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GENDER, INFORMALITY AND COURTS

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Abstract

Many judiciaries in the world struggle with the representation of women on the bench. Even in countries that invested a lot of energy into increasing the diversity of the judiciary the situation has improved only incrementally. At the same, in those countries where women judges outnumber their male colleagues, women still fail to be represented in the positions of power – at the apex courts, at judicial councils, among court presidents and other crucial positions within judicial governance. This may undermine trust in and the legitimacy of the judiciary. Much of the existing research that tackles this problem focuses on formal institutions. Yet, the problem often lies elsewhere, as it is informal institutions that may have more significant repercussions for horizontal and vertical gender segregation in judicial governance. The aim of this chapter is three-fold. First, it analyses two dominant theoretical approaches (neo-institutionalism and relational perspective) to how to study gendered informal practices and networks affecting the judiciary. Second, it identifies informal elements (practices, institutions and networks) that hamper or improve the role of women in the selection and promotion of judges. Third, it discusses the methodological challenges there are in studying the role of gender in informal judicial institutions and proposes avenues for further research.

Keywords

gender equality, judiciary, judicial governance, informal institutions

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GENDER, INFORMALITY AND COURTS

David Kosař and Marína Urbániková[1]

1. Introduction

It is increasingly accepted that it is important to have a fair representation of women[2] in the judiciary. Beyond the intrinsic value of having more women in key decision-making roles, gender diversity is important because it may improve the legitimacy of[3] and public confidence[4] in the judiciary and the structural impartiality of courts,[5] and enhance the diversity of experience and knowledge,[6] followed by increased quality due to the enlarged pool of candidates.[7] The presence of women judges signals equality of opportunity for women in the legal profession who aspire to judicial office and provides encouragement and active mentoring for women in that profession.[8]

While the literature on the effects of a judge's gender on substantive decision-making is largely inconclusive,[9] women judges are likely to have more empathy with women litigants and witnesses, educate and civilise their male colleagues on gender issues, and bring a

[1] David Kosař is an Associate Professor at the Faculty of Law and the Head of Constitutional Law Department at Masaryk University in Brno; and Marína Urbániková is an Assistant Professor at the Judicial Studies Institute and at the Department of Media Studies and Journalism of Masaryk University in Brno. The research carried out by the author for the purposes of this article has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (INFINITY, grant no. 101002660).

[2] We focus on the gender aspects of informality. See Josephine J. Dawuni. INTERSECTIONALITY AND WOMEN'S ACCESS TO JUSTICE IN AFRICA (2022); Alice J. Kang, Miki Caul Kittilson, Valerie Hoekstra and Maria C. Escobar-Lemmon. 'Diverse and Inclusive High Courts: A Global and Intersectional Perspective'. 8 POLITICS, GROUPS, AND IDENTITIES 812 (2020); Sally Jane Kenney. 'Measuring Women's Political Empowerment across the Globe'. In MEASURING WOMEN'S POLITICAL EMPOWERMENT ACROSS THE GLOBE 207 (Amy C. Alexander, Catherine Bolzendahl and Farida Jalalzai eds., 2018) and Judith Resnik. 'Representing What? Gender, Race, Class, and the Struggle for the Identity and the Legitimacy of Courts'. 15 THE LAW AND ETHICS OF HUMAN RIGHTS 1 (2021) for intersectional approaches to diversification in the judiciary.

[3] Sally Jane Kenney. GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER (2013); Sandra Day O'Connor and Kim K. Azzarelli. 'Sustainable Development, Rule of Law, and the Impact of Women Judges'. 44 CORNELL INTERNATIONAL LAW JOURNAL 3 (2011).

[4] Amanda Clayton, Diana Z. O'Brien, and Jennifer M. Piscopo. 'All Male Panels? Representation and Democratic Legitimacy'. 63 AMERICAN JOURNAL OF POLITICAL SCIENCE 113 (2019); Nienke Grossman. 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?'. 12 CHICAGO JOURNAL OF INTERNATIONAL LAW 647 (2012); Erika Rackley. WOMEN, JUDGING AND THE JUDICIARY (2013).

[5] Edward M. Chen. 'The Judiciary, Diversity, and Justice For All'. 10 ASIAN LAW JOURNAL 127 (2003); Sonia Lawrence. 'Reflections: On judicial diversity and judicial independence'. In JUDICIAL INDEPENDENCE IN CONTEXT 193 (Adam M. Dodek and Lorne Sossin eds., 2010).

[6] Keren Weinshall. 'Courts and Diversity: Normative Justifications and Their Empirical Implications'. 15 THE LAW AND ETHICS OF HUMAN RIGHTS 187 (2022); Resnik, *supra* n. 2.

[7] Rackley, *supra* n. 4, at 25–27.

[8] Josephine J. Dawuni. 'Ghana: The Paradox of Judicial Stagnation'. In GENDER AND THE JUDICIARY IN AFRICA: FROM OBSCURITY TO PARITY? 120 (Gretchen Bauer and Josephine Dawuni eds., 2016); Rosemary Hunter. 'More than Just a Different Face? Judicial Diversity and Decision-making'. 68 CURRENT LEGAL PROBLEMS 119 (2015).

[9] Kenney, *supra* n. 3.

gendered sensibility to the process of decision-making.[10] A more gender-diverse judiciary may also motivate female victims of violence, who often face trivialisation and discrimination from justice actors, to bring their cases to court.[11] Gender representation on the bench thus makes the difference even if we disagree on whether women judges are more "women-friendly" in their judgments. Moreover, it is important not only in consolidated democracies,[12] but also in fragile[13] and post-communist countries,[14] where government institutions are weak, people's trust in the judiciary is low and gender stereotypes widespread.

Despite this broad agreement, many judiciaries in the world struggle with representation of women on the bench.[15] Even in countries that invested a lot of energy in increasing the diversity of the judiciary the situation has improved only incrementally.[16] At the same time, in those countries where women judges outnumber their male colleagues, women still fail to be represented in the positions of power – at the apex courts, at judicial councils, among court presidents and other crucial positions within judicial governance.[17]

Much of the existing research that tackles this problem focuses on formal institutions such as appointment rules, their institutional design (e.g. executive appointment vs. merit commissions), their qualities such as transparency and accountability, and the role of a disruption to the process by which judges are typically appointed.[18] While formal institutions are relevant, we argue that the informal elements are crucial to a judge's career and that they usually strongly disadvantage women. Some of these informal elements are well-known, especially in the socio-legal literature (see Section 3), but the relevant literature focuses primarily on broader questions about what it means to be a woman judge and what career barriers she will encounter. Moreover, when this literature studies informality in the courts' actual operation, it focuses predominantly on access *to* the judiciary rather than on progress *within* the judiciary and other aspects of judicial governance. We fill this gap and argue that it

[10] Christina L. Boyd, Lee Epstein and ANDREW D. Martin. 'Untangling the Causal Effects of Sex on Judging'. 54 AMERICAN JOURNAL OF POLITICAL SCIENCE 389 (2010); Adam N. Glynn and Maya Sen. 'Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?'. 59 AMERICAN JOURNAL OF POLITICAL SCIENCE 37 (2015); Hunter, *supra* n. 8.

[11] Meena Jagannath. 'Barriers to Women's Access to Justice in Haiti'. 15 CITY UNIVERSITY OF NEW YORK LAW REVIEW 27 (2011); Marianne Tøraasen. 'Women's Judicial Representation in Haiti: Unintended Gains of State-Building Efforts'. 19 POLITICS & GENDER 1 (2022).

[12] Kate Malleson. 'Justifying Gender Equality on the Bench: Why Difference Won't Do'. 11 FEMINIST LEGAL STUDIES 1 (2003).

[13] Tøraasen, *supra* n. 11.

[14] Marína Urbániková, Barbara Havelková and David Kosař. 'The Art of Waiting Humbly: Women Judges Reflect on Vertical Gender Segregation'. FEMINIST LEGAL STUDIES (forthcoming 2023).

[15] Ignacio Arana Aráya, Melanie M. Hughes and Aníbal Pérez-Liñán. 'Judicial Reshuffles and Women Justices in Latin America'. 65 AMERICAN JOURNAL OF POLITICAL SCIENCE 373 (2021); Nancy B. Arrington, Leeann Bass, Adam Glynn, Jeffrey K. Staton, Brian Delgado and Staffan I. Lindberg. 'Constitutional Reform and the Gender Diversification of Peak Courts'. 115 AMERICAN POLITICAL SCIENCE REVIEW 851 (2021); Maria C. Escobar-Lemmon, Valerie J. Hoekstra, Alice J. Kang and Miki Caul Kittilson. 'Breaking the Judicial Glass Ceiling: The Appointment of Women to High Courts Worldwide'. 83 THE JOURNAL OF POLITICS 662 (2021).

[16] Hunter, *supra* n. 8.

[17] Mónica García Goldar. 'The glass ceiling at the highest levels of the Spanish judiciary'. 27 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 189 (2020); Barbara Havelková, David Kosař and Marína Urbániková. 'The Family Friendliness That Wasn't: Access, but Not Progress, for Women in the Czech Judiciary'. 47 LAW & SOCIAL INQUIRY 1106 (2022).

[18] This literature is vast. For a helpful summary see Arrington, *supra* n. 15; and Tøraasen, *supra* n. 11.

is crucial to study not only informality on the broader societal level (extra-judicial sphere), but also informal practices and informal institutions within the judiciary (intra-judicial sphere). They are often intertwined, but for conceptual as well as analytical purposes they should be analysed separately.

In this chapter we analyse only gender aspects of informal practices, informal institutions and informal networks in the selection and promotion of judges. In doing so, we are particularly interested in informal practices, institutions and networks that hold women back in the selection and promotion of judges. This is not to say that gender does not play a role in other aspects of judicial governance broadly understood,[19] such as case assignment or the disciplining of judges or in judicial decision-making, by which we mean not only the content of the judicial decision, but also the pre-deliberation stage (e. g. the selection of a judge rapporteur, discussion with the parties) and the deliberation phase (who speaks first, what sets the agenda, in what order judges vote etc.). We just cannot address the latter domains in more detail as they raise specific issues and are often under-researched.[20] Nevertheless, we believe that our framework is in general applicable also to these other domains of the workings of the judiciary.

This chapter proceeds as follows. Part 2 discusses the representation of women in the judiciary in different parts of the world and identifies the new trends. Part 3 provides a theoretical framework for how to study gender and informality within the judiciary. Part 4 examines gender and informality in judicial careers in both intra- and extra-judicial spheres. Part 5 concludes and proposes avenues for further research.

2. State of the game: women in the judiciary across the world

Women make up approximately 27% of the world's judges, although the numbers vary greatly among countries and courts,[21] and the representation of females in the high courts was 21% in 2012-2013.[22] According to the standard account in the literature, women are entering decision-making roles in increasing numbers around the world, and the judiciary is no exception.[23] Nevertheless, several caveats must be added. First, knowledge of women's access to the judiciary is largely based on the Global North.[24] Second, the existing literature tends to

[19] David Kosař and Katarína Šipulová. 'Politics of Judicial Governance'. In RESEARCH HANDBOOK ON THE POLITICS OF CONSTITUTIONAL LAW (Mark Tushnet and Dimitry Kochenov eds., 2023).

[20] See the blind spots discussed in Part 5.

[21] Numbers may have changed since 2015, but as global statistics on women judges are hard to come by, this is the most recent update. See Tam O'Neil and Pilar Domingo. 'The Power to Decide:Women, Decision-Making and Gender Equality'. ODI BRIEFING, 30 September 2015, https://odi.org/en/publications/thepower-to-decide-women-decision-making-and-gender-equality/; 'Women delivering justice: Contributions, barriers, Pathways'. INTERNATIONAL DEVELOPMENT LAW ORGANIZATION (2018), https://www.idlo.int/publications/women-delivering-justice-contributions-barriers-pathways.

[22] Escobar-Lemmon et al., *supra* n. 15.

[23] Tøraasen, *supra* n. 11.

[24] See e. g. Anne Boigeol. 'La Magistrature Française Au Féminin: Entre Spécificité et Banalisation'. 25 DROIT ET SOCIÉTÉ 489 (1993); Greg Goelzhauser. 'Diversifying State Supreme Courts'. 45 LAW & SOCIETY REVIEW 761 (2011); Kcasey McLoughlin. LAW, WOMEN JUDGES AND THE GENDER ORDER. LESSONS FROM THE HIGH COURT OF AUSTRALIA (2021); Judith Resnik. ''Naturally' without Gender: Women, Jurisdiction, and the Federal Courts'. 66 NEW YORK UNIVERSITY LAW REVIEW 1682 (1991); Kenney, *supra* n. 3; Rackley, *supra* n. 4.

focus on the domestic[25] highest courts.[26] Studies that include lower courts or that explain women's access to judiciaries beyond the Global North are scarcer.[27] This is understandable, given the difficulties in obtaining the necessary information in the Global South and due to the scarcity of global statistics on women's presence in lower court levels.[28]

Finally, the general trend of increasing the representation of women on the bench might conceal information about countries that backslide in gender representation. Especially in post-communist countries that inherited a large number of women on the bench we may expect their numbers to shrink once judicial office becomes more prestigious than during the communist era.[29] Given the gender backlash in this region,[30] we may expect such development also in other countries. In fact, the rise of populism all over the world brings about pushback against women's rights well beyond Central and Eastern Europe,[31] which may lead to stalemate or a downward trend in the representation of women in the judiciary. Trends in gender representation are thus non-linear and we need a more granular approach to disentangling the factors that drive the rise and fall of women on the bench.

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[25] We discuss gender representation on international courts only briefly in this chapter as it raises different concerns. See Josephine J. Dawuni and Akua Kuenyehia eds. INTERNATIONAL COURTS AND THE AFRICAN WOMAN JUDGE (2018); Stéphanie Hennette Vauchez. 'More Women - But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights'. 26 EUROPEAN JOURNAL OF INTERNATIONAL LAW 195 (2015); Nienke Grossman. 'Achieving Sex-Representative International Court Benches'. 110 AMERICAN JOURNAL OF INTERNATIONAL LAW 82 (2016); Andreas Føllesdal. 'How many women judges are enough on international courts?'. 52 JOURNAL OF SOCIAL PHILOSOPHY 436 (2021).

[26] Arrington, *supra* n. 15; Josephine J. Dawuni and Alice J. Kang. 'Her Ladyship Chief Justice: The Rise of Female Leaders in the Judiciary in Africa'. 62 AFRICA TODAY 45 (2015); Josephine J. Dawuni and Tabeth Masengu. 'Judicial Service Commissions and the Appointment of Women to Higher Courts in Nigeria and Zambia'. In RESEARCH HANDBOOK ON LAW AND COURTS 213 (Susan M. Sterett and Lee Demetrius Walker eds., 2019); Kang et al., *supra* n. 2; Frank C. Thames and Margaret S. Williams. CONTAGIOUS REPRESENTATION: WOMEN'S POLITICAL REPRESENTATION AROUND THE WORLD (2013); Melody E. Valdini and Christopher Shortell. 'Women's Representation in the Highest Court'. 69 POLITICAL RESEARCH QUARTERLY 865 (2016); Aráya, Hughes and Pérez-Liñán, *supra* n. 15; Escobar-Lemmon et al., *supra* n. 15.

[27] Elsje Bonthuys. 'Gender and Race in South African Judicial Appointments'. 23 FEMINIST LEGAL STUDIES 127 (2015); Melissa Crouch. WOMEN AND THE JUDICIARY IN THE ASIA-PACIFIC *(*2021); Josephine J. Dawuni. GENDER, JUDGING AND THE COURTS IN AFRICA. SELECTED STUDIES (2021); Winifred Kamau. 'Women Judges and Magistrates in Kenya: Challenges, Opportunities and Contributions'. In GENDER AND JUDGING 167 (Ulrike Schultz and Gisela Shaw eds., 2013); Sally Jane Kenney. 'Measuring Women's Political Empowerment across the Globe'. In MEASURING WOMEN'S POLITICAL EMPOWERMENT ACROSS THE GLOBE 207 (Amy C. Alexander, Catherine Bolzendahl and Farida Jalalzai eds., 2018); Gretchen Bauer and Josephine Dawuni, eds. GENDER AND THE JUDICIARY IN AFRICA: FROM OBSCURITY TO PARITY? (2016); Nadia Sonnevold and Monika Lindbekk, eds. WOMEN JUDGES IN THE MUSLIM WORLD. A COMPARATIVE STUDY OF DISCOURSE AND PRACTICE (2017).

[28] To our knowledge, such statistics are available on an annual basis only within the Council of Europe (see CEPEJ 2022, https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279, at pp. 69–72), but even these statistics have their limits.

[29] See e.g., Havelková et al., *supra* n. 17.

[30] Petra Guasti and Lenka Bustikova. VARIETIES OF ILLIBERAL BACKLASH IN CENTRAL EUROPE (2023); Anna Śledzińska-Simon. 'Populists, Gender and National Identity'. 18 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 447 (2020).

[31] Grainne DeBurca and Katharine Young. THE (MIS)APPROPRIATION OF HUMAN RIGHTS BY THE NEW GLOBAL RIGHT: AN INTRODUCTION TO SYMPOSIUM ICON (2023); Rebecca Sanders. 'Norm Spoiling: Undermining the International Women's Rights Agenda'. 94 INTERNATIONAL AFFAIRS 271 (2018); Taylor Sarah and Gretchen Baldwin. 'The Global Pushback on Women's Rights'. INTERNATIONAL PIECE INSTITUTE, 24 September 2019, https://www.ipinst.org/2019/09/global-pushback-on-womens-rights.

Even if we look only at the apex courts, by which we mean supreme courts as well as constitutional courts, we can see divergent responses to the calls for greater gender diversity even within the same region. Again, the peak courts are increasingly staffed by women.[32] For instance, within the last decade, gender parity or near parity has been reached on the national high courts of Angola, Australia, Canada, Ecuador, Rwanda, Serbia and Slovenia.[33] Within the Council of Europe, In the highest instance the share of women increased by almost 9% percentage points between 2010 and 2020, outpacing the increase in the overall proportion of women among judges in the same period.[34] Women are increasingly serving as presidents of prestigious courts, such as the Supreme Courts of Canada and Israel as well as the Constitutional Chamber of the Costa Rican Supreme Court, even though here the progress is usually more incremental.[35]

Despite these benefits, most states are far from parity.[36] Many have failed to begin to diversify until relatively recently. Whereas the first woman was appointed to the Mexican Supreme Court in 1961, the Constitutional Court and Supreme Court of Chile saw their first women judges in 1989 and 2001, respectively. While the first woman was appointed to the Federal Constitutional Court in Germany in 1951, the first female appointment as a Lord Appeal in Ordinary of the United Kingdom was made in 2004.[37] Moreover, in some countries such as the Czech Republic the number of women on all three apex courts (Supreme Court, Supreme Administrative Court and the Constitutional Court) has actually declined recently.[38]

In sum, our understanding of the mechanisms that influence entry to the judiciary still remains limited, due to the shortage of qualitative in-depth case studies from diverse contexts. We know even less about the progress of female judges once they enter the judiciary. In many countries, female judges can access the judiciary relatively easily and on fair criteria, but then they get stuck in the lower tiers and are promoted to higher courts in disproportionately small numbers. We believe that in order to understand these phenomena better we need to focus also on informal practices and informal networks that significantly affect a judge's career and usually strongly disadvantage women.

3. Gender, informality and the judiciary: theoretical framework

The last two decades have produced a number of studies analysing the status of women in the judiciary and examining the barriers they face. The existing scholarship on gender and judicial careers can be divided into five main streams: 1. doctrinal and normative studies on

[32] Valerie Hoekstra, Miki Caul Kittilson and Elizabeth Andrews Bond. 'Gender, High Courts, and Ideas about Representation in Western Europe'. In REPRESENTATION: THE CASE OF WOMEN 103 (Maria C. Escobar-Lemmon and Michelle M. Taylor-Robinson eds., 2014);. Laura Turquet, Papa Seck, Ginette Azcona, Roshni Menon, Caitlin Boyce, Nicole Pierron and Emma Harbour. 'Progress of the World's Women 2011–2012: In Pursuit of Justice'. UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN (2011), https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2011/ProgressOfTheWorldsWomen-2011-en.pdf.

[33] Arrington, *supra* n. 15.

[34] CEPEJ, *supra* n. 28, at 70.

[35] *Ibid*.

[36] Turquet et al., *supra* n. 32.

[37] Arrington, *supra* n. 15.

[38] Havelková et al., *supra* n. 17.

various aspects of gender, judicial careers and courts;[39] 2. case studies that analyse the circumstances of selected cases of judicial appointments from a gender perspective;[40] 3. essays that theorise on possible gender barriers in a given judiciary, often taking the statistical data on women's representation as a starting point;[41] 4. empirical studies based on administrative data on judicial appointments which analyse how the system of judicial selection affects the representation of women[42] or quantitatively examine possible explanatory factors;[43] 5. empirical studies that explore the experiences of women in the judiciary and the perceived barriers they face, using, typically, semi-structured or in-depth interviews,[44] sometimes combined with participants' observation;[45] focus groups;[46] oral history;[47] and questionnaire surveys.[48]

Although these studies generally do not use an institutionalism or relational approach as their main theoretical framing, they often examine norms, practices, rules, relationships, networks and institutions, both formal and informal, even if they do not necessarily explicitly refer to them as such.

Relational perspective on the study of courts and informality is a relatively novel approach.[49] Rather than focusing on informal practices and institutions, it zeroes in on actors and their social interactions and studies human relations in dyadic forms as well as in various networks.

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[39] E. g. Føllesdal, *supra* n. 25; Sally Jane Kenney. 'Equal Employment Opportunity and Representation: Extending the Frame to Courts'. 11 SOCIAL POLITICS 86 (2004); Kate Malleson. 'Rethinking the Merit Principle in Judicial Selection'. 33 JOURNAL OF LAW AND SOCIETY 126 (2006).

[40] E. g. Elsje Bonthuys. 'Gender and the Chief Justice: Principle or Pretext?'. 39 JOURNAL OF SOUTHERN AFRICAN STUDIES 59 (2013).

[41] E. g. Leah Treanor. 'Problems in the pathways to judicial success: Women in the legal profession in Northern Ireland'. 27 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 203 (2020); Goldar, *supra* n. 17; Havelková, Kosař, and Urbániková, *supra* n. 17.

[42] Michael Blackwell. 'Starting Out on a Judicial Career: Gender Diversity and the Appointment of Recorders, Circuit Judges, and Deputy High Court Judges, 1996-2016'. 44 JOURNAL OF LAW AND SOCIETY 586 (2017); Mark S. Hurwitz and Drew Noble Lanier. 'Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts'. 3 STATE POLITICS & POLICY QUARTERLY 329 (2003); Sundeep Iyer. 'The fleeting benefits of appointments commissions for judicial gender equity'. 51 COMMONWEALTH & COMPARATIVE POLITICS 97 (2013).

[43] E. g. Rebecca D. Gill and Christian Jensen. 'Where are the women? Legal traditions and descriptive representation on the European Court of Justice'. 8 POLITICS, GROUPS, AND IDENTITIES 122 (2020); Valdini and Shortell, *supra* n. 26; Escobar-Lemmon et al., *supra* n. 15.

[44] E. g. Achmad Kholiq and Iim Halimatusa'diyah. 'Does Gender Blindness Improve Gender Equality? Female Judges and the Glass Ceiling Effect in the Islamic Judicial System in Indonesia'. 32 SOCIAL & LEGAL STUDIES 139 (2022); Chunyan Zheng, Jiahui Ai and Sida Liu. 'The Elastic Ceiling: Gender and Professional Career in Chinese Courts'. 51 LAW & SOCIETY REVIEW 168 (2017); Urbániková et al., *supra* n. 14.

[45] E. g. Tabeth Masengu. 'The Judicial Service Commission and the appointment of Women: More to it than meets the eye'. 27 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 161 (2020).

[46] E. g. Philip Leith and John Morison. REWARDING MERIT IN JUDICIAL APPOINTMENTS?: A RESEARCH PROJECT UNDERTAKEN BY THE SCHOOL OF LAW, QUEEN'S UNIVERSITY BELFAST FOR THE NORTHERN IRELAND JUDICIAL APPOINTMENTS COMMISSION (2013),https://www.nijac.gov.uk/sites/nijac/files/media-files/Executive%20Summary%20of%20the%20QUb%20Research%202013.pdf.

[47] E. g. Elizabeth Chan. 'Women Trailblazers in the Law: The New Zealand Women Judges Oral Histories Project'. 45 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 407 (2014).

[48] E. g. Kathy Mack and Sharyn Roach Anleu. 'Entering the Australian Judiciary: Gender and Court Hierarchy'. 34 LAW & POLICY 313 (2012).

[49] Björn Dressel, Raul Sanchez Urribarri and Alexander Stroh. 'The Informal Dimension of Judicial Politics: A Relational Perspective'. 13 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 413 (2017).

These layers of interaction of each actor within the judiciary can be particularly helpful in studying gendered aspects of judicial patronage, nepotism and corruption.

Besides the relational approach, scholarship on gender and judicial careers could borrow the conceptual framework of neo-institutionalist perspective which draws attention to the continuum between formal and informal institutions[50] and aims to map "the formal architecture and informal networks, connections, conventions, rules, and norms of institutions".[51]

In particular, feminist institutionalism as a variant of new institutional theory which combines neo-institutionalism and feminist political science[52] can be inspiring for explaining the discrepancy between the (seemingly) gender-neutral formal rules and the observed different positions of men and women in the judiciary. Feminist institutionalism argues that in organisations, both formal and informal institutions are gendered[53], and that the gendered aspects of the norms, rules, practices and discourses that are at work here shape their operation and outcomes.[54] In short, feminist institutionalism explores both "the gendered character of institutions and the gendering effects of institutions".[55] So far, the perspective of feminist institutionalism has been applied mainly in political science, to explore and explain how informal institutions affect the logic of political recruitment and candidate selection.[56]

Given that the institutionalist perspective focuses on institutions, both formal and informal, and their interaction, the question arises whether and how the concepts typically used in the existing scholarship that examines the status of women in the judiciary fit into this framework. This depends on what we actually consider an institution. In general, an institution is "the sum of (abstract and formal) rules of the game".[57] According to Helmke and Levitsky,[58] informal institutions are "socially shared rules, usually unwritten, that are created, communicated, and

[50] Philip Ethington and Eileen McDonagh. 'The Eclectic Center of the New Institutionalism'. 19 SOCIAL SCIENCE HISTORY 467 (1995), at 470.
[51] Joni Lovenduski. 'Foreword'. In GENDER, POLITICS AND INSTITUTIONS: TOWARDS A FEMINIST INSTITUTIONALISM (Mona Lena Krook and Fiona Mackay, 2011).
[52] Meryl Kenny. 'Gender and Institutions of Political Recruitment: Candidate Selection in Post-Devolution Scotland'. In GENDER, POLITICS AND INSTITUTIONS: TOWARDS A FEMINIST INSTITUTIONALISM 21 (Mona Lena Krook and Fiona Mackay, 2011).
[53] Louise Chappell and Georgina Waylen. 'Gender and the Hidden Life of Institutions'. 91 PUBLIC ADMINISTRATION 599 (2013).
[54] Fiona Mackay, Meryl Kenny and Louise Chappell. 'New Institutionalism Through a Gender Lens: Towards a Feminist Institutionalism?'. 31 INTERNATIONAL POLITICAL SCIENCE REVIEW 573 (2010).
[55] Fiona Mackay. 'Conclusion: Towards a Feminist Institutionalism?'. In GENDER, POLITICS AND INSTITUTIONS: TOWARDS A FEMINIST INSTITUTIONALISM 181 (Mona Lena Krook and Fiona Mackay, 2011), at 181.
[56] Elin Bjarnegard and Meryl Kenny. 'Who, Where and How? Informal Institutions and the Third Generation of Research on Gendered Dynamics in Political Recruitment'. In GENDER AND INFORMAL INSTITUTIONS 203 (Georgina Waylen eds., 2017); Meryl Kenny and Tània Verge. 'Opening Up the Black Box: Gender and Candidate Selection in a New Era'. 51 GOVERNMENT AND OPPOSITION 351 (2016); Diana Højlund Madsen. 'Gender, Power and Institutional Change – The Role of Formal and Informal Institutions in Promoting Women's Political Representation in Ghana'. 54 JOURNAL OF ASIAN AND AFRICAN STUDIES 70 (2019).
[57] Marie-Laure Djelic. 'Institutional perspectives – working towards coherence or irreconcilable diversity?'. In THE OXFORD HANDBOOK OF COMPARATIVE INSTITUTIONAL ANALYSIS 15 (Glenn Morgan, John L. Campbell, Colin Crouch, Ove Kaj Pedersen and Richard Whitley, 2010), at 26.
[58] Gretchen Helmke and Steven Levitsky. 'Introduction'. In INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA 1 (Gretchen Helmke and Steven Levitsky, 2006), at 5.

enforced outside officially sanctioned channels", and, on the contrary, formal institutions are "created, communicated, and enforced through channels that are widely accepted as official". Besides the existence of a sanction, Pozas-Loyo and Ríos-Figueroa argue that informal institutions should also include shared expectations and an incentive for a certain group of people to adhere to which is known to them.[59] Moreover, according to Bjarnegård and Kenny, informal rules must form a coherent logic in order to be considered an informal institution.[60]

We argue that when it comes to judicial careers, two broad sets of institutions are at play here. First, there are specific intra-judicial formal and informal institutions that govern the broad arena of a judicial career (selection, appointment, promotion, etc.) and shape how things work when one wants to make a career in the judiciary. And, second, there are broader and more general extra-judicial formal and informal institutions around gender that go beyond the judiciary and operate at the societal level, and that regulate what it means to be a woman and a man, what their roles are, what positions they belong to, how they should behave and what society (and, through internalisation, people themselves) expects of them. These two sets of rules overlap and interact; more specifically, broader gender-related institutions help to shape more specific institutions related to judicial careers (more general gender rules interact with rules about selection, appointments, and promotion) and lead to these institutions being gendered and having gendering effect.[61]

We also argue that when it comes to the rules about gender they can, in fact, be considered as (mostly informal) institutions. They are socially shared, even if not always acknowledged by actors,[62] and they form a coherent logic. Also, they are controlled and enforced through sanctions, such as the known ones like ridicule or social disapprobation, but also internalisation, which, according to Sen, "may be as strong as actual sanctions, and can serve to recruit women themselves into norms of gender inequality".[63]

At the same time, not all informal phenomena that affect judges' careers can be considered informal institutions. Sometimes these phenomena can be merely ad hoc actions without forming a pattern, being institutionalised and having the character of stable rules of the game. For instance, gender stereotypes, prejudice and discrimination can be institutionalised in some judiciaries while being relatively rare and occasional in others. Just as there is no clear and unambiguous boundary between the formal and the informal, which is a continuum, there is no clear and unambiguous point at which rules and practices become institutions. Therefore, as suggested in the introductory chapter to this volume, when it comes to the broad topic of gender and judicial careers, too, we propose to focus on *relational informalities* alongside *institutionalised informalities*.

More concretely, how can the theoretical lens of the institutional and relational perspectives be used to explore the gender aspects of judicial careers and where should one focus research

[59] Andrea Pozas Loyo and Julio Ríos-Figueroa. 'Anatomy of an informal institution: The 'Gentlemen's Pact' and judicial selection in Mexico, 1917–1994'. 39 INTERNATIONAL POLITICAL SCIENCE REVIEW 647 (2018).
[60] Bjarnegård and Kenny, *supra* n.56.
[61] Mackay, *supra* n. 55.
[62] Georgina Waylen. 'Analyzing Gender in Informal Institutions: An Introduction'. In GENDER AND INFORMAL INSTITUTIONS 1 (Georgina Waylen, 2017).
[63] Gita Sen. 'Informal Institutions and Gender Equality'. In INFORMAL INSTITUTIONS: HOW SOCIAL NORMS HELP OR HINDER DEVELOPMENT 49 (Johannes Jütting, Denis Drechsler, Sebastian Bartsch and Indra de Soysa, 2007), at 52.

attention? As selection, appointment and promotion in the judiciary is a process guided by both formal and informal rules, we need to study these rules and the mix of formal and informal elements which creates "gendered institutional configurations".[64] In particular, the aim is to explore the role of the informal in reproducing male dominance: how informal practices, narratives, norms, rules, relations and networks impede women's selection and promotion, how they create a gendered opportunity structure, and how this leads to the over-representation of male judges in leadership positions and, in many judiciaries, also in rank-and-file positions. In particular, Gains and Lowndes suggest focusing on four elements.[65] First, rules about gender (which define and assign certain roles and activities to women and men); second, rules with gendered effects (which are seemingly neutral but actually have different implications and consequences for men and women); third, the gendered actors who interpret and apply the rules and their values and attitudes; and fourth, the gendered outcomes of action shaped by rules.

4. Gender, informality and judicial careers

What, according to the previous research, is the role of informality in judicial careers? What informal elements (and their constellations and interactions with formal elements) help to keep women judges down and back? Which informal judicial and wider social institutions work to exclude women and include men, and contribute to the under-representation of women among judges in some judiciaries, and of women judges in leadership positions in practically all judiciaries? Because the formal rules are typically the same for everyone regardless of gender, we argue that the informal elements are crucial to a judge's career and that they strongly disadvantage women. This section summarises the existing scholarship on gender and judicial careers and identifies various informal elements, informal institutions and informal relations and networks in the intra- and extra-judicial spheres that are at play in judicial selection, appointment and promotion.

4.1. Informality in the intra-judicial sphere

To begin with, a judicial career is to some extent affected by the idea of an "ideal judge" that is deeply gendered. Some scholars point out that judicial culture is in fact a male culture[66] and that the image of an ideal judge is constructed as male, creating the myth of "the man of law" who is reasonable, rational, detached, objective and unemotional.[67] Women judges, on the other hand, must adjust to the masculine norm and supress femininity to evoke authority.[68] These highly informal, unwritten and often even unconscious ideas can then be reflected in the formal and informal rules determining who is a suitable candidate for selection and promotion.

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[64] Mona Lena Krook. 'Beyond Supply and Demand: A Feminist-institutionalist Theory of Candidate Selection'. 63 POLITICAL RESEARCH QUARTERLY 707 (2010).

[65] Francesca Gains and Vivien Lowndes. HOW IS GENDER IMPLICATED IN INSTITUTIONAL DESIGN AND CHANGE? THE ROLE OF INFORMAL INSTITUTIONS: A CASE STUDY OF POLICE AND CRIME COMMISSIONERS IN ENGLAND AND WALES: WORKING PAPERS IN GENDER AND INSTITUTIONAL CHANGE, NO. 6. (2016).

[66] Seda Kalem. 'Being a woman judge in Turkish judicial culture'. 27 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 119 (2020); Zheng et al., *supra* n. 44.

[67] Ngaire Naffine. LAW & THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE (1990); Margaret Thornton. DISSONANCE AND DISTRUST: WOMEN IN THE LEGAL PROFESSION (1996).

[68] Margaret Thornton. 'Otherness' on the bench: How merit is gendered'. 29 THE SYDNEY LAW REVIEW 391 (2007).

Of course, this does not mean that the construction of the "ideal judge" is culturally universal. As Remiche suggests, the idea of the "imagined judge", that is, the judge as he or she is represented in a particular legal culture, differs from one legal system to another and influences the degree of feminisation in the judiciary.[69] While judges in civil law countries are imagined as "knowledgeable automatons"[70] and "anonymous interpreters of the law"[71] whose role is mechanically to apply the law designed by the parliament, in common law countries judges are powerful actors and decision-makers who find the law.[72] While in civil law countries formal qualifications and examination results play a greater role in entry to the judiciary, in common law countries professional visibility and access to (traditionally male) networks are crucial.[73] As a result, in common law countries it is harder for women to enter the judiciary and judges generally enjoy higher social status and a higher income.

These deeply rooted informal expectations and ideas about the "ideal judge" and his or her role in different legal systems then influence and interact with various formal and informal institutions related to judicial selection, appointment and promotion. Drawing on the work of Zheng, Ai and Liu,[74] we distinguish two tracks of selection and promotion: the professional and the political. While the professional track is based on expertise and work performance, the political track is based on social and cultural capital and political connections; patronage, corruption and clientelism can also come into play here.[75] We argue that these two tracks have different weights depending on the position (rank-and-file or leadership) and the judicial system (and country) in question. However, informal elements are common and powerful in both tracks and disadvantage women, although more so on the political than on the professional track.

First, the professional track seems to be relatively unproblematic for women in the case of judicial selection to rank-and-file positions in civil law countries, where the rules for selecting judges are formalised and transparent. However, this does not seem to be the case for rank-and-file positions in common law countries, and for promotions in general, regardless of the legal system. The lack of formal and transparent rules for selection and promotion and the closed nature of nomination processes disadvantage women.[76]

One of the main reasons for this is the social construction of merit, that is, (typically) an unwritten and informal set of rules governing who is considered a suitable candidate. Especially in the case of positions for which there are no formal rules and no clear criteria, the construction of merit plays a crucial role. Merit is not an objective criterion but rather "a rhetorical device shaped by power".[77] Selection based on vaguely defined merit typically

[69] Adelaide Remiche. 'When Judging Is Power: A Gender Perspective on the French and American Judiciaries'. 3 JOURNAL OF LAW AND COURTS 95 (2015).
[70] Remiche, *supra* n. 63.
[71] Ulrike Schultz and Gisela Shaw. 'Editorial: Gender and judging'. 15 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 1 (2008).
[72] Remiche, *supra* n. 63; Schulz and Shaw, *supra* n. 71.
[73] Schulz and Shaw, *supra* n. 71.
[74] Zheng et al., *supra* n. 44.
[75] *Ibid*.
[76] Valdini and Shortell, *supra* n. 26.
[77] Thornton, *supra* n. 68, at 391.

"unfairly advantage[s] candidates who are most similar to past appointees and the selectors themselves"[78] – and these candidates are often men. For example, in the UK, senior judges have traditionally been recruited from "an extremely narrow group consisting of white, male barristers drawn from a small number of commercial chambers in London";[79] in Australia, judges in the highest courts are predominantly recruited "from a long career at the private Bar".[80]

Merit is constructed in a dynamic process with reference to the candidate pool; thus, its definition adapts as the pool changes and, at the same time, the characteristics of the pool are influenced by changes in the definition of merit.[81] Here, the size and credentials of the male and female applicants' pools come into play. Typically, women are less represented in the positions that serve as a springboard for appointments and promotion in the judiciary and occupy jobs of lower status and income than men (e.g., they focus on family and child law), where there is less room to stand out. Given how merit is constructed and given the horizontal and vertical gender segregation in the legal field and the judiciary, the number of women who are considered suitable is often lower than that of men.[82] Again, this is not the result of formal rules and institutions, but rather of the interplay of various norms, informal rules and informal institutions that influence the career aspirations and trajectories of women in the judiciary.

Moreover, even if formalised rules and selection criteria exist and are driven by the desire to increase gender equality, informal practices and institutions can lead to their circumvention and subversion. For example, Hennette Vauchez states that, although there is a formal requirement to nominate at least one woman for the post of judge of the European Court of Human Rights, there is an informal practice of purely formal nomination of female candidates that undermines the formal rules.[83]

Second, besides the professional track, there is another career path in the judiciary: the political track. Its existence and importance may vary depending on the type of position and the judicial system involved. The political track of selection and promotion can exist in parallel with the professional track and complement it, but it can also replace it. Typically, it is this track on which women — for various reasons that will be discussed here — are more disadvantaged.[84]

The political track can take many forms. In a soft form, it may simply mean that merit consists not only of professional (qualifications, expertise, work performance, etc.) but also of political

[78] Malleson, *supra* n. 39, at 137.
[79] *Ibid*, at 138.
[80] Francesca Bartlett and Heather Douglas. 'Benchmarking' a Supreme Court and Federal Court judge in Australia'. 8 OÑATI SOCIO-LEGAL SERIES 1355 (2018).
[81] Malleson, *supra* n. 39.
[82] Lizzie Barmes and Kate Malleson. 'The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity'. 74 THE MODERN LAW REVIEW 245 (2011); Tabeth Masengu. 'It's a man's world: Barriers to gender transformation in the South African judiciary. Perspectives from women advocates and attorneys'. 23 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 305 (2016); Carmen Luisa Roche. 'Feminisation of the legal profession in Venezuela: Its meaning for the profession and for women lawyers'. 10 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 209 (2003); Malleson, *supra* n. 39; Bartlett and Douglas, *supra* n. 80; Treanor, *supra* n. 41; Leith and Morrison, *supra* n. 46.
[83] Vauchez, *supra* n. 25.
[84] Zheng et al., *supra* n. 44.

capital. This could be the case particularly when it comes to the top judicial positions and to the positions at the international courts. For instance, Basabe Serrano concludes that the low representation of women in the high courts of 18 Latin American countries is related not to professional merit but rather to "a structural process of exclusion of women from political decision-making fields".[85] When it comes to international courts, Hennette Vauchez argues that the judges at the European Court of Human Rights are recruited from individuals who possess both legal and political resources, and whose careers as lawyers are complemented by para-political or political positions.[86] Even though women are less likely to have work experience in a similar position, Hennette Vauchez argues that over time the idea of the positions in which this political capital can be acquired is changing, and with this change in the construction of merit more space is opening up for women.[87] Similarly, Grossman claims that the selection of judges for international courts is often driven more by a desire to reward political loyalty or advance political agendas than by an effort to select the most qualified or deserving candidates.[88]

On the political track, selection and promotion can also be based on patronage, corruption and clientelism. Regardless of whether these are occasional practices or have developed into fully fledged informal institutions, they usually disadvantage women, although there may be some exceptions if the political power assesses that women may be easier to target and manipulate.

In some judiciaries, like in Mexico, an informal patronage model of judicial selection where justices (typically male) took turns in filling vacancies — the so-called "Gentlemen's Pact" — led to institutional reforms with the explicit aim of ending the practice.[89] However, replacing an informal institution with a formal one does not always mean eliminating women's disadvantages. Masengu shows that in South Africa patronage still plays a role in judicial appointments despite the establishment of the Judicial Service Commission which was supposed to ensure a transparent selection process.[90] Although it is not a formal requirement, the Judicial Service Commission expects judicial candidates to have experience of acting as a judge in the court they are applying for (judge presidents offer this opportunity to legal practitioners when the court needs extra judges to help out), but the acting appointments system is based on patronage and these offers are disproportionately made to men.[91]

In some judiciaries patronage can be closely intertwined with corruption. Zheng, Ai and Liu suggest that in China male judges are favoured in their career advancement precisely because of corruption and patronage, which have the character of informal institutions rather than isolated practices.[92] In their informal interviews with judges, they found that some male court officials promoted male judges who were involved in bribe-taking with them because

[85] Santiago Basabe Serrano. 'The representation of women in the judicial branch: Eighteen Latin American High Courts in Comparative Perspective'. 185 REVISTA DE ESTUDIOS 259 (2019).
[86] Vauchez, *supra* n. 25.
[87] *Ibid*.
[88] Grossman, *supra* n. 25.
[89] Loyo and Julio Ríos-Figueroa, *supra* n. 59.
[90] Masengu, *supra* n. 45.
[91] *Ibid*.
[92] Zheng et al., *supra* n. 44.

"patronage and mutual trust are often built upon such activities in a masculine and corrupt judicial culture".[93]

Why does the political track of appointments and promotions usually work better for men? This is partly a consequence of the existing distribution of power. Given that the political scene is dominated by men and that men also hold leadership positions in the judiciary (in terms either of the hierarchy of the courts or of leadership positions in them), it is predominantly they who become patrons and may tend to choose other men as their protégés, for example because of gender bias. At the same time, on the political track of appointment and promotion, social and cultural capital, including political connections, is crucial. Men have more opportunities for informal socialising and interactions and more easily join and form "old boys' clubs" — informal networks maintained and strengthened in after-work meetings in pubs, bars, on golf courses or in saunas — where they acquire the capital that gives them career advantage.[94] Due to the unequal distribution of paid and unpaid work, women have less time available to form and maintain such informal relationships, and at the same time these relationships with men (and men in particular are the power holders) might not be considered appropriate. In particular, the gendered networks and "old boys' clubs" are areas where a relational perspective is a useful theoretical framework, regardless of whether it is an occasional practice or a stable informal institution.

Finally, the selection and promotion of judges, especially if the rules are not formalised and transparent, can also be influenced by informal elements of gender stereotypes and prejudice. Sexism can take different forms and can be institutionalised to varying degrees. It can affect not only the attitudes of the gatekeepers who can see women as less fit for judicial or leadership position, but also the attitudes and career ambitions of men and women judges themselves. In addition, women often face gendered double standards; for instance, Gill and Jensen state that, when it comes to the appointment of women to the European Court of Justice, "female candidates are expected to demonstrate partisan neutrality or policymaking expertise, while male candidates are assumed to have these traits".[95] Even more serious manifestations of sexism are sexist comments from male colleagues and superiors.[96] Various largely informal sexist and discriminatory practices have been noted by authors from around the world.[97] These informal practices are not isolated and occasional, but form a coherent

[93] *Ibid*, at 194.

[94] Dermot Feenan. 'Women Judges: Gendering Judging, Justifying Diversity'. 35 JOURNAL OF LAW AND SOCIETY 490 (2008); Anqi Shen. 'Women judges who judge women offenders: A Chinese case study on gender and judging'. 27 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 63 (2020); Chan, *supra* n. 47; Kalem, *supra* n. 66.

[95] Gill and Jensen, *supra* n. 43, at 122.

[96] Kalem, *supra* n. 66.

[97] See, e. g., Francesca Tacchi. 'Dangerous liaisons. Women, Lawyers and Judges since the 1980s'. 4 CAMBIO 65 (2014) for Italy; Goldar, *supra* n. 17 for Spain; Elaine Martin. 'Men and Women on the Bench: Vive la Difference?'. 73 JUDICATURE 204 (1990), Marianne Githens. 'Getting Appointed to the State Court: The Gender Dimension'. 15 WOMEN & POLITICS 1 (1996), Leah V. Durant. 'Gender Bias and the Legal Profession: A Discussion of Why There Are Still So Few Women on the Bench'. 4 UNIVERSITY OF MARYLAND LAW JOURNAL OF RACE, RELIGION, GENDER AND CLASS 181 (2004) and Sharon A. Navarro. 'Moving on up: The political incorporation of Hispanic women into the federal judiciary of Texas'. 11 LATINO STUDIES 4 (2013) for US; Chan, *supra* n. 47 for New Zealand; Roche, *supra* n. 82 for Venezuela; Ruth B. Cowan. 'Women's representation on the courts in the Republic of South Africa'. 6 UNIVERSITY OF MARYLAND JOURNAL OF RACE, RELIGION, GENDER AND CLASS 291 (2006) and Masengu, *supra* n. 82, for South Africa; Kholiq and Halimatusa'diyah, *supra* n. 44 for Indonesia.

logic; as summarised by Feenan, the disadvantage experienced by women in the judiciary is "rooted in deeply entrenched structural discrimination and exclusion".[98]

4.2. Informality in the extra-judicial sphere

The informal elements, institutions, networks and relationships that operate in the judiciary and that ultimately lead to women's career disadvantage grow out of broader extra-judicial formal and informal institutions around gender that operate at the societal level. In other words, the multitude of problems faced by women in the judiciary is not specific to the judicial profession, but relates to the entire labour market and stems from wider gender norms that govern the behaviour of women and men in society. In this regard, two powerful informal elements with a strong impact on women's and men's careers should be mentioned: the gendered division of paid and unpaid labour, and gender rules and norms regarding ambition and self-confidence.

First, practically all over the world, women face career challenges involving work-life balance. It is still the case that women are overwhelmingly the main providers of care (for example, for children or relatives) and have the main responsibility for running the household. As a result, they devote considerably more time to this unpaid work than men do. According to a survey of 75 countries by the International Labour Organisation, women spend on average more than 4.5 hours a day on unpaid work, while men spend less than 2 hours.[99] This logically leaves women with less space to build their careers. In the judiciary, this can include various activities that help judges or potential judges to stand out, such as attending conferences, writing scholarly articles or informal networking. In addition, the fact that childcare and household care are primarily perceived as the domain of women also affects their ability to move to other cities or commute daily to more distant cities, which is often associated with career advancement to higher courts.[100]

Given its deep rootedness and cultural universality, the gendered division between paid and unpaid labour can be said to be an informal institution. Its impact is widely described in the literature: studies from different countries and regions around the world show that motherhood and the difficulty of reconciling family and work life are significant career barriers for women in the judiciary.[101]

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[98] Feenan, *supra* n. 94, at 490.

[99] Jacques Charmes. THE UNPAID CARE WORK AND THE LABOUR MARKET. AN ANALYSIS OF TIME USE DATA BASED ON THE LATEST WORLD COMPILATION OF TIME-USE SURVEYS (2019).

[100] Urbániková et al., *supra* n. 14.

[101] Anne Boigeol. 'Feminisation of the French 'Magistrature''. In GENDER AND JUDGING 125 (Ulrike Schultz and Gisela Shaw, 2013); Maria da Gloria Bonelli. 'Brazilian judges in-between professionalism, gender and difference'. 22(2) INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 134 (2015); Madalena Duarte, Paula Fernando, Conceição Gomes and Ana Oliveira. 'The Feminization of the Judiciary in Portugal: Dilemmas and Paradoxes'. 10 UTRECHT LAW REVIEW 29 (2014); Majda Halilović and Heather Huhtanen. GENDER AND THE JUDICIARY: THE IMPLICATIONS OF GENDER WITHIN THE JUDICIARY OF BOSNIA AND HERZEGOVINA (2014); Ulrike Schultz. 'Introduction: Women in the World's Legal Professions: Overview and Synthesis'. In WOMEN IN THE WORLD'S LEGAL PROFESSIONS (Ulrike Schultz and Gisela Shaw eds., 2003); Chan, *supra* n. 47; Kalem, *supra* n. 66; Kholiq and Halimatusa'diyah, *supra* n. 44; Roche, *supra* n. 82; Durant, *supra* n. 97; Bonelli, *supra* n. 101; Shen, *supra* n. 94.

The reconciliation of work and family life depends to a large extent on how the informal institution of the unequal division of paid and unpaid work interacts with formal institutions and institutionalised childcare (nurseries, kindergartens, etc.), their availability and their social acceptance as suitable substitutes for direct maternal care. Interaction with other informal institutions regarding family life is also crucial: in some cultures, it is customary for the extended family to help with childcare, giving women more time to build their careers, while elsewhere care is seen as the responsibility of the nuclear family, and of the woman in particular.[102]

Second, another important informal element influencing women's and men's career paths is informal gender rules and norms regarding ambition and self-confidence. Women and men are socialised into their gender roles and, to a greater or lesser extent, internalise what society expects of them. Women therefore tend to pre-align their career expectations and ambitions to the gendered division between paid and unpaid work[103] and choose positions that allow them to balance work and family life better, often even before starting a family. However, these are generally not lucrative positions in fields where there is strong competition (e.g., large law firms) and which serve as a springboard to a career in the judiciary or leadership positions in general. Also, women may have lower self-esteem, and it can take them longer to gain the confidence that they have the necessary experience to apply for jobs.[104] Supporting women, whether through formal or informal institutions, therefore appears to be an important step towards change.[105]

Moreover, women's overt ambition may still be rejected in much of the world because it does not conform to the expected gender norm of being nice and modest, and deviating from this norm increases the risk of women encountering negative reactions and non-compliance.[106] In short, women find themselves trapped in a situation where they have to show ambition in order to apply for lucrative positions or promotions, but they have to hide it at the same time.[107]

Taken together, it is not surprising that previous studies have noted women's "internal career barriers and career denial"[108] or "a genuine lack of interest in reaching the top",[109] and that women often get stuck as efficient and reliable middle managers but do not reach the top positions in the judiciary to the same extent as their male counterparts. What would help, and what is currently sorely lacking in many judiciaries, is formal and informal institutions and networks that focus on encouraging women and increasing their representation in the judiciary in general and in leadership positions in particular.

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[102] Urbániková et al., *supra* n. 14.
[103] Treanor, *supra* n. 41; Roche, *supra* n. 82.
[104] Margaret S. Williams. 'Individual Explanations for Serving on State Courts'. 30(2) JUSTICE SYSTEM JOURNAL 58 (2009).
[105] Williams, *supra* n. 104.
[106] Alice H. Eagly and Steven J. Karau. 'Role Congruity Theory of Prejudice toward Female Leaders'. 109 PSYCHOLOGICAL REVIEW 573 (2002).
[107] Urbániková et al., *supra* n. 14.
[108] Ulrike Schultz. ''I was noticed and I was asked …' Women's Careers in the Judiciary. Results of an empirical study for the Ministry of Justice in Northrhine-Westfalia, Germany'. In GENDER AND JUDGING 145 (Ulrike Schultz and Gisela Shaw, 2013), at 161–163.
[109] Boigeol, *supra* n. 101, at 131.

4.3. Interaction of informal and formal elements: towards gender hierarchy or gender equality?

Different authors distinguish different types of informal institutions according to their relationship with formal institutions: complementary and competing;[110] complementary, accommodating, competing and substitutive;[111] or complementing, overlapping, reinforcing and redundant.[112] What are the relationships between the main formal and informal institutions regarding gender and a judicial career?

To summarise, the informal elements, networks and institutions that help to shape the career paths of women and men in the judiciary both are gendered and have a gendering effect,[113] and they, by and large, disadvantage women. Informality is often a substitute for a lack of formal regulation and formal institutions. When the rules for judicial selection and appointment are not clear, specific and transparent enough and nomination processes are closed in nature, this vacuum is filled by informal elements. The importance of the vaguely defined and socially constructed "merit" increases, as does the influence of informal networks, "old boys' clubs" and patronage systems — and all of these tend to favour men. Besides replacing non-existent formal institutions, some informal elements and institutions compete with or even substitute for the formal ones, and subvert them, for instance, when corruption and clientelism play a decisive role in appointments and promotions. This, again, usually leads to favouring men in a "masculine and corrupt judicial culture".[114] Moreover, even when rules for appointment and promotion exist and are designed neutrally, various informal elements, institutions and networks — like double standards, sexism and gender discrimination — can ultimately lead to these rules not being applied equally.

In addition to the formal rules for the selection and promotion of judges, another important area is the institutions regulating the reconciliation of family and work life, which are particularly important for women, given that childcare and household care are still perceived as their domain. In many countries there are no formal rules governing the use of various work-life balance measures, such as part-time work or the possibility of working from home, which increases the importance of informal elements when negotiating their use with supervisors. Alternatively, these options may not be available at all in some countries, a fact which again has a greater impact on women's careers. Countries also differ in how childcare is formally and informally institutionalised: while in some countries the mother is expected to care for the child personally for the first three years,[115] in others extended family or nannies are involved, or it is customary for the child to a enter childcare at a few months of age. The nature of these formal and informal institutions then has profound implications for women's careers.

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[110] Hans-Joachim Lauth. 'Formal and Informal Institutions'. In ROUTLEDGE HANDBOOK OF COMPARATIVE POLITICAL INSTITUTIONS 56 (Jennifer Gandhi and Rubén Ruiz-Rufino, 2015).

[111] Helmke and Levitsky, *supra* n. 58.

[112] Andrea Pozas Loyo and Julio Ríos Figueroa. 'Instituciones informales e independencia judicial de facto: El eslabón olvidado en el camino hacia la eficacia institucional'. 29(2) POLÍTICA Y GOBIERNO 1 (2022).

[113] Mackay, *supra* n. 55.

[114] Zheng et al., *supra* n. 44, at 194.

[115] Havelková, Kosař, and Urbániková, *supra* n. 17.

Besides these informal elements, institutions and networks which generally maintain and preserve gender hierarchies, there is also the problem of the absence or low relevance and effectiveness of informal (and sometimes formal) institutions and networks that would actively lead to greater gender equality, such as those that would encourage women and support their career development.

5. In place of conclusion: avenues for further research

In this chapter we have mapped different approaches to how to study gendered informal elements (practices, institutions and networks) affecting the judiciary and have identified informal elements that hold women back in the selection and promotion of judges. Based on these insights, in this concluding part we first provide a methodological reflection on how to research gender and informality, and then identify blind spots in studying the gendered effects of informal practices, institutions and networks on courts and judges.

As regards the methodological challenges, the main reason formal institutions are much more often the subject of scholarly research than informal ones is the difficulty of examining informality. In this respect, the usually readily available administrative data on judicial appointments and promotions can only serve as a springboard for further questions. Here, qualitative methods such as in-depth interviews with men and women judges, participants' observation and ethnography and "rapid ethnography"[116] appear to be key to gaining insights into the workings of informal institutions and networks. This need to resort to social science methods also explains why legal scholars rarely systematically study informal elements that affect the functioning of the judiciary,[117] even though the situation has improved recently.[118] As a result, informality in certain areas of judicial governance and judicial decision-making which lawyers have specific knowledge of is under-researched from the gender perspective.[119] One potential way to remedy this situation is to encourage more scholarly cooperation between legal and social science scholars and to nudge them to team up to tackle the issues none of the fields can address alone.

Moreover, all scholars studying informality and gender face at least three challenges. First, studying informality requires access to conversations, decisions and behavioural observations that take place behind the scenes and to which outsiders, including researchers, have limited access. Therefore, it is often necessary to rely on the insights and perceptions of key actors. However, this is not without methodological difficulties. This is because, second, actors may not always be open about how informal elements operate, usually because of social

[116] Louise Chappell and Natalie Galea. 'Excavating informal institutional enforcement through 'rapid' ethnography: Lessons from the Australian construction industry'. In GENDER AND INFORMAL INSTITUTIONS 67 (Georgina Waylen, 2017).

[117] Note that there is an important strand of legal scholarship on constitutional conventions, but it tackles only a narrow subset of informality, focuses on the common law countries and only rarely studies constitutional conventions specifically concerning the judiciary (for an exception, see Scott Stephenson. 'Constitutional Conventions and the Judiciary'. 41 OXFORD JOURNAL OF LEGAL STUDIES 750 (2021)).

[118] András Jakab. 'Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution-Building in Hungary'. 68 AMERICAN JOURNAL OF COMPARATIVE LAW 760 (2020); Edit Zgut. 'Informal Exercise of Power: Undermining Democracy Under the EU's Radar in Hungary and Poland'. 14 HAGUE JOURNAL ON THE RULE OF LAW 287 (2022).

[119] We discuss these blind spots below.

desirability (for example, perpetrators of gender discrimination can rarely be expected to describe their practices openly). Third, informal institutions may not be recognised and acknowledged by the actors themselves,[120] as they may be perceived as natural and taken for granted.[121] While this may be true for all informal institutions, it is particularly problematic for those that are gender-specific due to widespread gender blindness, i.e., the lack of recognition of how society and its institutions are biased against women.[122]

This brings us to the blind spots in informality and gender at courts. First, as emphasised before, the relevant literature focuses primarily on the impact of gender and informality on judicial careers, that is on issues concerning the selection of judges and their promotion to higher courts as well as to the positions of court presidents. These issues concerning a judicial career[123] are just one aspect of judicial governance though. Judicial governance covers at least seven other areas, namely regulatory, administrative, financial, educational, informational, digital and digital dimensions.[124] To be sure, not all of them are gender sensitive to the same degree. Nevertheless, especially the administrative dimension (covering issues such as the composition of panels and case allocation), judicial education and the ethical dimension (dealing with codes of conduct, extrajudicial activities and communication with the media) are probably gendered and often governed by informal rules. Yet, there has been little research on these issues.

The second huge blind spot concerns actual judicial decision-making. Here, important decisions are made in the pre-deliberation stage (e.g. the selection of the judge rapporteur, communication with the parties, referral to bigger panels and grand chambers), the deliberation phase (e.g. who speaks first, what sets the agenda and in what order judges vote), as well as in the post-deliberation phase (e.g. timing of press conferences, communication with the media, selecting judgments to be published in official collections of case law and ranking the importance of judgments in online search tools, the enforcement of judgments). It is important to study gender aspects of these often-hidden activities, sometimes referred to as judicial practices,[125] because they significantly shape judicial decision-making. Opening this "black box" of judicial decision-making would allow us to shed light on gender and informality in the inner workings of the courts.

Third, a relational approach to the study of informality and the courts could help to advance our understanding of the relationship between gender and judicial corruption. Recent

[120] Waylen, *supra* n. 62.
[121] Chappell and Waylen, *supra* n. 53.
[122] Sen, *supra* n. 63.
[123] Interestingly, even within the personal dimension of judicial governance there are several blind spots. For instance, there is very little research on how informality and gender affect the disciplining of judges, their reappointment (where retention is available), their transfer (permanent as well as temporary), their civil and criminal liability and their evaluation.
[124] Katarína Šipulová, Samuel Spáč, David Kosař, Tereza Papoušková and Viktor Derka. 'Judicial Self-Governance Index: Towards better understanding of the role of judges in governing the judiciary'. 17 REGULATION AND GOVERNANCE 22 (2023).
[125] Jeffrey L. Dunoff and Mark A. Pollack. 'International Judicial Practices: Opening the "Black Box" of International Courts'. 40 MICHIGAN JOURNAL OF INTERNATIONAL LAW 47 (2018).

research and policy documents suggested that judicial corruption is gendered,[126] as women judges may face different types of corruption such as sextortion,[127] may have difficulty in reaching high-level positions in the judiciary due to the "masculine and corrupt" judicial culture,[128] or might be forced to show more loyalty than male judges for traditional, religious or cultural reasons.[129] Judicial corruption also seems to be significantly shaped by the extrajudicial activities of judges, where bribery and other forms of corruption take place.[130] Yet there is still a very limited literature base that addresses these questions.

Finally, most qualitative studies studying gender and informality in the judiciary rely only on in interviews with female judges. This is understandable, but reaching out to male judges, and especially male court presidents, and inquiring how *they* perceive women judges and what *their* view is on how informality prevents them from reaching positions of power and from playing a more important role within a given judiciary could advance our epistemic knowledge about the gender barriers in the judiciary.

[126] 'The Time is Now: Addressing the Gender Dimensions of Corruption'. UNODC (2020),https://www.unodc.org/documents/corruption/Publications/2020/THE_TIME_IS_NOW_2020_12_08.pdf; Sian Herbert. JUDICIAL CORRUPTION AND GENDER (2022); Kenney, *supra* n. 3.

[127] 'Breaking the silence around sextortion: the links between power, sex and corruption'. TRANSPARENCY INTERNATIONAL, 5 March 2020), https://www.transparency.org/en/publications/breaking-the-silence-around-sextortion.

[128] Zheng et al., *supra* n. 44; see also Mario Joseph and Nicole Phillips. 'Judicial corruption in Haiti: The need for discipline and civil society participation'. 39 HASTINGS INTERNATIONAL & COMPARATIVE LAW REVIEW 183 (2016).

[129] Herbert, *supra* n. 126.

[130] Zheng et al., *supra* n. 44.