary meeting, notwithstanding the lack of any legal recognition of these entities.[54] Furthermore, this practice is normally coupled with a practice of inter-group negotiation, where each group's decision is itself the outcome of vote trading and not just of

[48]Legge 24 marzo 1958, *supra* note 15, at art. 1.

[49]Cons. Superiore della Magistratura, 20 Gennaio 2010.

[50]*See* Carlo De Chiara, *Introduzione: associazionismo giudiziario*, 4 Questione Giustizia 176 f. (2015).

[51]*See* Carlo Guarnieri, *Judicial Independence in Europe: Threat or Resource for Democracy*, 3 J. of Representative Democracy 347–59 (2013); Benvenuti & Paris, *supra* note 1, at 1655–658.

[52]Magistratura Indipendente, with 7 members, Area with 6 members, Unicost with 4 members, and Magistratura Democratica with 2 members. There is also one "*indipendente*", i.e. he is not affiliated to any judicial association.

[53]Nappi, *supra* note 39, at 27. In the eyes of the "renegade", council groups should not be *loci* for decision-making, rather discussion.

[54]Biondi, *supra* note 23, at 17.

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intra-group discussion.[55] This can, at times, even result in inconsistent voting in the plenary by members belonging to the same group, as a strategy to limit electoral drawbacks.[56]

All in all, this informal build-up of decision-making through council groups makes it possible for judicial associations to have major influence.[57] It is indeed normal that a council group and the leadership of the respective judicial association agree on a common stance; thus, the official position of council groups mirrors that of judicial associations.

2. Power Asymmetry Between the Togati and the Laici

The situation is different for lay members. First, with the abovementioned exception of the Vice-president, their professional requirements are interpreted loosely. The practice is therefore to select these members based on party lines where political characterization and proximity prevail over the substance of professional requirements.[58] Given the three-fifths threshold for election, the majority and opposition parties informally agree on selection of lay members based on the size of parliamentary groups. For some, this results in detrimental outcomes similar to those observed for the judicial members.[59]

To make the election process more open and increase the professional authority of candidates, a recent reform made self-nomination possible. It is thus possible to formally apply as a candidate to be elected as a lay member of the C.S.M., without the need for support by parties or deputies and senators.[60] Yet, one can easily imagine the weakness of this mechanism, because parties still dominate the process. In any case, the lack of (professional) authority potentially increases lay members' weakness at different levels. It does not entail dependence on party loyalties alone, but also on knowledge and the expertise gap.

Some have documented a certain degree of acquiescence by the *laici* to the straightforward stances of the *togati*.[61] Their lack of coordination also contributes to this. As one former member put it, lay members are more disorganized

> also because – mostly coming from academic ranks – when the possibility for coordination or the need to define at an early stage a line of conduct among the four or five mostly akin members (or less distant ones [. . .]) emerged, precisely four or five different lines of conduct emerged, and coordination ended to be arduous or just impossible.[62]

This generates an important asymmetry allowing the *togati* to master preliminary activities before decisions are formally taken by the C.S.M. This includes the content of decisions but also the very possibility of a decision being taken on a specific matter, by determining priorities in the working calendar. Priorities in the treatment of dossiers are not always transparent; due to the lack of objective criteria, they respond to elusive rationales and sometimes appear arbitrary.

The weight of council groups has thus been strongly criticized, because they are seen (and probably function) mostly as channels of influence by judicial associations, partly bringing

[55]Negotiation can take place even outside the C.S.M., during congresses, conferences, seminars, and other meetings organized by judicial associations: PIANA & VAUCHEZ, *supra* note 21, at 178.

[56]NAPPI, *supra* note 39, at 62.

[57]At mostly the symbolical level, council groups reflect in seating arrangements within the plenary, given the practice that seating arrangements followed members' belonging to judicial associations. In 2010, following a decision by the Steering Committee, members were asked to seat themselves by age, with the Vice-president, the head of the Supreme Court, and the Prosecutor general in the middle.

[58]Biondi, *supra* note 23, at 20 f.

[59]Zanon, *supra* note 34, at 446.

[60]Following this reform, for the elections of January 2023, more than 150 candidates (one third of them being women) applied.

[61]*See* Zanon, *supra* note 34; NAPPI, *supra* note 39, at 31.

[62]Zanon, *supra* note 34.

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decision-making outside the institution. As a reaction, this sparked attempts at achieving a greater formalization of the decision-making procedure. Among the most debated issues during the reform of the C.S.M.'s Internal Rules in 2016 was the demand for greater transparency of working committees, whose activity happens behind closed doors.[63]

Nevertheless, one cannot deny the positive side of this practice, in that it structures the decision-making process. The C.S.M. is a body endowed with a wide spectrum of competences. Besides the more general ones concerning the judiciary as a whole (opinions on government bills, public statements, etc.), there are more specific ones concerning, for instance, the treatment every year of thousands of individual dossiers concerning just professional assessments, promotions, and appointments. Each of the C.S.M.'s members is supposed to know and decide on each individual dossier. It is easy to understand that C.S.M. members cannot be directly aware of every single dossier and need to rely for the majority of them on other sources of information. This is where the structuring function of council groups comes into play, through an internal division of labor able to detect those most problematic dossiers.[64] Obviously, this in turn reinforces the asymmetry between *laici* and *togati*, because the former are not organized in groups and tend to act through a rather individualistic approach, besides suffering a knowledge gap, as elucidated in the next section.

III. Knowledge Gap and the Informal Influence of the Administrative Technostructure

The C.S.M. operates with the assistance of a wide administrative technostructure supervised by the Steering Committee under the direction of a Secretary-general. The administrative technostructure is composed of the Secretariat and the research department.[65] This apparatus is relevant both for its characters and for its functions.

On the one hand, until 2022 the Secretariat was formally composed partly of magistrates (*magistrati segretari*) appointed by the C.S.M., and partly of officials selected by public competition. On the other hand, the practice developed of appointing magistrates for almost all the positions, the relevant legal norms being considered by the C.S.M. to have been tacitly repealed (!).[66] In 2022, this prompted the legislator to enact new provisions requiring that at least one third of the officials of the Secretariat be recruited from among high-ranking officials from the constitutional bodies or the public administration, and one third of the officials of the Research Department from among university researchers or professors in the legal field or lawyers with ten years of experience.

Furthermore, appointments of *magistrati segretari* are based on their affiliation to judicial associations and the relative weight of council groups. The magistrates appointed to such administrative positions even participate in the weekly meetings of the relevant council groups, and their appointment is often one of the first steps in a judicial career, as well as in the parallel career within the association they belong to.[67] Between 2010 and 2014, there was an attempt by the Vice-president to claim a role for the Steering Committee in the selection of this staff, but without

[63]Such discussion on the reform of working committees' internal procedures resulted in very limited progress though. These procedures still very much contrast the high transparency of the plenary meetings, that can be attended by journalists and are video broadcasted.

[64]*See* Antonio Patrono, *Le correnti della magistratura e il Sistema elettorale per i componenti togati del C.S.M.*, *in* La riforma della legislazione sul Consiglio superiore della magistratura 109 (R. Balduzzi ed., 2022).

[65]Articles 7 and 7bis l. 195/1958 and articles 9-12 of the Internal Rules of the C.S.M. The Secretariat was composed of executives ("*magistrati della Segreteria*" selected from among the magistrates by the C.S.M.; the same applies to the Secretary-General and his adjunct) and officials ("*funzionari addetti ed ausiliari*", selected by public competition). In turn, the Research Department is composed of executives and officials and is directed by a member of the C.S.M.

[66]*See* Giovanni Mammone, *Quale riforma per il Consiglio superiore della magistratura?*, *in* La riforma della legislazione sul Consiglio superiore della magistratura 85 f. (R. Balduzzi ed., 2022). It should be mentioned that the legal provision reserving a share of positions in the administration to magistrates was itself the formalization of an initially informal practice.

[67]Zanon, *supra* note 34, at 448 ff.

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success.[68] Again, following the resilience of these informal institutions, the 2022 reform endowed a committee composed of two top magistrates and three full professors with the task of selecting the staff.

Clearly, the positions of the Secretary-General and, to a lesser extent, of the Head of the Research Department are particularly sensitive. The Secretary-General first used to be appointed through a system that allowed for some influence of council groups, and the legislator recently increased the powers of the Steering Committee. There was no amendment of the rules regarding the Head of the Research Department, who is appointed by the C.S.M. following the proposal of the Vice-President and the opinion of the competent committee,[69] even though her appointment sparked controversy, with the C.S.M. recently refusing by a large majority to endorse a proposal of the Steering Committee, due to its decision not to negotiate the appointment informally. All in all, (re)formalization of recruitment of the administrative staff is noteworthy, but it is too soon to draw any conclusions.

On the functional side, the administrative technostructure carries out important preliminary activities before any decision-making process can unfold. Just think of the preparation of reports and dossiers by the Research Department, or the role of the Secretariat in drafting the reasoning for decisions relating to appointments of court presidents, transfers, secondments, etc.[70] According to some accounts, magistrates seconded to the Secretariat and the Research Department play a role that sometimes replaces that of the C.S.M. members (due to a lack of time for proper examination of the dossiers) in articulating the reasoning for resolutions and other decisions. All in all, this creates a situation in which the *laici* depend on the preliminary activities of non-elected expert magistrates, who in turn are conditioned by *togati*, and ultimately judicial associations by means of loyalty ties.[71] One may add that members of the technostructure are employed for a much longer time than C.S.M. members, thus representing the institutional memory of the C.S.M.. This in turn emphasizes the imbalance with the members of the C.S.M. who change every four years.

To conclude, this is a second line of dependence—in terms of "information asymmetry"[72]—of lay members, favored by the influence of the *togati* and their council groups. As a former member of the C.S.M. put it bluntly,

> All considered, a lay member is, at its beginnings, essentially 'in the hands' of the relevant *magistrato segretario* (each committee has two of them), whom of course he did not select but just found already assigned and who [. . .] usually (yet with some commendable exceptions) actually 'responds' to the judicial association who 'brought' him in the C.S.M.[73]

C. Governing Judicial Careers: Confronting Informal Practices and the Push Towards Formalization

Having explored how informal institutions shape the C.S.M.'s internal balance and decision-making dynamics in general, I now look more specifically at informal institutions affecting the

[68]Nappi, *supra* note 39, at 157.

[69]C.S.M. Internal Rules, *supra* note 35, at art. 11.

[70]Piana & Vauchez, *supra* note 21, at 167–84, 89–93.

[71]Nappi, *supra* note 39, at 157; Zanon, *supra* note 34, at 450. It also happened that a magistrate of the Research Department drafted on behalf of a judicial member a counter-memorandum to a memorandum drafted by a lay member whose criticism of this informal practice resulted in a protest from the magistrates of the administration supported by their peers, members of the C.S.M.

[72]On information asymmetry in a different jurisdiction, see Adam Blisa & David Kosař, *Court Presidents: The Missing Piece in the Puzzle of Judicial Governance*, 19 German L.J. 2031, 2067 (2018). *See also* Kosař, *supra* note 14, at 390.

[73]Zanon, *supra* note 34, at 449.

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C.S.M.'s set of powers relating to the careers of judges, namely the appointment of court presidents and professional assessment.

I. Negotiating the Appointment of Court Presidents

The appointment of court presidents in Italy is highly formalized.[74] The law identifies three criteria: Seniority, merit, and aptitude, which the C.S.M. has detailed in a very baroque manner through quite a number of "general and specific indicators" and so-called "comparative criteria."[75] It is commonly acknowledged that this hyper-regulation did not, in practice, curb the C.S.M.'s discretion; quite the contrary. This opened up room for informal institutions whose rationale is not necessarily the one inspiring formal rules.

The so-called "*nomine a pacchetto*" ("appointment packages") are a very common example of this. This is a widely documented practice[76] that favors agreements among "council groups" to divide among themselves the top positions in courts (or other important positions).[77] When a vacancy at a court is announced, it is not filled immediately and is postponed until a sufficient number of vacancies can be accumulated in sealed agreements on "appointment package(s)." The plenary of the C.S.M. then votes on the packages altogether, and not for each individual candidate separately. By allowing a single vote to fill a number of positions, this practice favors a system where judicial positions are divided up among the different judicial associations who agreed upon the package (a phenomenon labeled as "*lottizzazione*").

This practice clearly depends on the cohesiveness of "council groups" (ensured by their decisions being taken by majority, as referred to in the previous paragraph), because such cohesiveness allows for only occasional inter-group agreements. Yet, even after lengthy negotiations,[78] decisions are not always unanimous, for instance when two distinct packages are presented by opposing "council group" coalitions.[79] Agreements may even fail[80] and in some cases prospective agreements can fix this failure at the next "round."[81] However the dynamics unfold, it is still up to the judicial members to lead the game. This also entails establishing informal channels of communication with other judges or prosecutors, but also with actors outside the C.S.M., such

[74]On court presidents see Blisa & Kosař, *supra* note 72.

[75]Circolare CSM 28 luglio 2015, n. P-14858-2015 art. 6–35, G.U. (It.).

[76]Besides newspaper accounts and reports by members of the C.S.M., this practice is acknowledged by many magistrates who criticize it. Also, Heads of State in their function of president of the C.S.M. often condemned the consequences deriving from this practice. *See* E. Antonucci, *I presidenti della Repubblica e le degenerazioni delle correnti nella magistratura: da Pertini a Mattarella (1978-2020)*, *in* 2 Storia e Politica 289-324 (2021).

[77]The importance of a position should be understood here not just in terms of the powers connected to it, so that, e.g., it once used to be common to talk in dark corridors of the position of Prosecutor-general as counting as two Ministries. Importance relates also to visibility or to its significance for the purpose of a prospective judicial career.

[78]Exemplary in this regard is what happened when the C.S.M. had to fill a number of positions in the Milan district: *procuratore della Repubblica*, Court of Appeal president, president of the *Tribunale di sorveglianza*, president of the *Tribunale per i minorenni*, adjunct investigating magistrate ("*giudice per le indagini preliminari*"), and six more positions as presidents of chambers of the Milan court. The complexity of the situation slowed the procedure to such a point that, on initiative of the Vice-president, the C.S.M. anticipated the appointment of the *Procuratore della Repubblica*, because it was considered inappropriate to decide on this after the administrative election for the mayor of Milan, to be held in few-days' time. However, this upset the equilibria negotiated by judicial associations.

[79]*See* G. Di Federico, *Il contributo del C.S.M. alla crisi della giustizia*, Relazione tenuta il 19 ottobre 2012 in occasione dell'Incontro di studio su 'Le novità in materia di ordinamento giudiziario' organizzato dall'Associazione italiana fra gli studiosi del processo civile, 12 (2012).

[80]Nappi, *supra* note 39, at 61, 80. This can result in confrontational press communiqués put out by "losing" judicial associations, as happened in 2017 with the appointment of Giovanni Melillo as General-Prosecutor in Naples over Federico Cafiero De Raho.

[81]Nappi, *supra* note 39, at 60 f.

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as politicians, as the "Palamara affair" witnessed to the highest degree.[82] As a member of the judiciary put it, "lay members [. . .] elected by Parliament act as bit players."[83]

There are three main negative consequences of this practice. The first relates to the transparency of the relevant decisions. The second, possibly more serious, is the inefficiency deriving from belated appointment to such positions, in some cases for as long as a year or more. Thirdly, because the process is not transparent and the decision-making rationale does not straightforwardly rest on the principles defined by the law (merit and especially aptitude to hold a given position), this generates a pathological malfunction of the legal system. The Supreme Administrative Court (*Consiglio di Stato*), which has the competence to review C.S.M. decisions (except for disciplinary decisions), indeed often annuls decisions on appointments of court presidents, considering their motivation inadequate.[84] This in turn increases delays even more and determines institutional strains among two constitutional bodies.

This explains why there have been attempts to counter this practice (and its consequences in particular) by formalizing the process, attempts which followed the Head of State's official stances against the practice. In 2014, time limits were introduced for appointment to top positions, and the replacement of the *rapporteur* in charge of the dossier was envisaged in the event of non-compliance. In 2016, the Internal Rules of the C.S.M. established that appointment packages relating to the same court could not be voted all together, imposing a separate voting process for each candidate, and allowed for alternative candidates being proposed during plenary debate.[85] The same regulation also allowed for greater transparency of the meetings of the competent committee.[86] Finally, the reform of judicial organization approved in 2022 introduced quite a few innovations, forbidding "appointment packages" in principle, imposing duties of greater openness and transparency, setting stricter provisions as to the criteria to be followed and the sources of information.[87] This indicates a strong trend towards formalization that can be detected also in relation to other areas of judicial governance following the Head of State's official stances.

II. Upwardly Leveled Professional Assessment

A similar push towards formalization can also be observed in relation to professional assessment. Indeed, the Italian judicial assessment system is highly formalized and, on paper, very effective—possibly one of the strictest among EU countries.[88] In fact, after a reform in 2006, every judge (and

[82]*See* Maurizio Catino, Cristina Dallara, & Sara Rocchi, *The Organizational Reasons for Wrongdoing. The Case of Italy's Superior Council of the Judiciary (C.S.M.)*, 79 CRIME, L. & SOC. CHANGE 453, 458–59 (2023). The Palamara affair also resulted in the publication of whatsapp chats between Luca Palamara at the time when he was a member of the C.S.M. and members of the judiciary relating to negotiations for appointment to important judicial positions, where personal relationships and not just judicial association loyalties came into play. Some of these messages can be read at https://www.laverita.info/online-i-messaggi-con-pina-casella-e-antonella-ciriello-2646302762.html. Apparently, there are also "waiting room practices" with meetings between potential candidates and C.S.M.), *Via la toga: il C.S.M.*, *in* IL DUBBIO, Nov. 22 2022. These accounts shockingly resemble the many accounts from 19th-century France, when magistrates visited the Ministry of justice to endorse their promotions: MARCEL ROUSSELET, HISTOIRE DE LA MAGISTRATURE FRANÇAISE. DES ORIGINS À NOS JOURS 130-153 (1957). *Compare Via la toga: il C.S.M. sospende Palamara*, IL DUBBIO, July 13, 2019, https://www.ildubbio.news/carcere/via-la-toga-il-csm-sospende-palamara-gpv9ecsu; *Autopromozioni o vassallaggio? I reati nascosti dell'epopea C.S.M.*, IL DUBBIO, Nov. 2, 2022, https://www.ildubbio.news/cronache/autopromozioni-o-vassallaggio-i-reati-nascosti-dellepopea-csm-gvoy855o.

[83]*See* Paolo Borgna, *L'inchiesta di Perugia. L'autogoverno dei magistrati non è più una virtù? Cambiamo*, AVVENIRE, May 28, 2020, https://www.avvenire.it/opinioni/pagine/lautogoverno-dei-magistrati-non-pi-una-virt-cambiamo.

[84]The intervention of the supreme administrative court follows a high number of complaints, between 21% and 35% of the appointments between 2011 and 2018, with a peak of 66,7% in 2010. Only Spain has similar features. *See, e.g.,* M. Fabri, *La magistratura italiana e quelle europee: uno sguardo comparato*, *in* STORIA DELLA MAGISTRATURA 157 (Scuola Superiore della Magistratura, 2022).

[85]C.S.M. Internal Rules, *supra* note 35, at art. 38.

[86]*Id.* at arts. 29, 30, 37.

[87]Legge 17 giugno 2022, n.71 art. 2, G.U. (It.).

[88]The rules are contained in the law, in the Internal Rules of the C.S.M., and in Circolare C.S.M. n. 20691/2007.

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prosecutor) undergoes professional assessment every four years, while before 2006 there were four assessment rounds in the whole of a magistrate's career.[89] The C.S.M. is the authority formally assessing the judge, but it does so relying on an individual report by the head of that judge's court complemented by an opinion of the local judicial council (*consiglio giudiziario*). The proposal is drafted taking into account the parameters and the relevant indicators established by the C.S.M.[90] and relying on different sources of information.[91]

The system is not considered to be effective in its functioning for multiple reasons. First, assessment is positive in the great majority of cases. This did not change after the 2006 reform. It is reported that between 1979 and 2007, negative assessment varied between 0.4 percent and 0.9 percent concerning usually magistrates who were awarded disciplinary sanctions or were awaiting criminal proceedings. Similar features appear with reference to the following period, with "positive" assessment in 98.22 percent (also faced by magistrates under disciplinary sanctions or serious work delays),[92] "non-positive" assessment in 1.14 percent of the cases, and "negative" assessment in 0.65 percent of cases.[93]

These features are the result of informal practices involving court presidents and local judicial councils, both tending to be highly encomiastic in assessing judges within their respective competences. This can probably be explained by personal relationships, making it difficult to officially provide negative opinions about colleagues, and/or again as a consequence of judicial associations' corporatist attitudes in local judicial councils. For instance, it is not common practice for local judicial councils to rely on a diversified set of sources of information to draft their opinions, taking into account lawyers' complaints. Exceptions could be noted though, with some local judicial councils being more willing to involve lawyers.[94]

An additional problem is that assessment strongly emphasizes merits, but the aptitude to hold a specific position less so, as it does not allow to differentiate among magistrates who received positive assessment.[95] The lack of articulation in assessment allows for the C.S.M. to have greater discretion when deciding on appointments to specific positions.[96] A high degree of discretion, which naturally entails conflicting views, might not be a problem; quite the contrary, because discretion is inherent in a constitutional body of a collegiate nature.[97] The problem rather lies in the parameters funneling discretion: While clear and understandable on paper, they change nature in practice, leaving a wide margin (actually and even more so in the public's perception) for personal loyalties and group allegiances.

[89]According to the system introduced between 1967 and 1973, the 4 assessments happened two years after recruitment for promotion as a first instance judge (*magistrato di tribunale*), then after 11 more years for promotion as a second instance judge (*magistrato d'appello*), then after 7 years to be promoted to being a third instance judge (*magistrato di cassazione*), then after 8 years to be promoted as a third instance judge with executive functions (*magistrato di cassazione con funzioni direttive*). Before 1967, the same four-step promotions followed a public competition open to magistrates. *See* Giuseppe Di Federico, Recruitment Evaluation and Career of Judges and Prosecutors in Europe. Austria, France, Germany, Italy, The Netherlands and Spain 138–42 (2005) (on the system before 2006).

[90]*See* G. Scarselli, *Note de iure condito e de iure condendo sulla valutazione di professionalità dei magistrati*, *in* L'ordinamento giudiziario 74 (Scuola Superiore della Magistratura, 2022).

[91]The complexity of this procedure entails delays in assessment, sometimes for well over a year.

[92]The C.S.M. in 2014 discussed the binding nature of disciplinary sanctions when it comes to professional assessment, under the stimulus of the Steering Committee, but did not reach any decision after the judicial members almost unanimously opposed it on September 10, 2014.

[93]*See* M. Volpi, *La legge sull'ordinamento giudiziario a tredici anni dalla riforma: Bilancio e prospettive*, *in* L'ordinamento giudiziario 49 (Scuola Superiore della Magistratura, 2022); Fabri, *supra* note 84, at 153 f. (holding that this might be the result of the bad design of the assessment scale).

[94]Scarselli, *supra* note 90, at 78. This was the case of the *Consiglio giudiziario* in Milan.

[95]*See* Francesca Biondi, *I comportamenti del magistrato tra etica, professionalità e disciplina*, *in* L'ordinamento giudiziario 170 (Scuola Superiore della Magistratura, 2022).

[96]Mammone, *supra* note 66, at 76.

[97]*See* S. Benvenuti, *La dirigenza degli uffici giudiziari. Riflessioni in una prospettiva comparata*, *in* La riforma del C.S.M. Snodi problematici e prospettive di riforma. Atti del Seminario Annuale 175 (Federica Grandi, ed., 2020).

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A third problem is the overlap with disciplinary accountability.[98] Due to the upwardly leveled professional assessment, the disciplinary system tends from a functional perspective to replace professional assessment, which entails both its distortion (because the disciplinary body deals with inefficiencies that should not incur disciplinary sanctions in principle) and an increased number of procedures.[99] All in all, this set of negative effects of informal institutions in the area of professional assessment pushed the legislator into introducing stricter regulation.[100]

III. Resisting the Weight of Informal Loyalties and the Push Towards Formalization

What comes to surface is the considerable influence of council groups (as a projection of judicial associations within the C.S.M.) in deciding on appointments of court presidents through intense, and at times lengthy, negotiation. Furthermore, I stressed the trivialization of one fundamental tool for judicial accountability, such as professional assessment, as a consequence of informal relations taking place at different levels: Courts, with the deference of court presidents towards judges they are supposed to assess, local judicial councils, and the C.S.M.

To complete this picture, one should stress that, strong influences in these two crucial areas of magistrates' careers notwithstanding, an opposite trend exists, countering the weight of corporatism and informal distortions. The adoption of new formal rules in 2022 in the areas of the judicial appointment of court presidents and of professional assessment are actually a direct consequence of this.

As to appointments, one should mention the increasingly recurring and inflexible statements of the Head of State in relation to the grip of judicial associations on the C.S.M.'s decisions, especially those relating to court presidents.[101] Tangible attempts to oppose such informal practices in both areas have been made by the Vice-President and the Steering Committee. Their opposition to positive assessment succeeded when they approached the issue proactively,[102] otherwise, corporatist attitudes prevailed, also entailing uneven and inconsistent assessments over time. All in all, this contributed to the sparking of public debate, making these practices increasingly costly and preparing the ground for and legitimizing legislators' interventions.

To conclude, informal institutions in these two areas of judicial governance paint a grim picture of what happens behind the scenes of formal rules, yet this picture is more nuanced and dynamic than one might expect. In this sense, we have witnessed new practices coming into existence in recent years, which pushed for formalization aimed at neutralizing those informal practices that are widely considered strongly negative.

D. Conclusion: The Pervasiveness of Informal Institutions in the System of Judicial Governance

This article has dealt with a set of informal institutions in judicial governance. It has provided details of how these institutions work and shed light on the actors shaping or opposing them, exploring what the consequences thereof are. The analysis displays a landscape of interactions concretizing such practices. Some of these are hidden, some are not. Some take place among judicial actors, some originate among judicial and non-judicial actors, and some among non-judicial actors only. Some are based on patronage, some on personal loyalties, some are more ideological in character. Yet, they all in one way or another affect judicial governance.[103]

[98]Biondi, *supra* note 95, at 171 f.

[99]These are around 150 per year.

[100]*See* Legge 17 giugno 2022, n.71 art. 2, G.U. (It.).

[101]Antonucci, *supra* note 76.

[102]Nappi, *supra* note 39, at 127 ff.

[103]*See* Björn Dressel, Raul Sanchez-Urribarri & Alexander Stroh, *Courts and Informal Networks: Towards a Relational Perspective on Judicial Politics Outside Western Democracies*, 39 Int'l Pol. Sci. Rev. 573, 576 (2018).

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The Italian case-study proves how pervasive informal institutions are in judicial governance and gives evidence of the scope of their operation. These concern the Head of State acting as C.S.M. President, the C.S.M. Vice-president and the Steering Committee, judicial and lay members, the administrative apparatus, actors formally outside the system of judicial governance (political parties, individual politicians, or judicial associations), court presidents in their relationship with "their" judges, and local judicial councils. No one escapes informality. This confirms what has been suggested so far about the importance of informal institutions in established democracies, and not just "where formal institutions are new, underdeveloped, or dysfunctional."[104]

It is useful to briefly restate the informal rules and practices detected, emphasizing the factors behind the relevant patterns, their origin, the functions played by informal judicial institutions, and the positive or negative assessment of informality.

As regards the *Head of State*, informal institutions relate to his quantitatively limited participation in meetings coupled with the use of alternative channels of influence based on confidentiality and self-restraint. These informal institutions—whose origin[105] cannot be precisely stated but is rather a process—are essential for the President of the C.S.M. to fully play his role of safeguarding a delicate system of checks and balances within (balances between its multiple components) and outside the C.S.M. (respect for institutional boundaries between the C.S.M., State powers, and other constitutional authorities). Also, it serves—as far as possible—to shield the judiciary from controversies. There have been specific interruptions to some of these informal institutions, but they have proved resilient. The subsequent reaction has made them even more robust.

As for the *Vice-president* and his appearance of impartiality, I have referred to practices related to the election process, complementing the few formal provisions on a secret ballot set in the C.S.M.'s Internal Rules. Interestingly, informal institutions extend beyond the very moment of the Vice-President's election, to involve also actors formally outside the system. This is the case for political parties informally choosing, while electing lay members, and through talks with judicial members of the C.S.M., the would-be Vice-president. In general, his impartial appearance does not seem to be challenged by the prevailing political profile of the Vice-presidents elected over the years—a profile that responds to a need for "political wisdom." Then, impartiality and consensus spill over in the exercise of the functions that the Vice-president is assigned to by formal rules through resorting to shared decision-making. However, I reported a breach of this practice—the Vice-President refusing to involve the C.S.M.'s members in some important decisions—to be understood within the context of an expanding role for the Vice-President and the Steering Committee to counter the grip of council groups. Whether we are witnessing a shift from one informal practice to another it is still too soon to say.

In general, institutional choices relating to the chairmanship appear wise, with the relevant informal practices largely contributing to the functionality of the system. This might have partly neutralized those conflicts and excessive imbalances experienced in systems where different arrangements have been devised, bestowing the steering function on personalities directly involved in confrontational dynamics.[106]

As regards the *togati* and *laici* informal institutions are more straightforward and directly compete with formal rules. For the *togati*, the practice of establishing council groups challenges

[104]Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSP. ON POL. 37, 38 (2012).

[105]HELMKE & LEVITSKY, *supra* note 4, at 730.

[106]*See* Bianca Selejan-Guțan, *Romania: Perils of a "Perfect Euro-Model" of Judicial Council*, 19 GERMAN L.J. 1707, 1734 (2018); Samuel Spáč, Katarina Šipulová & Marina Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia*, 19 GERMAN L.J. 1741, 1749, 1752, 1755 (2018); Aida Torres Pérez, *Judicial Self-Government and Judicial Independence: The Political Capture of the General Council of the Judiciary in Spain*, 19 GERMAN L.J. 1769, 1783 f. (2018).

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the provisions on independence and impartiality. Yet this practice—that is rather weakly countered and appears to be very resilient—not only has a loyalty rationale but can also be explained by typically organizational needs (structuring decision-making). The same goes for the *laici*, whose relevant informal institutions challenge their legal framing as independent and impartial. I mentioned the loose interpretation of their professional requirements which entails both politicization and a lack of authority, letting them at the margins of the C.S.M.'s decision-making. This brings us to clear asymmetries. Exceptions usually concern the Vice-president and those elected members coming from academia.

Informal institutions relating to the administrative technostructure are multiple, all of them in the direction of strengthening the corporatist tendencies of the C.S.M.'s decision-making. Again, counter-trends emerge, both informal (related to the attempt by the Steering Committee to assert its own role) and formal (by incremental attempts to eliminate these practices through legislation). Despite the scarce attention paid to it, the salience of this dimension is due to the practice of the C.S.M.'s (lay) members of just relying on the dossiers prepared by these magistrates, without "fighting back" (while the opposite has actually happened).

The hold of council groups on decision-making reflects to the highest degree in the appointment of court presidents through "appointment packages" resulting from lengthy negotiations taking place within and outside the institutional walls of the C.S.M. This has fundamentally negative consequences in terms of efficiency, the functionality of the legal system, and transparency. This possibly affects citizens' trust overall but may affect even magistrates' trust of their court presidents. Judicial corporatism is a problem that starts to hurt the judiciary too. The outcome of a referendum organized by the *Associazione Nazionale Magistrati* among its members on the introduction of the selection by drawing lots of their "representatives" within the C.S.M.[107] and a survey of the European Network of Councils for the Judiciary on magistrates' perceptions of the correctness of appointments of court presidents are telling. Here, too, trends towards formalization are strong, notwithstanding the resistance of judicial associations' leaderships. Similar considerations hold for professional assessment, even though in this area it might prove more difficult to escape the weight of informal practices.

Taking the described phenomena together, two types of factors behind the relevant patterns stand out. First, informal institutions come to the surface due to legal factors, i.e., the flexibility of the legal framework, which may or may not be desired. Flexibility can be desired, for example when the legal framework is intentionally open to multiple developments, as in the case of practices relating to the position and powers of the Head of State and its relation to the Vice-president and the C.S.M. at large, or the powers of the Steering Committee defined in the C.S.M.'s Internal Rules. Flexibility is undesirable when the legal framework is too complex or has loopholes, allowing for informal practices that do not necessarily fit with the legal rationale. This is the case with the hyper-regulation of the criteria for appointing court presidents (complexity), or the lack of regulation of council groups, e.g., their prohibition or the ban on members of the technostructure participating in council groups' activities (loopholes). The second type of factor pertains to the weight of extra-legal (f)actors distorting the legal setting through informal practices. This is the case with judicial associations, which affect the operation and organization of the C.S.M. to a higher degree (as in the case of the council groups, or in appointments to the administrative technostructure) or its judicial governance functions (agreements for appointments of court presidents, professional assessment). Also, the weight of political parties is quite obvious in the informal institutions relating to the election of non-judicial members of the C.S.M.

To conclude on the positive or negative assessment of informal institutions as to their effect on core judicial values and the quality of democracy, the impact seems clear-cut on accountability, transparency, efficiency and trust, yet there is no straightforward general answer on the direction

[107]The result was 60% to 40% against a government bill aimed at neutralizing the grip of judicial associations on the election process.

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of such impact, which is both positive and negative on a case-by-case basis. For sure, informal institutions should not be seen only as negatives. This is not just because some informal institutions are positive, while others are negative. There are also cases where the same informal institution has negative and positive effects at the same time. One example from the pool of those mentioned is the sharing by the Steering Committee of its decision-making powers with the members of the C.S.M.: This is a positive practice, because it avoids tensions that can affect the Vice-president, but at the same time it further increases the grip of the *togati* on the actual functioning of the C.S.M.

Overall, the formal template of judicial governance based on a delicate balance of accountability looks in practice to be stretched very far, in general and especially when it comes to the appointment of court presidents (but for other dimensions of judicial governance this might not be necessarily true).[108] This is still the case notwithstanding the counterweight of other actors within and outside the C.S.M. As observed elsewhere, over time this model has contributed to securing the independence of the judiciary in a post-authoritarian setting, but the picture is less satisfactory in terms of judicial accountability's efficiency, transparency, and trust. It is possibly still tenable in terms of legitimacy, thanks to the moderating role of the Head of State and the pressures inducing changes in judicial culture and ethics. As someone put it, prefiguring future developments,

> Something has changed. There is a different dynamic, in the functioning of the C.S.M., compared to what was imagined by the drafters of the Constitution. And at this point the composition of the C.S.M. should be reconsidered. Also because the decision to have a majority of *togati* was the result of a resolution of the Constituent Assembly passed by a whisker.[109]

Whether such a far-reaching change will happen or not may depend on how informal institutions will develop in the future.

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[108] Kosař, *supra* note 20, at 1597.

[109] *Intervista al Costituzionalista Giovanni Guzzetta*, Il Dubbio, Sept. 30, 2018.

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