


ARTICLE

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

Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the *Bundesverfassungsgericht*

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Abstract

The German Federal Constitutional Court (BVerfG) has for decades used informality to establish, build, and protect its authority. Yet, as the political landscape has shifted in recent years, in particular since the end of the Merkel-era Grand Coalition and the rise of the right-wing populist AfD, several longstanding informal practices and institutions have become politicized. Those concern extra-judicial activities of judges, regular informal meetings between the Court and the government, and privileged early access to the Court's press releases for certain journalists. This Article first introduces various forms of informality that the BVerfG employs in its internal self-administration and the judicial-legal culture in general, before tracing how, why, and by whom the three aforementioned practices of informality are challenged. Ultimately, this Article analyzes how the Court and its judges respond to the politicization of informality, and in particular how it triggered processes of formalization of judicial behavior and changes in institutional communication.

Keywords: German Federal Constitutional Court (BVerfG); courts; politicization; informality; populism; communication

A. Introduction: The Role of Informality at the BVerfG

For a long time, it seemed as if the politicization of the judiciary in public discourse had passed over Germany.¹ While constitutional adjudication rarely lacks critical voices,² the German Federal

¹Politicization is a multi-level concept that has been applied in various contexts. See Claudia Wiesner, *Introduction: Rethinking Politicisation in Politics, Sociology and International Relations*, in *RETHINKING POLITICISATION IN POLITICS, SOCIOLOGY AND INTERNATIONAL RELATIONS 1* (Claudia Wiesner ed., 2021). In general, politicization describes a process in which issues or institutions are transported into the public sphere and become a matter of political debate. See Michael Zürn, *Politicization Compared: At National, European, and Global Levels*, 26 J. EUR. PUB. POL'Y 977 (2019). For the debate on the politicization of courts, see, among others, Basil Bornemann, *Politisierung des Rechts und Verrechtlichung der Politik durch das Bundesverfassungsgericht?: Systemtheoretische Betrachtungen zum Wandel des Verhältnisses von Recht und Politik und zur Rolle der Verfassungsgerichtsbarkeit*, 28 Z. FÜR RECHTSZOIOL. 75 (2007); COURTS, POLITICS AND CONSTITUTIONAL LAW: JUDICIALIZATION OF POLITICS AND POLITICIZATION OF THE JUDICIARY, (Martin Belov ed., 2020).

²See, for instance most recently, Susanne Baer, "Sie brauchen Grundrechte, wenn Sie irgendwie anders sind", DER SPIEGEL (June 9, 2023), <https://www.spiegel.de/kultur/richterin-susanne-baer-sie-brauchen-grundrechte-wenn-sie-irgendwie-groesser-als-anders-kleiner-als-sind-a-51e856ed-9e43-49f9-b6c5-3963ed8f5578>; Klaus Ferdinand Gärditz, *Kritik an*

Constitutional Court (BVerfG) has famously enjoyed significantly more trust among the general public than any other constitutional organ.³ The BVerfG has been referenced as the “popstar among courts”⁴ and the “citizen court par excellence.”⁵ Even designated “critical reflections” by constitutional law scholars did not usually pose a serious challenge to the BVerfG.⁶ However, this should not suggest that the Court, its judges, and its institutional law and procedure are outside the political sphere.

In fact, the BVerfG often relied on informality to engage in political debates, particularly when they related to the Court’s role and the exercise of its mandate.⁷ An early example of an informal act that centrally contributed to establishing the Court as a constitutional organ was the publication of the *Status-Denkschrift* in 1952. This was an appeal by the Court to the representatives of the main federal constitutional organs to award the BVerfG a more central role in the young democracy, including independence from the Ministry of Justice. According to Konstantin Chatziathanasiou, the informal form of the *Status-Denkschrift* allowed the young BVerfG to act politically strategically vis-à-vis the political decision-makers without being considered politicized.⁸ Since then, the BVerfG, like most of the apex courts that feature in this symposium, has integrated informality into its daily institutional activities in manifold ways.

This Article explores the dual role of informality at an apex court using the example of Germany. This means how informality, on the one hand, contributes to the authority of a Court and, on the other, also opens the Court up to significant criticism, not least by populist actors. It introduces various practices and institutions at the BVerfG that have an informal character. In line with the framework of this symposium, informality is defined as social structures that constrain and shape judicial practice.⁹ This informality can be gradual, including formal elements, as well as well-known but not formally regulated acts. It can take the form of single acts, practices such as patterns of routine behavior, and institutions, which are usually considered as stable “rules of the game.” What makes something informal is often highly contingent on the respective situation (the “I know it when I see it”-formula) as informality often takes place in the cracks of formal regulation. This Article does not aim at establishing a conceptual framework of informality but to zoom into those cracks, to highlight the spaces of informality that exist in a highly regularized and formalized judicial system such as the German one.

The main focus of this Article lies in the informality of the BVerfG and its judges vis-à-vis the political and public spheres—external informality.¹⁰ In contrast to internal informality, which

Karlsruhe: Rückzug in die Echokammer, FRANKFURTER ALLGEMEINE ZEITUNG (July 10, 2023), <https://www.faz.net/aktuell/feuilleton/kritik-am-bundesverfassungsgericht-rueckzug-in-die-echokammer-19021651.html>.

³See OLIVER LEMBCKE, ÜBER DAS ANSEHEN DES BUNDESVERFASSUNGSGERICHTS: ANSICHTEN UND MEINUNGEN IN DER ÖFFENTLICHKEIT 1951–2001 (2006); Hans Vorländer & André Brodocz, *Das Vertrauen in das Bundesverfassungsgericht. Ergebnisse einer repräsentativen Bevölkerungsumfrage*, in DIE DEUTUNGSMACHT DER VERFASSUNGSGERICHTSBARKEIT 259 (Hans Vorländer ed., 2006).

⁴Anuscheh Farahat, *The German Federal Constitutional Court*, in THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW VOLUME 3 279, 280 (Armin von Bogdandy et al. eds., 2020). See also Johannes Masing, §15 *Das Bundesverfassungsgericht*, in HANDBUCH DES VERFASSUNGSRECHTS: DARSTELLUNG IN TRANSNATIONALER PERSPEKTIVE 981 (Matthias Herdegen et al. eds., 2021).

⁵Jutta Limbach, *Wirkungen der Rechtsprechung des Bundesverfassungsgerichts*, in RICHTERLICHES ARBEITSRECHT: FESTSCHRIFT FÜR THOMAS DIETERICH 344 (Peter Hanau et al. eds., 1999); see also Jutta Limbach, *The Role of the Federal Constitutional Court*, 53 SMU L. REV. 429 (2000).

⁶MATTHIAS JESTAEDT ET AL., DAS ENTGRENZTE GERICHT: EINE KRITISCHE BILANZ NACH SECHZIG JAHREN BUNDESVERFASSUNGSGERICHT (2011).

⁷See in more detail, FABIAN MICHL, WILTRAUT RUPP-VON BRÜNNECK (1912–1977): JURISTIN, SPITZENBEAMTIN, VERFASSUNGSRICHTERIN (2022).

⁸Konstantin Chatziathanasiou, *Die Status-Denkschrift des Bundesverfassungsgerichts als informaler Beitrag zur Entstehung der Verfassungsordnung*, 11 RECHTSWISSENSCHAFT 145 (2020).

⁹See David Kosař and Katarína Šipulová and Marina Urbáníková, *Informality and Courts: Uneasy Partnership in this special issue*.

¹⁰Johanna Croon, *Abseits der Verfassungsgerichtlichen Arenen – Informale Kommunikation*, in DAS LETZTE WORT – RECHTSETZUNG UND RECHTSKONTROLLE IN DER DEMOKRATIE 39 (Rahel Baumgartner et al. eds., 2014).

means informality in the internal organization of the judiciary and the judicial-legal culture as such, external informality goes to the core of the role and function of a constitutional court in a modern democracy that faces a changing structural transformation of the public sphere¹¹ and its political preconditions.

The BVerfG has for decades used informality to establish, build, and protect its authority across the political sphere. While the existence of informal practices and institutions was not actively concealed from the public, they mostly managed to evade public scrutiny. In Germany, as Helmuth Schulze-Fielitz has analyzed in his central monograph,¹² informality is mainly used as an instrument of coordination between the *Funktionselite*. The functionary elite consists of those people at the top of central political, judicial, economic, social, or cultural groups or institutions that have a broader influence on a state or society.¹³ As Schulze-Fielitz argues, informal instruments facilitate continuity, reciprocity, flexibility, and trust among the functionary elite. However, to do so they require distance from the public sphere and secrecy. This creates tension with the need for transparency and publicness.¹⁴ Naturally, this elite coordination function is not limited to the German context but can be seen in many of the contributions of this special issue.

Yet, in recent years informality has become the Achilles heel of the BVerfG. Informal institutional practices and institutions that had been employed by the Court for decades without any serious challenges have suddenly been politicized. In particular, three informal practices and institutions, namely extrajudicial activities of judges, regular informal meetings between the Court and the government, and cooperation between the Court and members of the *Justizpressekonferenz*, triggered significant public controversy. The latter concerns the practice of giving certain journalists privileged access to the press release and the introduction of the Chamber President of a forthcoming BVerfG decision on the evening before the official pronouncement. The three informal activities—talks, dinners, and envelopes at nightfall—found themselves on the front pages of major national newspapers, and were challenged before administrative courts and debated in parliament. They became politicized, which means that they moved from being unknown, while not exactly hidden, to and unchallenged by the center of public political debate.¹⁵ What explains this recent politicization of informality?

I argue that the politicization of informality at the BVerfG in recent years is symptomatic of a broader conflict over the nature of constitutional adjudication in a consensus-oriented democracy that comes under pressure. This builds upon observations by constitutional law scholars in recent years who argue that the BVerfG's jurisprudence is increasingly characterized by a desire to paint itself as beyond politics, or at least an unwillingness to confront political issues.¹⁶ For instance, Uwe Volkmann heavily criticizes the BVerfG for shifting to an approach to constitutional interpretation that relies on even denser and more technical forms of dogmatics that primarily rely on its precedents while deflecting the political dimension of constitutional jurisprudence.¹⁷ According to Florian Meinel, under the Grand Coalition in the Merkel-era, the BVerfG became an arbiter of political decisions that aims to uphold a median

¹¹JÜRGEN HABERMAS, *Ein neuer Strukturwandel der Öffentlichkeit und die deliberative Politik* (2022).

¹²See HELMUTH SCHULZE-FIELITZ, *Der informale Verfassungsstaat: Aktuelle Beobachtungen des Verfassungslbens der Bundesrepublik Deutschland im Lichte der Verfassungstheorie* (1984).

¹³For the concept of *Funktionselite*, see also HANS-PETER DREITZEL, *Elitebegriff und Sozialstruktur. Eine soziologische Begriffsanalyse* (1962).

¹⁴See SCHULZE-FIELITZ, *supra* note 12, at 96, 134–36.

¹⁵*Verfassungsrichter Henning Radtke im Gespräch*, ARD AUDIOTHEK (Mar. 30, 2023), <https://www.ardaudiothek.de/episode/die-justizreporter-innen/verfassungsrichter-henning-radtke-im-gespraech/swr/12546483/>.

¹⁶For recent criticism of this jurisprudential approach, for instance during the Covid-19 pandemic, see Oliver Lepsius, *Einstweiliger Grundrechtsschutz nach Maßgabe des Gesetzes*, 60 STAAT 609 (2021).

¹⁷See Uwe Volkmann, *Die Dogmatisierung des Verfassungsrechts*, 75 JURISTENZEITUNG 965 (2020).

approach to constitutional interpretation, effectively narrowing down the space for a more open and deliberative understanding of democratic constitutionalism.¹⁸

Informal practices and institutions facilitated a respectful and productive relationship between the BVerfG and central political or societal actors in the functionary elite. The informal approach of the BVerfG was very much in line with the German-style consensus democracy that peaked in the Merkel years. The consensus-orientated approach to informality at the BVerfG was built upon the exclusion of outsiders. “Outsiders” must be understood in a broad sense, in particular concerning the traditional functionary elite that has developed in the last 70 years of West German democracy; it includes radical parties on both the left and the right of the spectrum as well as media institutions, activists, and social movements that have grown outside the mainstream. The end of the Grand Coalition and the rise of the Alternative for Germany (“AfD”) as the first right-wing populist party in the federal parliament since 1945 have fundamentally shifted the political landscape in which the BVerfG operates. Those transformations challenge the functionary elite and its informal instruments as those outsiders move to the center of politics. The BVerfG now faces the challenge of how to include those outsiders in its internal and external informal practices and institutions. In turn, the outsiders have discovered previously overlooked forms of informality and now challenge them publicly. What consequences does this politicization of informality have on the way the BVerfG communicates to the political and public spheres?

This Article investigates this shift to the politicization of informality that has happened in the last decade. I will first present three informal practices and institutions related to its internal organization and influence on judicial-legal culture that have contributed to the Court’s authority (Section B). In the second section, I will investigate how, why, and by whom the three informal instruments—extrajudicial activities of judges, meetings with the government, and privileged access for certain journalists—have been politicized and whether that politicization has contributed to the formalization of informal instruments (Section C). Ultimately, in the concluding section, I will explain how the politicization of informality has led to a paradigm shift in court communication that prioritizes public, transparent, and institutional communication (Section D).

B. Practices and Institutions of Internal Informality at the BVerfG

The 1949 Basic Law, the constitution of the Federal Republic of Germany, does not provide specific rules for the internal organization and functioning of the BVerfG. In particular, during the first two decades after its establishment in 1951, the BVerfG had to struggle to establish itself as a central constitutional organ.¹⁹ Formalization of procedural rules was considered essential for carving out a strong role for the BVerfG in the young democracy. This is why, for instance, the social democrats (SPD), then in opposition, pushed for adopting rules on the internal organization of the BVerfG in the first months after the establishment of the Parliament in 1949 to limit the power of Chancellor Adenauer.²⁰ Since the BVerfG opened its doors in Karlsruhe, various forms of regulations have been developed to formalize many practices at the Court.

Today, the BVerfG is embedded in multiple regulatory layers of formalization. This includes, first of all, formal judicial acts, such as the Act on the Federal Constitutional Court (BVerfG Act) which regulates the procedures and the internal organization of the BVerfG and was first adopted in 1951.²¹ The behavior of the constitutional judges also falls under the more general framework of

¹⁸See Florian Meinel, *Das Bundesverfassungsgericht in der Ära der Grossen Koalition: Zur Rechtsprechung seit dem Lissabon-Urteil*, 60 STAAT 43 (2021). See also Florian Meinel, *The Merkel Court: Judicial Populism since the Lisbon Treaty*, 19 EUR. CONST. L. REV. 111 (2023).

¹⁹See HEINZ LAUFER, VERFASSUNGSGERICHTSBARKEIT UND POLITISCHER PROZESS 169–206 (1968).

²⁰See *id.* at 95–101.

²¹*Bundesverfassungsgerichtsgesetz*, DEJURE, <https://dejure.org/gesetze/BVerfGG> (last amended Nov. 20, 2019) (last visited July 23, 2023).

the German Judiciary Act (DRiG), first adopted in 1961, which regulates the judicial profession.²² The BVerfG has also adopted Rules of Procedure (GOBVerfG) that formalize daily business such as deliberation, voting, and judicial activities.²³ The assignment of cases to judges according to subjects and the respective assignments are also published in an annual, publicly accessible allocation plan.²⁴ Internal practices and procedures have also been categorized, debated, and analyzed extensively in numerous legal commentaries. In Germany, such commentaries provide an overview of legal practice and, while not binding, are considered “probably the most frequently cited legal publication genres.”²⁵ For the BVerfG, the BVerfG Act is continuously commented on not only by academics and judges but also by former judicial clerks, for instance, in the 2017 *Mitarbeiterkommentar*, which even advertises that it provides an “insider perspective” on the Court and its procedures.²⁶

Informality at the BVerfG may rarely come under the spotlight, but it plays a central role in safeguarding, promoting, and defending judicial authority internally. Empirical studies of the BVerfG, whether from a political science or socio-legal perspective, emphasize its secretive and intransparent nature. External perspectives on its inner workings, for instance from an ethnographic point of view such as Bruno Latour’s work on the Conseil d’Etat,²⁷ do not exist. Whistleblowers and “leaks,” such as in other apex courts, are rare. Only in publications and interviews with—mostly former—judges can we grasp how informality plays out in this highly regularized judicial system.²⁸ Informality was used by the BVerfG to coordinate among the judicial functionary elite and prevent politicization by creating a non-partisan Court that serves as a guarantor of German democracy.²⁹ In order for it to do so, informality is employed during its nomination (Subsection I), socialization (Subsection II), and deliberation (Subsection III) processes.

I. Nomination

The most prominent informal institution in the context of the BVerfG is probably the nomination of its judges according to a distribution based on an arrangement between the major political parties.³⁰ This party-affiliated distribution is formally regulated neither in the Constitution nor in

²²Deutsches Richtergesetz, DEJURE, <https://dejure.org/gesetze/DRiG> (last amended June 25, 2021) (last visited July 23, 2023).

²³GESCHÄFTSORDNUNG DES BUNDESVERFASSUNGSGERICHTS, BUNDEMINISTERIUM DER JUSTIZ, https://www.gesetze-im-internet.de/bverfgo_2015/index.html (last updated Nov. 19, 2014).

²⁴GESCHÄFTSVERTEILUNG, BUNDEVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/GV_2023/GV_2023_S1_I_Geschaeftsverteilung.pdf?__blob=publicationFile&v=2 (Dec. 21, 2022).

²⁵*Perspektiven der Rechtswissenschaft in Deutschland*. WISSENSCHAFTSRAT 51 (Nov. 12, 2012), <https://www.wissenschaftsrat.de/download/archiv/2558-12.html>. See also Christian Djeflal, *A Commentary on Commentaries: The Wissenschaftsrat on Legal Commentaries and Beyond*, VERFASSUNGSBLOG (June 30, 2014), <https://verfassungsblog.de/commentary-commentaries-wissenschaftsrat-legal-commentaries-beyond-2>.

²⁶TRISTAN BARCZAK, BVERFGG: MITARBEITERKOMMENTAR ZUM BUNDESVERFASSUNGSGERICHTSGESETZ (2017).

²⁷BRUNO LATOUR, *THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D’ÉTAT* (2010).

²⁸Dietrich Herrmann, *Politikwissenschaftliche Forschung zum Bundesverfassungsgericht*, in *ANALYSE DEMOKRATISCHER REGIERUNGSSYSTEME* 401, 412 (Klemens H. Schrenk & Markus Soldner eds., 2010). See also most recently, GERTRUDE LÜBBE-WOLFF, *BERATUNGSKULTUREN: WIE VERFASSUNGSGERICHE ARBEITEN, UND WOVON ES ABHÄNGT, OB SIE INTEGRIEREN ODER POLARISIEREN* (2022).

²⁹OLIVER W. LEMBECKE, *HÜTER DER VERFASSUNG* (2007); MICHAELA HAILBRONNER, *TRADITIONS AND TRANSFORMATIONS: THE RISE OF GERMAN CONSTITUTIONALISM* (2015); *VERFASSUNGSGERICHTSBARKEIT IN DER BONNER REPUBLIK: ASPEKTE EINER GESCHICHTE DES BUNDESVERFASSUNGSGERICHTS* (Florian Meinel ed., 2019). Whether the narrative of courts as bulwarks against autocratic tendencies is realistic in the German case remains an open question; in the words of Klaus Ferdinand Gärditz, “courts are usually not known for being pockets of resistance.” See Masing, *supra* note 4, at 301.

³⁰See Uwe Kischel, *Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective*, 11 INT. J. CONST. LAW 962 (2013); Christine Landfried, *The Selection Process of Constitutional Court Judges in Germany*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER* 196 (Kate Malleson & Peter H. Russell eds., 2006); Christine Landfried, *Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität der Verfassungsgerichtsbarkeit*, in

the BVerfG Act.³¹ Yet, it is consistently followed. Until 2016, nominations had largely alternated between the two major parties, the CDU/CSU and the SPD. Since 2018, a three-three-one-one allocation of two judges for each of the two Senates has been agreed upon that also gives a seat to the Greens and the -FDP-.³² Prior to this new agreement, the smaller parties were able to nominate a judge only when their right to nominate a judge was specifically passed onto them by the two major parties. The new distribution was agreed upon to account for the increasing diversification of political affiliations and pluralism. This informal institution also means that other parties that are represented in parliament, such as the socialist Die Linke and the AfD, are de facto barred from nominating judges.³³ Proponents of this informal institution argue that it guarantees a democratically balanced, stable Court and prevents more radical parties' access to influencing constitutional adjudication. Yet, this informality also opens up space for misappropriation, for instance, the justification for excluding radical positions can also be weaponized, as the failed 2008 nomination of Horst Dreier to the BVerfG had demonstrated. Dreier had been first proposed by the SPD, but, following a media campaign on his allegedly radical views on stem cell research and the prohibition of torture, his nomination failed to attract sufficient support from the Conservatives, an occurrence which is highly unusual in the informal nomination procedure.³⁴

Other instances of informality in nomination do not take place in the open. Socio-legal studies have in particular focused on informal practices related to the staff at the BVerfG. Today, approximately 270 persons, including the sixteen judges, are employed at the Court. While the role and behavior of judges are heavily formalized, the same does not hold true for the other employees of the Court. Their formal role set out in the Rules of Procedure remains vague, and, according to scholarly analysis, significantly downplays their actual influence upon the practice of the Court. Political players are aware of the importance of those secret players in the "engine room of justice."³⁵ Archival research helps to lift the veil on other informal acts. For instance, Fabian Michl has recently described how the then-BVerfG President and former CDU politician, Gebhard Müller, schemed to guarantee to place loyal Conservatives in central positions before he retired in 1971.³⁶ He successfully lobbied for Walter Rudi Wand to be promoted from Director to Judge at the BVerfG, the first time someone had successfully moved from an administrative to a judicial role. Müller had first employed Wand as a clerk and valued his loyalty over his lack of academic merit and the resistance of the other judges to this appointment. Wand was elected in 1970 to replace Judge Kutscher, who had suddenly been appointed to the CJEU, for the remaining year of Kutscher's tenure. However, in 1971, Judge Wand was exceptionally re-elected for a full

HANDBUCH BUNDESVERFASSUNGSGERICHT IM POLITISCHEN SYSTEM 369 (Robert Chr van Ooyen & Martin H. W. Möllers eds., 2015); Ulrich K. Preuß, *Die Wahl der Mitglieder des BVerfG als Verfassungsrechtliches und -politisches Problem*, 21 Z. FÜR RECHTSPOLIT. 389 (1988).

³¹*Sachstand; Die Wahl der Richter des Bundesverfassungsgerichts*, Deutscher Bundestag: Wissenschaftliche Dienste [WD] 3 3000 258/16 (Dec. 6, 2016), <https://www.bundestag.de/resource/blob/493592/bafe230e7b592f30de4761f1dcc3df5d/WD-3-258-16-pdf-data.pdf> (Ger.).

³²See also Markus Grabitz, *Besetzung des Bundesverfassungsgerichts: Parteien streiten um Vorschlagsrecht für Verfassungsrichter*, TAGESSPIEGEL (Mar. 15, 2019), <https://www.tagesspiegel.de/politik/parteien-streiten-um-vorschlagsrecht-fur-verfassungsrichter-3933649.html>; Melanie Aman & Dietmar Hipp, *Wer wird der höchste Richter im Land?*, DER SPIEGEL (July 13, 2018), <https://www.spiegel.de/politik/bundesverfassungsgericht-wer-wird-der-hoechste-richter-im-land-a-00000000-0002-0001-0000-000158383088>.

³³This is different for the constitutional courts on the state level. See Michael Hein, *Ausgrenzen oder integrieren?: Verfassungsrichterwahlen mit oder gegen die AfD*, VERFASSUNGSBLOG (July 9, 2018), <https://verfassungsblog.de/ausgrenzen-oder-integrieren-verfassungsrichterwahlen-mit-oder-gegen-die-afd>.

³⁴Thorsten Jungholt, *Fast-Verfassungsrichter: Horst Dreier und seine Version des Rufmordes*, WELT (July 18, 2008), <https://www.welt.de/politik/article2227067/Horst-Dreier-und-seine-Version-des-Rufmordes.html>.

³⁵Amelie Kaufmann, *Im Maschinenraum des höchsten Gerichts: Wer hält das Bundesverfassungsgericht am Laufen?*, LEGAL TRIBUNE ONLINE (Dec. 21, 2021), <https://www.lto.de/recht/justiz/j/bverfg-am-bundesverfassungsgericht-arbeiten-verwaltung-jobs-post-protokoll-bibliothek-direktor/>.

³⁶Fabian Michl, TWITTER (Mar. 5, 2023, 11:26 AM), <https://twitter.com/FabianMichl/status/1632417400644685831>.

twelve-year tenure period. As Michl argued, Wand's election allowed Müller to appeal to CDU politicians to appoint another young, Conservative-leaning director at the BVerfG, Karl-Georg Zierlein. The young Zierlein remained the director of the BVerfG until 1999. During his exceptional twenty-eight-year-long tenure, he was heavily engaged in the promotion of the German model of constitutional justice. He received the *Großes Verdienstkreuz* in 1998 in particular for his "tireless" support of constitutional lawyers and judges in Eastern Europe by providing them with information about the Basic Law and the BVerfG.³⁷ The informal scheming behind the scenes to appoint both Wand and Zierlein did not attract public attention; instead, it managed to place as central actors at the BVerfG people who held views that were in line with the political mainstream of the time and thus facilitated the coordination between the judiciary and the political elite. However, the nomination of certain persons to the Court is just one aspect of informality. Following the nomination, the second step is socialization.

II. Socialization

The BVerfG has traditionally been regarded as very successful in socializing its members into the Karlsruhe *esprit de corps*.³⁸ This is particularly noteworthy as the formal requirements provide for significant leeway in nomination. On a personal level, each BVerfG judge has to be over forty years of age and has to hold the legal qualifications to become a judge, which means the *Zweites Staatsexamen*.³⁹ On an institutional level, three of the eight judges making up each of the two Senates have to have at least three years of experience as federal judges.⁴⁰ The majority of BVerfG judges come from a career in either the federal courts or academia.⁴¹ However, a significant number of former politicians who hold the relevant legal qualifications have been nominated to the Court.⁴² This has sometimes created political controversy.⁴³ Yet, in general, the election of BVerfG judges who were former politicians does not trigger a general charge of political bias; on the contrary, some argue that they try to be even more careful in keeping their distance from the political sphere.⁴⁴ According to Uwe Kranenpohl's study on the BVerfG that relied on anonymized interviews with thirty former and active BVerfG judges as well as nine close affiliates to the Court, several judges welcomed more former politicians at the Court as those would bring certain sensibilities on the outcome of a decision on the political-administrative processes to the

³⁷Bundespräsident verleiht Direktor beim BVerfG das Große Verdienstkreuz, BUNDEVERFASSUNGSGERICHT Press Release No. 13/1998 (Feb. 19, 1998), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/1998/bvg98-013.html>.

³⁸This was also recently emphasized as a very positive feature in official farewell speeches of judges. See Peter M. Huber, *Der Erfolg des Bundesverfassungsgerichts*, FRANKFURTER ALLGEMEINE ZEITUNG (Apr. 5, 2023), <https://www.faz.net/einspruch/das-bverfg-in-der-gesellschaft-und-sein-erfolg-18802688.html>; Baer, *supra* note 2.

³⁹See Bundesverfassungsgerichtsgesetz [BverfGG] [Law on the Federal Constitutional Court] § 3 https://www.gesetze-im-internet.de/bverfgg/_3.html.

⁴⁰See Bundesverfassungsgerichtsgesetz [BverfGG] [Law on the Federal Constitutional Court] § 2(3) https://www.gesetze-im-internet.de/bverfgg/_2.html.

⁴¹On the differences between Berufsrichter:innen und Professorenrichter:innen, see also Franz C. Mayer, *Das Verhältnis von Rechtswissenschaft und Rechtspraxis im Verfassungsrecht in Deutschland*, 71 JURISTENZEITUNG 857, 861–62 (2016).

⁴²UWE KRANENPOHL, *HINTER DEM SCHLEIER DES BERATUNGSGEHEIMNISSES* 233 (2010).

⁴³Niema Movassat & Sandra Schulz, *Richterwahl im Bundestag. Aktive Politiker gehören nicht an das Bundesverfassungsgericht*, DEUTSCHLAND (Nov. 22, 2018), <https://www.deutschlandfunk.de/richterwahl-im-bundestag-aktive-politiker-gehoren-nicht-an-100.html>; Jan Keuchel & Volker Votsmeier, Stephan Harbarth: *Verfassungsrichter mit umstrittener Vergangenheit*, HANDELSBLATT (Mar. 5, 2020), <https://www.handelsblatt.com/politik/deutschland/designierter-praesident-stephan-harbarth-verfassungsrichter-mit-umstrittener-vergangenheit/25612434.html>. See also Benjamin G. Engst, Thomas Gschwend & Sebastian Sternberg, *Die Besetzung des Bundesverfassungsgerichts: Ein Spiegelbild gesellschaftlicher Präferenzen?*, 61 POLIT. VIERTELJAHRSSCHR. 39 (2020).

⁴⁴See Annette Riedel, *Verfassungsrichter Müller über Verhältnis zur Politik, Wir haben keinen politischen Gestaltungsehrgeiz*, DEUTSCHLANDFUNK (Sept. 11, 2021), <https://www.deutschlandfunkkultur.de/verfassungsrichter-mueller-ueber-verhaeltnis-zur-politik-100.html>. See also KRANENPOHL, *supra* note 42, at 451–52.

deliberation.⁴⁵ Kranenpohl explains this exceptional socialization and sense of community through the internalization of informal practices and institutions, for instance, the seniority principle that prevents certain internal conflicts from arising. At the BVerfG, the seniority principle not only provides guidance on who is assigned which office—infamously, before the renovation of the building, not all of them had air-conditioning and became quite uncomfortable in summer—on who sits close to the president during deliberations, or who accompanies the Court’s president on official visits,⁴⁶ but also influences the respective allocation of substantive issue areas that each judge has been assigned—at least in the Second Senate⁴⁷—or the internal order of deliberation when it is usually turned around and the most junior member of the Court starts presenting his or her argument. However, according to former constitutional judge (2002–2014) Gertrude Lübbecke-Wolff, other informal practices that were mainly aimed at subordinating new judges into the Court, for instance, that the most junior member has to stand in the last row of pictures or has the task of regularly airing the Second Senate’s meeting rooms, have been discontinued.⁴⁸

Informal practices in the socialization and promotion of judicial clerks at the BVerfG also anchor the constitutional mission overall in the judicial system. The judicial clerks, *wissenschaftliche Mitarbeiter:innen*, at the BVerfG have often been described as a “black box”, however, their influence on constitutional adjudication has been compared to their constituting a “Third Senate” in its own right.⁴⁹ While their main function is merely to prepare the first analysis of a decision or legal question, the high workload of the judges gives their assessment special importance.⁵⁰ At the beginning of the BVerfG, only one clerk was assigned to support the entire Court; however, that number quickly rose to six in 1956 and twenty-one in 1971.⁵¹ Since then, as the number of constitutional complaints has risen, so has the number of judicial clerks. Today, each judge is supported by four judicial clerks that he or she selects in accordance with Article 13 (2) 1 of the Rules of Procedure. There are no public calls for application, so the mode of selection remains opaque. Socio-legal studies have demonstrated that most clerks come from administrative courts or the ordinary civil jurisdiction.⁵² Judges, prosecutors, and civil servants can be assigned to the BVerfG, but judicial clerks also come from academia and legal practice.

The clerks themselves have developed informal practices that contribute to the promotion of the jurisprudence and authority of the BVerfG. While they remain invisible in the adjudicative process itself and are not named or listed on the homepage of the BVerfG,⁵³ the clerks have adopted a more proactive voice, in particular, through the publication of legal commentaries. In 2002, Dieter C. Umbach and Thomas Clemens published the first *Mitarbeiterkommentar* and handbook on the Basic Law by current and former clerks of the BVerfG.⁵⁴ Since 2009, the judicial

⁴⁵*Id.* at 207–09.

⁴⁶*Id.* at 441–46.

⁴⁷See LÜBBECKE-WOLFF, *supra* note 28, at 410.

⁴⁸*Id.* at 417–18.

⁴⁹See Vanessa Hellmann, *Organisation des Bundesverfassungsgerichts. Blick in die Box: Zur Arbeit der wissenschaftlichen Mitarbeiter*innen am Bundesverfassungsgericht*, in REFORM DES BUNDESVERFASSUNGSGERICHTS? 100 (Thomas Gawron et al. eds., 2021); OTWIN MASSING, POLITIK ALS RECHT—RECHT ALS POLITIK: STUDIEN ZU EINER THEORIE DER VERFASSUNGSGERICHTSBARKEIT 187–96 (2005); Rüdiger Zuck, *Die Wissenschaftlichen Mitarbeiter des Bundesverfassungsgerichts*, in DAS BUNDESVERFASSUNGSGERICHT IM POLITISCHEN SYSTEM 283 (Robert Chr. van Ooyen & Martin H. W. Möllers eds., 2006).

⁵⁰For a balanced assessment, see KRANENPOHL, *supra* note 42, at 88–91; see LÜBBECKE-WOLFF, *supra* note 28, at 457–59.

⁵¹See Zuck, *supra* note 49, at 285–86.

⁵²*Id.*

⁵³This also resulted in curious outputs, such as the so-called *Festschrift Nagelmann*, a satirical edited volume by former clerks of the BVerfG in remembrance of a fictitious F. G. Nagelmann, the “first Hiwi” (judicial clerk) at the BVerfG in the name of the “Third Senate.” See also DAS WAHRE VERFASSUNGSRECHT: ZWISCHEN LUST UND LEISTUNG. GEDÄCHTNISSCHRIFT FÜR F. G. NAGELMANN (Dieter C. Umbach et al. eds., 1984).

⁵⁴GRUNDGESETZ: MITARBEITERKOMMENTAR UND HANDBUCH (Dieter C. Umbach & Thomas Clemens eds., 2002).

clerks have published edited volumes on central strands of BVerfG jurisprudence openly marketed “as discussed by the judicial clerks.”⁵⁵ Until 2022, six such volumes had emerged, each with a preface by the BVerfG President at the time.⁵⁶ They consist of in-depth analysis of major strands of case law at the Court on a variety of subjects from procedural questions to fundamental rights, special areas such as international, tax, and financial law, as well as due process and access to justice. In their own words, those volumes aim to provide a structural, analytical, and scientific overview of the full range of constitutional adjudication from “a close-up view.”⁵⁷ Additionally, in 2017, current and former clerks under the leadership of Tristan Barczak published another *Mitarbeiterkommentar* on the BVerfG Act to provide a practice-oriented overview of the procedural and organizational norms at the Court. According to Franz C. Mayer, these legal commentaries are heavily cited in briefs to the Court, while they do not have much impact on the scholarly discussion.⁵⁸ This demonstrates that the times in which clerks remained invisible are mainly over; however, the traces of informality that remain in the hiring, socialization, and future promotion of clerks shape an elite that is loyal to the vision of democratic constitutionalism⁵⁹ that the BVerfG embodies.

The BVerfG clerkship is also characterized as a “*Kaderschmiede*,” an elite training ground.⁶⁰ While there are no statistics on the clerks’ career prospects, clerkship was traditionally considered an essential step to climbing the echelons of the German judiciary. According to Dieter Grimm, former judge of the BVerfG:

[M]ost law clerks on the Constitutional Court are judges in the other systems. They usually come to the BVerfG for two or three years, and then return to the ordinary courts. Currently [in 2021, *authors insertion*] the presidents of all five Supreme Courts were former law clerks of the BVerfG.⁶¹

However, this has changed in recent years as the current composition of the BVerfG features only a minority of former BVerfG clerks, and the posting of clerks to the Court is allegedly becoming more burdensome to state authorities due to the rapidly increasing shortage of judges. According to Kranenpohl, former judges usually stay in touch with their former clerks, in some cases via annual meetings over several decades.⁶² The same *esprit de corps* can thus be found also in the “Third Senate.” The clerkship at the BVerfG, which lasts approximately three years, serves a socialization function for the broader legal system; it creates an elite group of people with particular expertise in constitutional law which spreads throughout the higher judiciary and, to some extent, academia.⁶³ In the words of Lübke-Wolf, this diffusion of constitutional consciousness and constitutional loyalty contributes to the integrative force of the Constitution.⁶⁴

As in the nomination of judges, informal practices of socialization guarantee that outsiders are barred from the highest judicial spheres. This prevents more radical persons, for instance, those holding politically extremist views, from accessing judicial clerkship. Yet, from a socio-legal perspective, this informal approach to the selection also facilitates implicit biases and structural

⁵⁵See HARTMUT RENSEN & STEFAN BRINK, LINIEN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS: ERÖRTERT VON DEN WISSENSCHAFTLICHEN MITARBEITERN. BAND 1 (2009).

⁵⁶See DANIEL BERNHARD MÜLLER & LARS DITTRICH, LINIEN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS: ERÖRTERT VON DEN WISSENSCHAFTLICHEN MITARBEITERINNEN UND MITARBEITERN. BAND 6 (2022).

⁵⁷*Id.*

⁵⁸See Mayer, *supra* note 41, at 862.

⁵⁹See also Farahat, *supra* note 4, at 280.

⁶⁰See KRANENPOHL, *supra* note 42, at 363.

⁶¹Alec Stone Sweet and Giacinto della Cananea, *A Conversation with Dieter Grimm*, 22 GERMAN L. J. (2021) 1548.

⁶²*Id.* at 447.

⁶³On academia, see Mayer, *supra* note 41, at 862.

⁶⁴See LÜBBE-WOLFF, *supra* note 28, at 466.

discrimination. While the number of female clerks seems to be increasing steadily, people with (noticeable) disabilities, people of color, and those with other forms of migration experiences are rarely found in the pool of selected clerks.⁶⁵ In most cases, the clerks are not recent graduates but come with significant work experience in the judiciary, administration, or academia. They are usually in their mid to late thirties and relocation to Karlsruhe for a few years might pose additional hurdles, for instance for people with caring responsibilities. As we lack empirical data on the clerks, the informal conditions suggest that this reproduces the functional elite in the judiciary.

III. Deliberation

Ultimately, the deliberative process, while not informal as such, is accompanied by informal institutions.⁶⁶ The principle of secrecy of deliberation at the BVerfG, also compared to a “black box” in scholarship,⁶⁷ should protect the politically-appointed judges from undue pressures and safeguard central democratic elements such as the separation of powers.⁶⁸ While separate opinions have been permitted at the BVerfG since 1970,⁶⁹ judges have mentioned that, as an “informal rule,” a judge may attach a separate opinion only a few times in their career.⁷⁰ Procedurally, after a judge announces his or her desire to formulate a separate opinion, the draft of the opinion is discussed in the respective plenary of the Senate to re-visit the arguments and attempt to find common ground.⁷¹ This informal institution increases the internal pressure to reach consensus and reduces the individual visibility of judges. According to Lübke-Wolff, this prevents the further popularization and politicization of individual judges and portrays a unified bench.⁷² However, she argues that to keep some balance, in contrast to apex courts which more frequently allow separate opinions, BVerfG judges enjoy significantly more leeway in their public speech.

Former judges highlight the open and discursive deliberative culture which provides for a respectful but also very intense discussion. Informal institutions in this deliberative culture bar judges from promoting party-political arguments,⁷³ or, as former constitutional judge (1999–2008) Wolfgang Hoffmann-Riem describes, even avoiding close personal contacts such as having lunches and drinks together to avoid discussing questions outside the meetings concerning them.⁷⁴ Not even the clerks are in the room during the deliberation. The framework of informality and secrecy in Senate deliberation thus enables judges to keep an open mind and also to change their position or accept being outvoted without losing face.⁷⁵ Additionally, most applicable constitutional complaints are processed in the chambers, which consist of three judges that are

⁶⁵For a larger discussion on the (lack of) diversity in the German legal field, see MICHAEL GRÜNBERGER ET AL. *DIVERSITÄT IN RECHTSWISSENSCHAFT UND RECHTSPRAXIS. EIN ESSAY* (2021).

⁶⁶For a political science perspective on judicial deliberation, see Silvia von Steinsdorff, (*Verfassungs-*)*Richterliches Entscheiden*, in *INTERDISZIPLINÄRE RECHTSFORSCHUNG: EINE EINFÜHRUNG IN DIE GEISTES- UND SOZIALWISSENSCHAFTLICHE BEFASSUNG MIT DEM RECHT UND SEINER PRAXIS* 207 (Christian Boulanger et al. eds., 2019).

⁶⁷See KRANENPOHL, *supra* note 42, at 20; ANNA-BETTINA KAISER, *ENTSCHEIDUNGEN UND ENTSCHEIDUNGSPROZESSE DER RECHTSPRECHUNG* 2–3 (Matthias Jestaedt et al. eds., 2020).

⁶⁸However, see also Benjamin G. Engst, Thomas Gschwend, Nils Schaks & Sebastian Sternberg, *Zum Einfluss der Parteinähe auf das Abstimmungsverhalten der Bundesverfassungsrichter—eine quantitative Untersuchung*, 72 *JURISTENZEITUNG* 816 (2017).

⁶⁹For more detail, see MATTHIAS K. KLATT, *DAS SONDERVOTUM BEIM BUNDESVERFASSUNGSGERICHT* (2023).

⁷⁰See KAISER, *supra* note 65, at 3.

⁷¹See KRANENPOHL, *supra* note 42, at 483.

⁷²See LÜBBE-WOLFF, *supra* note 28, at 145.

⁷³ARD AUDIOTHEK *supra* note 15.

⁷⁴Wolfgang Hoffmann-Riem, *Die Klugheit der Entscheidung ruht in ihrer Herstellung—selbst bei der Anwendung von Recht*, in *KLUGES ENTSCHEIDEN. DISZIPLINÄRE GRUNDLAGEN UND INTERDISZIPLINÄRE VERKNÜPFUNGEN* 15 (Arno Scherzberg et al. eds., 2022).

⁷⁵*Id.*

assigned to particular areas of law, as laid down in the Rules of Procedure. As chamber composition varies over time, Christoph Engel has empirically shown that the success of a constitutional complaint is significantly lower following the re-composition of a chamber.⁷⁶ The decisions in the chambers, the *Kammerbeschluss*, are deliberated not in person but in writing and circulated among the members of the chamber. In the absence of separate opinions, the circulated draft proposed by the judicial rapporteur should thus identify a consensus early on.⁷⁷ In a similar vein, the decision to not accept a constitutional complaint, which is the result in approximately 80 percent of all incoming complaints, does not require the Court's written justification in accordance with Article 93d (1) 3 BVerfG Act. However, some argue that this is because the Chamber cannot agree on a common justification for non-acceptance.⁷⁸ All this has contributed to a deliberative culture at the BVerfG which produces, in the words of Lübke-Wolff:

A high rate of decisions that are unanimous or at least without dissenting opinion by international standards, and—more importantly—a jurisprudence that is not characterized by voting blocs ('factions') and fluctuating between the positions of bloc majorities but, on the whole, continuously centered and balanced, through which the court has earned great trust and a high reputation as an impartial authority.⁷⁹ (translation by the author)

This section has demonstrated that informality plays a central role at the BVerfG. Informal practices and institutions have been part and parcel of a deliberative culture that is aimed at facilitating consensus and broad support above all other means. Informal practices remain largely invisible to maintain the collective nature of the Court.⁸⁰ In the turn towards increasing complexity, high technicality, and limited political margins,⁸¹ the Court has relied on informal practices to consolidate its authority. In particular, the Court employs informality to stabilize and promote its authority while avoiding politicization. For instance, informality aims to hide the links between politics and the Court that are most visible in the appointment of judges.

C. The Politicization of External Informality at the BVerfG

In the history of the BVerfG, informality has contributed to the reputation of an impartial, legitimate, and non-partisan court. At the same time, informality provides the Court with links to political, legal, and judicial actors that might strengthen its standing, facilitate compliance, and defuse tensions. Many informal instruments were gradually developed to establish the institutional authority of the Court in its first decade, for instance via extrajudicial engagement. Informal practices such as the clerkship at the BVerfG, served as a form of socialization of an elite class of high court judges and thus promoted and integrated constitutional jurisprudence across the judicial system. Informal institutions such as deliberation rules were aimed at keeping the BVerfG free from political influence.

⁷⁶Christoph Engel, *Lucky You: Your Case Is Heard by a Seasoned Panel—Panel Effects in the German Constitutional Court*, 19 J. EMPIRICAL LEGAL STUD. 1179, 1206 (2022).

⁷⁷See Hoffmann-Riem, *supra* note 74, at 18.

⁷⁸Pia Lorenz & Markus Sehl, *Nichtannahme ohne Begründung durch das BVerfG: Weg von der Praxis des leeren Blatts?*, LEGAL TRIBUNE ONLINE (Nov. 16, 2018), <https://www.lto.de/recht/justiz/j/bundesverfassungsgericht-verfassungsbeschwerde-nichtannahme-ohne-begrueundung-pflicht/>. This was also challenged by the AfD. See Entwurf eines Sechsten Gesetzes zur Änderung des Bundesverfassungsgerichtsgesetzes [Draft Sixth Amendment of Federal Constitutional Court Act] Deutscher Bundestag: Drucksache [BT]19/5492, <https://dserver.bundestag.de/btd/19/054/1905492.pdf> (Ger.).

⁷⁹See LÜBBE-WOLFF, *supra* note 28, at 41–42.

⁸⁰Hans Vorländer, *Deutungsmacht—die Macht der Verfassungsgerichtsbarkeit*, in DIE DEUTUNGSMACHT DER VERFASSUNGSGERICHTSBARKEIT 9, 27–29 (Hans Vorländer ed., 2006).

⁸¹See Volkmann, *supra* note 17.

Yet, informality can also become a threat to the Court's authority as every informal practice creates outsiders. Those outsiders have plenty of reasons to challenge this informality, in particular when they are populist actors who want to employ anti-elite rhetoric. In the late- and post-Merkel years, the BVerfG, which had long evaded the onslaught of politicization that had affected other apex and international courts, has been challenged precisely on account of the existence of informality.⁸² While some practices and institutions that fall into the internal dimension of informality are challenged by outsiders such as the AfD, for instance, the nomination of BVerfG judges,⁸³ external informal practices and institutions trigger a much higher level of politicization across the political and public spheres. In contrast to internal informality, the opacity and secrecy of external informal practices and institutions pose a stark contrast to principles of publicness and accountability. This facilitates their politicization among the general public, as critics argue that those practices contravene fundamental rights, judicial independence, media freedom, and democratic legitimacy.

The next Section explores this politicization of informality during the last decade. It highlights three informal instruments that have come under significant public scrutiny: The informal acts in the context of extrajudicial activities of judges (Subsection I); the informal practice of meetings of judges with governmental officials (Subsection II); and the informal institution cooperation with the *Justizpressekonferenz* (Subsection III). During the politicization of those informal instruments, they were addressed openly and attempts were made to either formalize or amend them. Those processes of formalization thus contribute to the existence of varying degrees of informality.

I. Extrajudicial Activities

Judges play a central role in establishing the authority and integrity of a court. The conduct of judges reflects not only on the court's institutional standing but also on the integrity of its jurisprudence. Under German law, judges enjoy freedom of speech under the Basic Law but have to practice restraint and moderation while exercising it as it could threaten their impartiality.⁸⁴ This holds particularly true for apex courts whose judges play a more pronounced part in public life. Accordingly, in such a public role, judicial conduct has to fulfill high moral standards. Those requirements are laid down in Article 39 of the German Judiciary Act (DRiG), which provides that “[t]he judge has to behave in- and outside his office also in political activities, in such a manner that trust in his independence is not jeopardized.”⁸⁵

Traditionally, Karlsruhe has embraced a more restrained approach to regulating the extrajudicial activities of its judges. In contrast to those of other national apex courts, the judges at the BVerfG have usually kept their public activities to a minimum. They do not generally comment on the jurisprudence of the Court and remain rather distant from the political life in Bonn or Berlin—even, or especially when they come from a party-political background. This was not only a question of geography, but also a traditional characteristic of the BVerfG. As previously discussed, the BVerfG promotes a vision of a court as a harmonious unit; it prefers the collective over the individual judge.⁸⁶ Kranenpohl identifies this also as a type of informality that contributes to the role of the internalization of the judges, namely to safeguard the reputation of the Court

⁸²See Jens Peter Paul, *Kritik a Bundesverfassungsgericht: Karlsruhe verspielt seinen Ruf*, CICERO (Oct. 10, 2021), <https://www.cicero.de/innenpolitik/kritik-am-bundesverfassungsgericht-karlsruhe-verspielt-seinen-ruf-klima-klage>.

⁸³Stephan Brandner, *Richterwahl für das Bundesverfassungsgericht reformieren*, AfD BUNDESTAG (Feb. 20, 2023) <https://afdbundestag.de/stephan-brandner-richterwahl-fuer-das-bundesverfassungsgericht-reformieren/>. On the local level, see also Hein, *supra* note 33.

⁸⁴For a legal analysis of the German and European context, see JANNIKA JAHN, *DIE MEDIENÖFFENTLICHKEIT DER RECHTSPRECHUNG UND IHRE GRENZEN* (2021).

⁸⁵*Deutsches Richtergesetz*, DEJURE, <https://dejure.org/gesetze/DRiG> (last amended June 25, 2021) (last visited July 23, 2023) Article 39.

⁸⁶See KRANENPOHL, *supra* note 42; see also LÜBBE-WOLFF, *supra* note 28.

(*die Würde des Hauses*).⁸⁷ Interviewed judges were also adamant that it is an informal but absolute commandment (*absolutes Gebot*) that they avoid seeking out political influence and refuse any attempts by the political sphere to influence judicial decision-making.⁸⁸ Still, judges engage in various ways in political discussions, including speeches and interviews in public or closed settings. In the absence of formal regulation, the judges established various ways of informally structuring their extrajudicial activities.

The tenure of Andreas Voßkuhle as President of the BVerfG caused a paradigm change in the regulation of extrajudicial activities. Voßkuhle started at the BVerfG in 2008 as a Vice-President and then continued as President from 2010 until 2020. While he soon adopted a very outspoken and prominent profile in the political landscape, his reputation, also due to his academic background, was non-partisan. This also led to him being considered twice as a candidate for the Federal President, an offer Voßkuhle declined. As President of the BVerfG, Voßkuhle was concerned by two developments: On the one hand, he believed strongly that courts have to explain their decisions better to the public. He argued that in the face of rising populism courts have to take a more proactive approach to communication. Judges have to inform the citizens about their role and promote the acceptance and legitimacy of the judicial function.⁸⁹ On the other hand, he also considered the rise of populism in Poland and Hungary as a warning sign for judges to be even more cautious in upholding a spotless reputation so that they do not fall easy prey to populist agendas.⁹⁰ An increase in extrajudicial communication has to entail stricter scrutiny of extrajudicial activities, in particular, if those relate to political or commercial interests. The rising populist threat thus served as the final impetus for creating a stricter framework for extrajudicial activities.

The idea of the Karlsruher *Ethikkodex* was born. In its annual press conference, in February 2017, President Voßkuhle announced that the judges at the BVerfG planned to adopt voluntary guidelines for judicial conduct. This self-imposed framework should clarify rules on judges' moonlighting, which means it should regulate their engagement in secondary employment, for instance, when engaging in consulting work or receiving financial compensation for speeches, during their tenure as well as their behavior after having left office. A four-person working group, consisting of Judges Susanne Baer, Michael Eichberger, Peter M. Huber, and Sibylle Kessal-Wulf, was entrusted with drafting guidelines on media activities, honoraria for speeches, or a possible cooling-off period after leaving office. Sanctions for misconduct were not envisioned.⁹¹ Even among the judges, this proposal was not uncontroversial. Some reports assumed that Voßkuhle's public announcement had been a strategic choice to raise the stakes for the successful adoption of the guidelines in light of internal criticism.⁹² The need for guidelines was further strengthened by the conduct of two former judges: First, Christine Hohmann-Dennhardt, who, after having left office, immediately joined the board of Daimler and later Volkswagen, from whom she collected a multi-million Euro severance package, and, secondly, former BVerfG President Hans-Jürgen Papier, who started a prolific and highly lucrative career in writing expert opinions immediately after his tenure in Karlsruhe ended and became very outspoken in its criticism of the Court in the media.⁹³

⁸⁷See KRANENPOHL, *supra* note 42, at 463–66.

⁸⁸*Id.* at 466–69.

⁸⁹See Thorsten Jungholt & Jacques Schuster, "Insofern haben es Richter leichter als Minister oder die Kanzlerin", WELT (June 9, 2018), <https://www.welt.de/politik/deutschland/plus177258912/Bundesverfassungsgericht-Andreas-Vosskuhle-sieht-Ermuedung-der-Gesellschaft.html>.

⁹⁰Marc Brost & Heinrich Wefing, *Organisierter Widerstand*, DIE ZEIT ONLINE (May 16, 2012), <https://www.zeit.de/2012/21/Interview-Vosskuhle>. See also ANDREAS VOßKUHLE, *EUROPA, DEMOKRATIE, VERFASSUNGSGERICHT* (2021).

⁹¹Wolfgang Janisch, *Karlsruher Kodex*, SÜDDEUTSCHE ZEITUNG (Feb. 22, 2017), <https://www.sueddeutsche.de/politik/ethik-karlsruher-kodex-1.3391088>.

⁹²Christian Rath, *Karlsruher Ethik-Code: Benimm-Regeln für Verfassungsrichter*, LEGAL TRIBUNE ONLINE (Jan. 5, 2018), <https://www.lto.de/recht/justiz/j/bverfg-verhaltensrichtlinien-richter-ethik-code-ansetzen-bevoelkerung/>.

⁹³Constantin Baron van Lijnden, *Vertrauen und Verantwortung*, LEGAL TRIBUNE ONLINE (Feb. 23, 2017), <https://www.lto.de/recht/hintergruende/h/bverfg-ethik-kodex-vertrauen-bevoelkerung-erhalten-politik-wirtschaft-einfluss/>.

The judges at the BVerfG adopted the final guidelines in November 2017 and they were published on the Court's homepage in January 2018. They were signed by the judges individually and included 16 specific provisions. Article 1 highlights the aim of those guidelines, namely to ensure that the judges' conduct "does not compromise the reputation of the court, the dignity of the office and confidence in its independence, impartiality, neutrality, and integrity."⁹⁴ To ensure that, judges have, among other things, to practice restraint in commenting on their jurisprudence as well as the cases of other national and international courts,⁹⁵ disclose the details of any gifts or compensation they receive,⁹⁶ and refrain from providing consultations and legal opinions regarding any questions that would fall within the subject area of their judicial department for the first year after they leave office.⁹⁷ Every member of the Court has the right to raise concerns over the application of and compliance with the rules.⁹⁸

The guidelines of the BVerfG, while clearly soft law, are a first attempt from the inside to uphold the authority of the Court in times of increasing societal polarization. The pronounced public role of the constitutional judges provides the impetus for this formalization of informal acts. In the United States, a similar attempt at formalization and regulation of extrajudicial activities in the face of ethics scandals involving certain judges and the political politicization of the US Supreme Court is currently being discussed. As the judges were unable to find consensus on a code of conduct, in February 2023 Senators proposed legislation on a new "Supreme Court Ethics, Recusal, and Transparency Act"⁹⁹ that would include a mandate for the creation of a binding ethics code.¹⁰⁰

Yet, the guidelines emerged relatively late, following the aforementioned massive scandals on the behavior of former judges and years of increased criticism of Voßkuhle's frequent interactions with the media, often alleging that the public communication of the institution had been turned into a "one-man show."¹⁰¹ For over a decade, the attempt of Karlsruhe to find a delicate balance between explanation and representation, between freedom of speech and the respect for authority, between the public diplomacy of a court president and the institutional communication of a Court had been rather hit and miss. In this delicate situation, guidelines were welcome and necessary, yet, interestingly, they did not provide binding rules for judicial behavior. Instead, formalization was employed to safeguard informality. Not even Voßkuhle had mentioned the possibility of amending the BVerfG Act, which would have transferred the question to the political realm.¹⁰² The decision to choose soft law thus again demonstrates how the Court attempts to safeguard its authority vis-à-vis the political sphere, even when an external regulation of judicial behavior might have been more effective in both creating binding rules and limiting appearances of problematic self-regulation.

Moreover, it remains unclear whether guidelines are sufficient to establish clear standards and orientation for the judges in future years. In case of doubt, the procedural law of the BVerfG allows

⁹⁴VERHALTENSLINNIEN FÜR RICHTERINNEN UND RICHTER DES BUNDESVERFASSUNGSGERICHTS, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/DE/Richter/Verhaltensleitlinie/Verhaltensleitlinien_node.html.

⁹⁵*Id.* at arts. 6, 12.

⁹⁶*Id.* at art. 9.

⁹⁷*Id.* at art. 15.

⁹⁸*Id.* at art. 16.

⁹⁹Robert Barnes & Ann E. Marimov, *Supreme Court Justices Discussed, But Did Not Agree on, Code of Conduct*, THE WASHINGTON POST (Feb. 9, 2023), <https://www.washingtonpost.com/politics/2023/02/09/supreme-court-ethics-code/>.

¹⁰⁰Sheldon Whitehouse, *Sens. Whitehouse and Blumenthal and Reps. Johnson, Nadler, Quigley, and Cicilline Introduce New Version of Supreme Court Ethics, Recusal, & Transparency Act*, SHELDON WHITEHOUSE, (Feb. 29, 2023), <https://www.whitehouse.senate.gov/news/release/new-version-of-supreme-court-ethics-recusal-and-transparency-act>.

¹⁰¹For a particular noteworthy Berlin visit in 2013, see Katja Gelinsky, *Voßkuhle und die Presse: Stimmungsumschwung oder Manipulation?* VERFASSUNGSBLOG (Mar. 24, 2013) <https://verfassungsblog.de/voskuhle-und-die-presse-stimmungsumschwung-oder-manipulation/>.

¹⁰²I am grateful to Florian Meinel for raising this point.

significant leeway for both lenience and restriction in assessing judicial conduct. A controversial example is the 2021 decision on the prejudice of newly elected BVerfG Judge Astrid Wallrabenstein from participating in the judicial proceedings in the PSPP case, in particular the upcoming enforcement order. The Court here sided with the complainant, Peter Gauweiler, who argued on the basis of the relevant provisions in the BVerfG Act that an interview given by Wallrabenstein shortly after her election cast doubts on her judicial impartiality.¹⁰³ The interview had been of a general nature on ECB policies and Wallrabenstein had not commented on the original PSPP decision, which had been adopted a few weeks before she entered office. As Florian Meinel and Christian Neumeier point out, this very restrictive reading of the relevant prejudice provisions deviates from the more lenient approach the BVerfG took with respect to complaints of prejudice against Peter M. Huber and Stephan Harbarth in other proceedings.¹⁰⁴ Additionally, in a highly exceptional move, the decision banning Wallrabenstein from participating in the proceedings was adopted “with opposing votes;” however, the ratio was not specified. Despite this irregularity, the BVerfG did not publish a press release on the decision and took some time to publish it on its homepage.¹⁰⁵ In a similarly problematic decision, the BVerfG responded recently to a press inquiry on a possible prejudice of Judge Peter Müller, who had given an interview comparing the situation of the Berlin elections with that in a “dictatorial developing country,”¹⁰⁶ that he did the interview in his private capacity—notwithstanding his position as rapporteur in the related BVerfG proceedings.¹⁰⁷ In the absence of binding formal acts, extrajudicial activities as informal acts will thus continue to oscillate between the need for safeguarding institutional authority and the prevention of political instrumentalization.

II. Informal Dinner Meetings with the Government

On July 1, 2021, a short press statement of the BVerfG disclosed another informal practice that soon triggered a public outcry followed by a series of judicial proceedings challenging the informality. The plain statement revealed that the day before, a delegation of the Court led by its President, Stephan Harbarth, and Vice-President, Doris König, had met members of the government in Berlin for a shared dinner in the chancellery at the invitation of Chancellor Angela Merkel. The most explosive information was kept for the last sentence, which read that “the visit continues a tradition that has existed for many years.”¹⁰⁸ In this short statement, no information was provided on the number of participants, the dinner’s length, or the subject of the meeting.

The 2021 meeting attracted heightened media interest and public scrutiny due to two cases that were pending at the BVerfG when the meeting took place. The first case concerned the constitutionality of Covid mobility restrictions (*Bundesnotbremse I*) and thus falls squarely within

¹⁰³BVerfG, 2 BvR 2006/15, Rn. 1-39, Jan. 12, 2021, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/01/rs20210112_2bvr200615.html.

¹⁰⁴Florian Meinel & Christian Neumeier, *Befangen? Zur Ablehnung der Bundesverfassungsrichterin Astrid Wallrabenstein im PSPP-Verfahren*, VERFASSUNGSBLOG (Feb. 10, 2021), <https://verfassungsblog.de/befangen>.

¹⁰⁵Christian Walter & Philip Nedelcu, *Der Wallrabenstein-Beschluss und die politische Dimension des Verfassungsprozessrechts*, VERFASSUNGSBLOG (Feb. 16, 2021), <https://verfassungsblog.de/der-wallrabenstein-beschluss-und-die-politische-dimension-des-verfassungsprozessrechts>.

¹⁰⁶Alexander Schmalz, *Wahlpannen in Berlin: Karlsruher Richter sieht Zustände wie in einer Diktatur*, BERLINER ZEITUNG (Oct. 5, 2022), <https://www.berliner-zeitung.de/news/wahlpannen-in-berlin-karlsruher-richter-sieht-zustaende-wie-in-einer-diktatur-li.273785>.

¹⁰⁷In a similar vein, see also Florian Meinel of a possible prejudice by Peter Müller, also as judge rapporteur, in the decision on the *Gebäudeenergiegesetz* following his speech on the industrial consequences of climate change at the CDU party meeting. Florian Meinel, *Legitimation contra Verfahren: Der Beschluss des BVerfG zur parlamentarischen Beratung des Gebäudeenergiegesetzes*, VERFASSUNGSBLOG (July 9, 2023), <https://verfassungsblog.de/legitimation-contra-verfahren>.

¹⁰⁸BESUCH DES BUNDESVERFASSUNGSGERICHTS BEI DER BUNDESREGIERUNG, BUNDESVERFASSUNGSGERICHT (July 1, 2021), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2021/bvg21-054.html>.

one of the two main subjects that were being discussed. Leaks to the media suggested that BVerfG President Harbarth, himself a former member of parliament, had specifically requested to include the topic “deciding under conditions of insecurity,” while the government had tried to warn him of the close topical connection to the pandemic.¹⁰⁹ The second case concerned Angela Merkel herself, who was charged with having violated neutrality requirements and the right to equal opportunities for political parties after she had publicly condemned the election of a state prime minister with the help of AfD votes. The hearings in the case against Merkel herself started less than two weeks after the 2021 dinner took place.¹¹⁰

In both cases, the claimants—the regional opposition party *Freie Wähler* in the case of the Bundesnotbremse and the AfD in the case of Angela Merkel—legally challenged the participation in the dinner meeting of President Harbarth and Judge Susanne Baer—who had given a presentation during it¹¹¹—as well as the Second Senate as a whole¹¹² due to prejudice. Both applications were rejected by the BVerfG as neither the subject nor the format of the dinner meeting had given rise to perjury.¹¹³ Yet, this is not the end of the story. Journalist Lydia Rosenfelder, who works for Germany’s largest tabloid, *Bild*, tried to gather more information on the content of Judge Baer’s presentation at the dinner meeting after she had identified irregularities in the documentation.¹¹⁴ After the BVerfG had repeatedly refused to answer her questions, she applied to the Karlsruhe administrative court for a temporary injunction against the BVerfG requiring it to comply with the press right to information. After the claim had been filed, the BVerfG forwarded her some of the requested information but refused to bear the costs of the proceedings. Ultimately, the Karlsruhe administrative court sided with the journalist.¹¹⁵

The alleged collusion between the BVerfG and the government was also addressed in political fora, again mainly by the AfD. Following a minor interpellation by AfD politicians,¹¹⁶ on August 5, 2021 the government disclosed the full list of participants, which included all sixteen judges and most government ministers, and the two topics for discussion on which presentations were given by ministers and judges during the 2021 dinner meeting, namely “Legislation in Europe” and “Deciding under Conditions of Insecurity.” It also provided a full overview of the dinner menu: Antipasti, beef stew, white chocolate mousse for dessert, and a cheese board. Additionally, the response noted that the meetings had taken place annually in 2018 and 2019, but had occurred multiple times, even though irregularly, in the past, which is why they constituted a “tradition” between the constitutional organs.

In February 2022, AfD politicians followed up with another minor interpellation to gain more information on the 2021 meeting as well as on all the participants and topics of all former

¹⁰⁹Felix W. Zimmermann, *VG Karlsruhe urteilt über das BVerfG: BVerfG durfte Presseanfragen nicht abblocken*, LEGAL TRIBUNE ONLINE (June 27, 2022), <https://www.lto.de/recht/hintergruende/h/vg-karlsruhe-bverfg-presseanfrage-auskuenfte-bild-auskunftsanspruch-kosten-klage-rosenfelder/>.

¹¹⁰*Vor Prozess gegen Kanzlerin: Angela Merkel und das pikante Abendessen mit den Verfassungsrichtern im Kanzleramt*, FOCUS ONLINE (July 11, 2021), https://www.focus.de/politik/deutschland/vor-prozess-gegen-kanzlerin-merkel-laedt-verfassungsrichter-zum-essen-spaeter-sollen-diese-ueber-sie-urteilen_id_13485292.html.

¹¹¹BVerfG, Oct. 12, 2021, 1 BvR 781/21, Rn. 1-38, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/10/rs20211012_1bvr078121.html.

¹¹²BVerfG, 2 BvE 4/20, Rn. 1-36, July 20, 2021, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/07/es20210720_2bve000420.html.

¹¹³Jannika Jahn, *Das Bundesverfassungsgericht, die Bundesregierung und der Interorganrespekt*, VERFASSUNGSBLOG (July 11, 2022), <https://verfassungsblog.de/das-bundesverfassungsgericht-die-bundesregierung-und-der-interorganrespekt>.

¹¹⁴Felix W. Zimmermann, *VG Karlsruhe urteilt über das BVerfG: BVerfG durfte Presseanfragen nicht abblocken*, LEGAL TRIBUNE ONLINE (June 27, 2022), <https://www.lto.de/recht/hintergruende/h/vg-karlsruhe-bverfg-presseanfrage-auskuenfte-bild-auskunftsanspruch-kosten-klage-rosenfelder/>.

¹¹⁵VG Karlsruhe, June 14, 2022, 4 K 233/22, OPENJUR, <https://openjur.de/u/2430638.html>.

¹¹⁶Antwort der Bundesregierung [Government Answer], Deutscher Bundestag: Drucksache [BT]19/31887 (Aug. 5, 2021), <https://dserver.bundestag.de/btd/19/318/1931887.pdf> (Ger.).

meetings between the BVerfG and the government.¹¹⁷ The government disclosed the full agenda of the 2021 dinner meeting as well as revealed who among the participants gave the presentation.¹¹⁸ It also provided information on all the meetings that took place in 2004, 2006, 2007, 2010, 2012, 2015, 2018, and 2019. Most meetings took place in the chancellery in Berlin and were classified as dinners. They all included high-profile ministers and most judges of the Court; presentations focused on general but topical issues and were also given by the Ministers of Justice, of the Interior, or Foreign Affairs. “Dinners with Angela” were thus high-profile meetings that relied on informality for facilitating exchange, and, ultimately, coordination among the *Funktionseelite*. It is thus not surprising that this practice has been challenged by the outsider, here the AfD. Consequently, while neither the Karlsruhe administrative court nor the Parliament condemned it as such, the informal practice of the dinner meetings was successfully challenged.

How should courts react when informality is challenged? In contrast to the *Ethikkodex*, which was a clear, even if mainly symbolic action to create transparency and safeguard public authority, the debate on dinner meetings with the government has been a cautionary tale. The political and legal consequences of the 2021 dinner meeting demonstrate how the protection of informality can backfire on institutional authority.¹¹⁹ “Dinners with Angela” were not exactly hidden from the public in the past; however, the political context and the catastrophic crisis management by the Court have contributed to the allure of shadiness and elite collusion. This creates the perfect breeding ground for populist parties and the media to challenge what they consider corrupt elites. It is not known whether the new government under Chancellor Olaf Scholz has continued the annual meetings. In the absence of any press release by the Court, it must be assumed that the dinners have been paused. To protect informal practices, transparency and openness have to be provided from the start and not in the reluctant, piecemeal approach that was adopted by the government and Court. If that does not happen, not only is the authority of the Court or the impartiality of judges damaged, but also liberal constitutional democracy as such. Loopholes of informality are the perfect traps benefitting populist argumentation, too.

III. The Justizpressekonferenz

The lack of transparency has also been the Achilles heel of another informal institution that has recently been in the spotlight: The BVerfG’s cooperation with the *Justizpressekonferenz* [judicial press conference]. The “Justizpressekonferenz Karlsruhe e.V.” is a registered association of journalists whose primary job is to report on the judicial practice of the BVerfG and other main judicial actors in Germany. Based in Karlsruhe, it was founded in 1975 and based on the model of the *Bundespressekonferenz* [federal press conference] in Berlin. Membership of the *Justizpressekonferenz* is restricted to “full-time journalists that continuously report on the jurisprudence of the highest federal courts as well as questions of legal and judicial policy.”¹²⁰ The list of members and their journalistic affiliations is publicly available on its homepage; at the time of writing (March 2023) it had thirty-six full members and thirty-three guest members.¹²¹ The latter include journalists that work on judicial matters but are not permanently reporting from Karlsruhe. Except for Verfassungsblog and Legal Tribune Online, most journalists are affiliated with traditional newspapers as well as public service television and radio stations. Importantly, the existence of the *Justizpressekonferenz* itself does not give rise to informality. On the contrary, it is

¹¹⁷Kleine Anfrage [Response of MPs], Deutscher Bundestag: Drucksache [BT]20/885 (Mar. 2, 2022), <https://dserver.bundestag.de/btd/20/008/2000885.pdf> (Ger.).

¹¹⁸Antwort der Bundesregierung [Government Answer], Deutscher Bundestag: Drucksache 20/988 (Mar. 17, 2022), <https://dserver.bundestag.de/btd/20/009/2000988.pdf> (Ger.).

¹¹⁹ARD AUDIOTHEK, *supra* note 15.

¹²⁰Verein, JUSTIZPRESSEKONFERENZ, <http://www.justizpressekonferenz.de/?Verein> (last visited July 23, 2023).

¹²¹Mitglieder, JUSTIZPRESSEKONFERENZ, http://www.justizpressekonferenz.de/?Verein___Mitglieder (last visited July 23, 2023).

legally registered, the mission and list of members are made public, and its activities are in line with its statute.

The problematic aspect of informality concerns the privileged access that members of the *Justizpressekonferenz* enjoy to forthcoming BVerfG's decisions. In short, on the evening before the public delivery of a judgment the members of the *Justizpressekonferenz* can collect the written form of the press release and the written introduction by the Chamber President at the gate of the Court. The public and journalists that are not members of the *Justizpressekonferenz* receive the press release only at 10:00 AM the next day when the judgment is delivered. The same holds true for the applicant and all parties to the proceedings. If a decision is delivered only in writing, the members of the *Justizpressekonferenz* receive the information concerning it the day before it is released and can pick up the press release at 8:30 AM on the next day. Again, non-members receive the press release only when the decision is put on the homepage of the court at around 9:30-10:00 AM.¹²² This means that the privileged access to information granted to the members of the *Justizpressekonferenz* gives them additional preparation time to process decisions and prepare reports on them. As Legal Tribune Online, whose journalists enjoy membership in the *Justizpressekonferenz*, reports,

[i]n particularly important cases, which are often decided by means of very detailed reasons for the judgment—and thus also extensive press releases—they have a lead of more than twelve hours over other journalists. The BVerfG's judgments, such as the recent one on the foreign surveillance of the Federal Intelligence Service, are often hundreds, and its press releases are often several, sometimes dozens of pages long.¹²³ (translation by the author)

According to the BVerfG, this cooperation has existed for decades. The Court announced that it was in conformity with its self-imposed press guidelines that were adopted by both Senates in 2013. However, the relevant guidelines have not been made public.¹²⁴ In the Court's opinion, privileged access by some journalists safeguards “high-quality and accurate reporting on its sometimes extremely long decisions.”¹²⁵ Accordingly, the members of the *Justizpressekonferenz* would be well-respected and highly professional journalists and thus comply with the informal code of conduct requiring them not to leak the decision before its release; hence, in the eyes of the Court, this procedure does not infringe the rights of the parties to the proceedings.¹²⁶

The politicization of this informal institution has been a more recent phenomenon. In particular, it can be traced back to an article on June 7, 2020 by Jost Müller-Neuhoff in the conservative newspaper *Tagesspiegel* on “Secret Public Relations: The BVerfG reveals its judgments in advance.”¹²⁷ On the same day, Müller-Neuhoff, who also is the representative of the German Journalist Association (“DJV”) on the German Press Council, followed up with a highly critical commentary on the privileged access under the heading of “Secret Public Relations of the

¹²²Ausarbeitung: Vorabinformationen des Bundesverfassungsgerichts an Mitglieder der Justizpressekonferenz Karlsruhe, Deutscher Bundestag: Wissenschaftliche Dienste [WD] 10 3000 044/20 (Nov. 4, 2020), <https://www.bundestag.de/resource/blob/812672/fff96bc7cd89ed0525f3b0ea2ab6a475/WD-10-044-20-pdf-data.pdf> (Ger.).

¹²³Pia Lorenz, *Vorabinformationen des BVerfG an Journalisten: Karlsruhe exklusiv*, LEGAL TRIBUNE ONLINE (Aug. 20, 2020) <https://www.lto.de/recht/justiz/j/bverfg-kritik-presserat-vorab-informationen-karlsruher-journalisten-vollmitglieder-justizpressekonferenz/>.

¹²⁴LTO cites from the respective provision. See Hasso Suliak, *Vorabinformationen an ausgewählte Journalisten: Bundestagsjuristen kritisieren Pressearbeit des BVerfG*, LEGAL TRIBUNE ONLINE (Nov. 14, 2022) <https://www.lto.de/recht/hintergruende/h/wissenschaftlicher-dienst-bundestag-gutachten-pressearbeit-bverfg-vorabinformationen-jpk/>.

¹²⁵Deutscher Bundestag: Wissenschaftliche Dienste [WD] 10 3000 044/20.

¹²⁶Jost Müller-Neuhoff, *Bevorzugung ausgewählter Medien: Parlamentarier kritisieren Verfassungsgericht für seine Öffentlichkeitsarbeit*, TAGESSPIEGEL (Aug. 10, 2020) <https://www.tagesspiegel.de/politik/parlamentarier-kritisieren-verfassungsgericht-fur-seine-offentlichkeitsarbeit-5373319.html>.

¹²⁷Jost Müller-Neuhoff, *Heimliche Pressearbeit: Bundesverfassungsgericht verrät vorab seine Urteile*, TAGESSPIEGEL (June 7, 2020) <https://www.tagesspiegel.de/politik/bundesverfassungsgericht-verraet-vorab-seine-urteile-8128354.html>.

BVerfG: Drop the Act.”¹²⁸ According to Müller-Neuhoff, the practice not only damages the Court’s reputation, but also gives the impression of a “confidentiality cartel” of favoritism and elite collusion.¹²⁹ This would erode public trust in the BVerfG. The next day, the Karlsruhe administrative court rejected a preliminary injunction sought by the AfD that aimed at forcing the BVerfG to stop the disclosure to the *Justizpressekonferenz* of a press release relating to an upcoming decision on June 9, 2020.¹³⁰ The case concerned a so-called *Organstreitverfahren*—proceedings based on a dispute between supreme federal bodies—between the AfD and the Minister of the Interior.¹³¹ The Karlsruhe administrative court argued that the informal practice of privileged access would violate neither the requirements of public pronouncement nor its rights as a political party. While Article 32 (1) of the BVerfG’s Rules of Procedure provides that a decision can be published only after the parties to the case have been notified, this only concerns a potential threat and would at most amount to internal regulations the applicant cannot rely on.¹³²

Müller-Neuhoff’s disclosure of the informal institution triggered significant controversy among political actors and the media. Representatives of political parties, in particular the AfD, the Die Linke, and the FDP have openly criticized the practice of privileged access and appealed publicly to the Court to change it. The major parties, CDU/CSU, SPD, and the Greens, however, kept silent and it was reported in August 2020 that the plenum of the BVerfG had decided to maintain its approach.¹³³ Yet, the German Press Council published a critical statement on the discrimination this creates among journalists and sent a letter to the President asking him to change the practice as it would threaten the freedom not only of the press and information but also to choose an occupation.¹³⁴ Other newspapers, even those that employ journalists that are members of the *Justizpressekonferenz*, also reported critically on the “two-class society” that the BVerfG creates.¹³⁵ The *Justizpressekonferenz* countered this criticism, arguing that the *Justizpressekonferenz* aims to provide a formal, regulated framework and ultimately prevent instances of “problematic proximity” between judges and journalists.¹³⁶ The *Justizpressekonferenz* announced that it would amend its statute to become more inclusive and also allow to become members journalists who do not have a permanent office in Karlsruhe but attend the judicial proceedings and events of the *Justizpressekonferenz* regularly. However, Müller-Neuhoff still did not qualify to become a member and on October 23, 2020, the BVerfG denied his request to be given priority access, arguing that the Court fulfills its requirement for public access and information and no claim can be derived from internal guidelines that the Court shares with the *Justizpressekonferenz*.¹³⁷

The challenge to informality continued in both parliament and the courts. A report on the research services of the German Federal Parliament published in November 2020 discussed both the practice of the *Justizpressekonferenz* to exclude journalists and media that are not based in

¹²⁸Jost Müller-Neuhof, *Heimliche Pressearbeit des Verfassungsgerichts: Schluss mit dem Theater*, TAGESSPIEGEL (June 7, 2020) <https://www.tagesspiegel.de/politik/schluss-mit-dem-theater-4172779.html>.

¹²⁹*Id.*

¹³⁰VG Karlsruhe, June 8, 2020, 3 K 2476/20, OPENJUR, <https://openjur.de/u/2248665.html>.

¹³¹BVerfG, June 9, 2020, 2 BvE 1/19, OPENJUR, <https://openjur.de/u/2202229.html>.

¹³²VG Karlsruhe, *supra* note 130.

¹³³Jost Müller-Neuhof, *Bevorzugung ausgewählter Medien: Parlamentarier kritisieren Verfassungsgericht für seine Öffentlichkeitsarbeit*, TAGESSPIEGEL (Aug. 10, 2020), <https://www.tagesspiegel.de/politik/parlamentarier-kritisieren-verfassungsgericht-fur-seine-offentlichkeitsarbeit-5373319.html>.

¹³⁴*Gleicher Zugang für alle Journalisten zu BVerfG-Informationen*, PRESSERAT (Aug. 17, 2020), <https://www.presserat.de/presse-nachrichten-details/gleicher-zugang-f%C3%BCr-alle-journalisten-zu-bverfg-informationen.html>.

¹³⁵Stephan Detjen & Brigitte Baetz, *Zweiklassengesellschaft bei der Berichterstattung?*, DEUTSCHLANDFUNK (Aug. 18, 2020), <https://www.deutschlandfunk.de/bundesverfassungsgericht-und-justizpressekonferenz-100.html>.

¹³⁶Lorenz, *supra* note 123.

¹³⁷Pia Lorenz, *BVerfG erklärt seine Presse-Praxis für rechtmäßig: Tagesspiegel-Korrespondent bekommt keine Vorab-Informationen*, LEGAL TRIBUNE ONLINE (Dec. 10, 2020), <https://www.lto.de/recht/justiz/j/bverfg-1274-691-20-vorab-informationen-nur-an-vollmitglieder-justizpressekonferenz-ungleichbehandlung-gerechtfertigt-tagesspiegel-korrespondent/>.

Karlsruhe to report on judicial practice as well as the privileged access to information the BVerfG provides. While it did refrain from giving a final legal assessment of the *Justizpressekonferenz*, its critical undertone affirmed that “unequal treatment between different press media and individual journalists requires compelling reasons.”¹³⁸ Based on its 2020 preliminary injunction that had been denied, the AfD again applied to the Karlsruhe administrative court to claim declaratory relief as the practice of privileged access would violate its right to a fair trial and the principle of equality of arms between the applicants and the journalists of the *Justizpressekonferenz*. On August 26, 2022, the case was again rejected as the administrative court argued that a political party cannot rely on the rights of equal treatment and the neutrality of the state.¹³⁹ On October 25, 2022, AfD politicians submitted a minor interpellation on the privileged treatment of the *Justizpressekonferenz*. In it, they requested further information on the financial support for the *Justizpressekonferenz* by the government or any government agency as well as any follow-up measures, amendments, or legal reports that the government or the Ministry of Justice had taken since the practice came to light in 2020.¹⁴⁰ Ultimately, on March 28, 2023, the BVerfG announced that it would immediately suspend its cooperation with the *Justizpressekonferenz* for at least the second and third quarters of the year in light of the “changing context” which made the Court restructure its communication activities in general.¹⁴¹ On 24 August, 2023, the Court announced that it will announce upcoming selected decisions in a weekly press briefing on its homepage from 1 September.¹⁴²

The debate on the *Justizpressekonferenz* is a textbook case of successful politicization. The informal institution of cooperation between the BVerfG and the *Justizpressekonferenz* had served the coordination among central actors seamlessly for decades. It provided the insiders, the BVerfG on the one hand and the journalists on the other, with a mutually beneficial arrangement. It seems that in more than four decades the informal arrangement between the two actors to refrain from publishing any information until the official pronouncement is made had never been broken. This created a relationship of trust. Membership of the *Justizpressekonferenz* was contingent upon observing the press embargo and thus served as a carrot and a stick. The BVerfG thus successfully outsourced the sanctioning instrument. Moreover, as the *Justizpressekonferenz* argued in its only available press statement, the information shared is “only the press release with an embargo—it’s no more than that.”¹⁴³ It is not, in fact, the full decision. Only when outsiders—here a non-member journalist—made the practice public, was politicization ensured. The AfD again, as well as Die Linke, another outsider, found a perfect example with which to challenge the independence of both the press and the courts. Again, its underlying criticism, while couched in highly polarized language, is not unfounded. As legal researchers have argued, there are severe doubts about whether the informal institution of privileged access complies with the legal requirements.¹⁴⁴ An

¹³⁸Deutscher Bundestag: Wissenschaftliche Dienste [WD] 10 3000 044/2.

¹³⁹VG Karlsruhe, Urteil vom Aug. 25, 2022–3 K 606/21, OPENJUR, <https://openjur.de/u/2450618.html>. See also LTO, *Klage wegen der Pressearbeit des BVerfG: AfD scheidet in Karlsruhe gegen Karlsruhe*, LEGAL TRIBUNE ONLINE (Aug. 26, 2022), <https://www.lto.de/recht/nachrichten/n/vg-karlsruhe-3k60621-afd-erfolglos-mit-klage-gegen-pressearbeit-bverfG/>.

¹⁴⁰Kleine Anfrage der Abgeordneten [Small Request for MPs] *Die Privilegierung der Justizpressekonferenz durch das Bundesverfassungsgericht*, Deutscher Bundestag: Drucksache [BT]20/4148 (Oct. 21, 2022), <https://dservr.bundestag.de/btd/20/041/2004148.pdf> (Ger.).

¹⁴¹PRESSEMITTEILUNG NR. 35/2023, BUNDESVERFASSUNGSGERICHT (Mar. 28, 2023), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2023/bvg23-035.html>.

¹⁴²PRESSEMITTEILUNG NR. 74/2023, BUNDESVERFASSUNGSGERICHT (Aug. 24, 2023), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2023/bvg23-074.html>.

¹⁴³Justizpressekonferenz Karlsruhe e.V. (JPK), *Es geht um Pressemitteilungen mit Sperrfrist—mehr ist es nicht*, JUSTIZPRESSEKONFERENZ (Aug. 17, 2020), http://www.justizpressekonferenz.de/userfiles/downloads/2020_08_17_Stellungnahme_Vorab_NEU.pdf.

¹⁴⁴Jörg Thomas & Jost Müller-Neuhoff, *Benachteiligt das Bundesverfassungsgericht Journalisten?*, 74 NEUE JUSTIZ 536 (2020); Amélie Heldt & Matthias Klatt, *Die Privilegierung der Justizpressekonferenz durch das Bundesverfassungsgericht*, 10 NEUE Z. FÜR VERWALTUNGSRECHT 684 (2021).

instrument that has long served to stabilize the authority of the Court has turned into a significant problem. The decision to abandon the informal institution is thus to be welcomed; however, it raises the question of how the BVerfG can safeguard the professional and correct reporting of its decisions in the media—an invaluable asset in times of increasing societal polarization and populist argumentation.

D. Conclusion: From Informality to Institutional Communication

This Article has focused on Germany, yet I argue that its findings—from the elite coordination function of informality to the politicization of informality and the ensuing dangers for the authority of constitutional adjudication from the rising right—go far beyond the German context.

In 1984, Schulze-Fielitz described informality as “the current paradigm of constitutional life in Germany.”¹⁴⁵ This contribution has shown that, at least for constitutional jurisprudence, the use of informality has been a central factor in the history and development of the BVerfG’s authority. The BVerfG has used informality to internally strengthen its self-administration and spread its jurisprudence across the judicial-legal field through informal practices and institutions in the nomination, socialization, and deliberation processes at the Court. Yet, informality might also threaten the institutional authority of the Court. Informal practices and institutions create outsiders who challenge its use. This has been the case in particular concerning external informality in Germany. This means informal practices and institutions that the Court has employed in the political and public spheres. In particular, three of the BVerfG’s external informal practices and institutions have become politicized in the last decade. By examining those three debates—on extrajudicial activities, dinners with the government, and cooperation with a privileged number of journalists—I have shown how particularly populist actors have addressed and challenged informality. Consequently, instead of serving as a form of coordination across the functionary elite, informal practices and institutions became a threat to public trust in the Court and the judicial independence of its judges.

While informality has been criticized in the past, this new intensity of politicization of practices and institutions of external informality has arisen in the context of a changing political landscape in Germany. The end of the Merkel-era Grand Coalition and the rise of the AfD have challenged the consensus-oriented style of German democracy. It is not surprising that those outsiders that have now moved to the center of politics are challenging longstanding practices form of informality. In particular, the AfD has used several parliamentary questions and even court cases to challenge the existence of those informal practices. This AfD strategy has been described as “strategic litigation from the right,” which not only strengthens the AfD’s narrative of being discriminated against by the mainstream in the political process but also facilitates the transformation of partial judicial victories into political success stories.¹⁴⁶ The AfD frames its criticisms in a productive and accessible way; for instance, a recent legislative proposal to prevent politicians from becoming BVerfG judges is titled “the depoliticization of the BVerfG and the strengthening of the acceptance of its decision,”¹⁴⁷ which is a wording that attracts supporters from beyond its right-wing populist base.¹⁴⁸ This does not mean that the AfD’s criticism is unfounded; on the contrary. In fact, it is because of the obvious tensions informal practices create for principles of openness and transparency in a liberal democracy that the criticism is shared by

¹⁴⁵See SCHULZE-FIELITZ, *supra* note 12, at 11–15.

¹⁴⁶Markus Sehl, *Strategische Klagen von rechts: Wie die AfD mit Auftritten vor Gericht das politische System vorführt*, 8–9 ANWALTSBLATT 464 (2021).

¹⁴⁷Änderung des Bundesverfassungsgerichtsgesetzes [Amendment to Federal Constitutional Court Law] Entwurf eines Gesetzes zur Entpolitisierung des Bundesverfassungsgerichts und Stärkung der Akzeptanz seiner Entscheidungen, Deutscher Bundestag: Drucksache [BT]20/6581 (Apr. 27, 2023), <https://dserver.bundestag.de/btd/20/065/2006581.pdf> (Ger.).

¹⁴⁸Markus Sehl, *Sollten Politiker vorm Wechsel ans BVerfG eine Pause einlegen*, LEGAL TRIBUNE ONLINE (June 26, 2023), <https://www.lto.de/recht/justiz/j/bverfg-politiker-wechsel-abklingzeit-pause-karenz-afd-gesetzentwurf-harbarth/>.

other actors in the political and public spheres such as opposition parties and journalists. Abandoning all forms of informality is neither possible nor desirable for the BVerfG, so how should it react to this politicization of external informality?

So far, the BVerfG has responded in a rather opaque and disorganized fashion to those challenges by outsiders. While the adoption of the Ethikkodex was an attempt to protect the reputation of the judges, the *Wallrabenstein* decision raises doubts about being overcautious, or at least not consistently applying standards on judicial conduct. The temporal and substantive nexus with pending cases with respect to the dinner meetings could have been avoided while stone-walling journalists looking for further information has backfired spectacularly. This is heavily problematic, as many of the informal instruments, such as the *Justizpressekonferenz's* privileged access to press releases, are both legally and normatively problematic. However, by leaving them unaddressed, stone-walling, and not providing transparency and openness, they become the perfect breeding ground for populist, anti-elite, and anti-democratic arguments. In a time when the ordinary political process is coming under pressure, re-establishing perceptions of independence, impartiality, and public trust in the highest Court remains fundamental.

Nonetheless, it seems that the BVerfG is sensitive to these changing winds in public opinion. It looks for ways to be more proactive in its communication with the public by not only providing more transparency but also strategically legitimizing its role.¹⁴⁹ For instance, in 1996 it established an official press unit following a massive legitimacy crisis triggered by highly disputed decisions.¹⁵⁰ In 2001, on the occasion of its fiftieth anniversary, it initiated an annual open house day,¹⁵¹ while its seventieth anniversary in 2021 was celebrated with a series of documentary and information films on the proceedings and major cases of the Court,¹⁵² as well as a rather short-lived Instagram account.¹⁵³ Most recently, an increased focus on improved public communication was announced by the Court, with a significant budgetary increase of 500,000 EUR for public relations, which amounted to approximately 700,000 EUR in 2023.¹⁵⁴ This goes beyond corporate design¹⁵⁵ but has the potential to fundamentally restructure how the Court speaks to the public in the 21st century.¹⁵⁶ To combat allegations of collusion and secrecy, promoting transparency and openness in public communication is the way forward.

¹⁴⁹For an overview of the development of the BVerfG's press and media activities, see Christina Holtz-Bacha, *Germany: The Federal Constitutional Court and the Media*, in JUSTICES AND JOURNALISTS 101 (Richard Davis & David Taras eds., 2017). See also for an analysis of press releases of the BVerfG, Philipp Meyer, *Judicial Public Relations: Determinants of Press Release Publication by Constitutional Courts*, 40 POL. 477 (2020).

¹⁵⁰Christian Rath, *Pressearbeit und Diskursmacht des Bundesverfassungsgerichts*, in HANDBUCH BUNDESVERFASSUNGSGERICHT IM POLITISCHEN SYSTEM 403 (Robert Chr van Ooyen & Martin H. W. Möllers eds., 2015).

¹⁵¹André Brodocz & Steven Schäller, *Hinter der Blende der Richterbank. Über den Tag der offenen Tür am Bundesverfassungsgericht*, in DIE DEUTUNGSMACHT DER VERFASSUNGSGERICHTSBARKEIT (Hans Vorländer ed., 2006).

¹⁵²FILME, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/DE/Service/Infothek/Filme/filme_node.html (last visited July 23, 2023).

¹⁵³Silvia Steininger, *Swipe up for the German Federal Constitutional Court on Instagram*, VERFASSUNGSBLOG (Aug. 19, 2021), <https://verfassungsblog.de/the-gfcc-on-instagram>.

¹⁵⁴Jochen Zenthöfer, *Ein teurer Adler*, FRANKFURTER ALLGEMEINE (Mar. 11, 2023), <https://www.faz.net/aktuell/feuilleton/medien/bundesverfassungsgericht-gibt-700-000-euro-fuer-pr-aus-18736671.html?premium=0x65b8bc06ddec21ccbae83501d83d45c323c9a5c83d9fe786de33c045b318074e>.

¹⁵⁵Patrick Heinemann, *Einfach irgendein Vogel*, LEGAL TRIBUNE ONLINE (Apr. 4, 2023), <https://www.lto.de/recht/hintergruende/h/bverfg-neues-design-bundesadler-hoheitszeichen-zustaendigkeit-bundespraesident/>.

¹⁵⁶See, for instance, the analysis of the BVerfG's communication instruments in Barry Sullivan & Ramon Feldbrin, *The Supreme Court and the People: Communicating Decisions to the Public*, 24 UNIV. PA. J. CONST. LAW 1, 57–66 (2022). On judicial communication policy in times of backlash in general, see Silvia Steininger, *Creating Loyalty: Communication Practices in the European and Inter-American Human Rights Regimes*, 11 GLOB. CONST. 161 (2022).

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