

Contents lists available at [ScienceDirect](https://www.sciencedirect.com)

International Journal of Law, Crime and Justice

journal homepage: www.elsevier.com/locate/ijlcrj

The politics of informality in criminal procedures

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ARTICLE INFO

Keywords:

(in)formality
(in)formalization
Criminal justice
Criminal procedure
Policing

ABSTRACT

The tension between formality and informality is intrinsic to the implementation of criminal law. Criminal procedures in fact always happen on a continuum between formality and informality, where the different actors involved (police officers and other street-level bureaucrats, prosecutors, judges, experts, defense lawyers, etc.) continuously perform and negotiate (in)formality. This special issue explores these “politics of (in)formality” in different criminal law settings and from different disciplinary perspectives. The different empirical contributions explore the continuum between formality and informality as well as practices of informalization in two different levels of the criminal justice system: police investigations and court proceedings.

1. Introduction

‘Law in the book versus law in action’, ‘epistemic legalism versus legal realism’, ‘rituals of justice versus everyday judicial practices’, as well as many more established scholarly dichotomizations conjure up ideas of formality and informality in the way law is studied. When it comes to empirically distinguishing what is formal from what is informal in the judicial process, however, the terms either evade definition or lean towards a normative positivism – where the formal would be equated to transparent, fair, documented and legal, while the informal would resonate as arbitrary and unchecked (Davis, 2017).

In fact, in practice, formality and informality turn out to be elusive and relational states, oftentimes coexisting in legal settings. More importantly, they are processual and are constantly (re)produced through processes of formalization and informalization. Socio-legal scholarship puts forward many entries into how formality and informality are constructed through space (Braverman, 2011), architecture (Mulcahy, 2010), artefacts (Barrera, 2008), interactions (Hambly, 2019), practices (van Oorschot, 2021), language (Conley et al., 2019) or atmospheres (Gill et al., 2021).

Producing formality is a constitutive part of law implementation, as well as a specific task of the miscellaneous actors involved. One obvious manifestation of formalization is the production of procedural artefacts, in particular through written documentation. As an example, case files reflect a specific formalization of the prosecution process, a narrative of the case constructed through selection and entextualization (Vismann, 2008), in a way that makes it coherent and useable for judicial decision-making (Bucholtz 2009). Legal case files and other procedural artefacts not only formalize the transition from common-sense facts to legal facts, but also make visible specific kinds of actions, interactions and agencies, while silencing other facets of the procedure (Capus and Grisot, 2022). By making the workings of judicial systems legible through documentation, judicial and administrative organizations signal their accountability, foster their legitimacy, and contribute to fair truth-finding (Pigg et al., 2018).

The roles and functions performed by the different actors of the legal system also point to the theatrical dimension of (in)formalization, as (in)formality of situations and interactions in judicial procedures is constructed and negotiated between actors with

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important power differentials (Braverman, 2011). For example, police officers and prosecutors mobilize (in)formality by creating particular investigative settings or determining what is put on record and what remains off the record (Coulthard, 1996; Smith, 1997). That way, the choice for either formalization or informalization is reflected in law enforcement strategies. The latter is a timely issue as national legislators increasingly create explicit spaces for (more or less constrained) informality within settlement procedures allowing negotiation and a high level of prosecutorial discretion (King and Lord, 2018; Capus and Bozinova, 2023).

In this special issue,¹ we aim to shed light on the interplay between formality and informality in criminal justice systems. The different empirical contributions explore the continuum between formality and informality as well as practices of informalization in two different levels of the criminal justice system: police investigations and court proceedings. In other words, they look at the politics of (in)formality at play in the implementation of criminal law.

2. Criminal law and (in)formality

The tension between formality and informality is intrinsic to the implementation of criminal law. Criminal procedures in fact always happen on a continuum between formality and informality, where the different actors involved (police officers and other street-level bureaucrats, prosecutors, judges, experts, defense lawyers, etc.) continuously perform and negotiate (in)formality. This special issue explores these – as its title indicates – “politics of (in)formality” in different criminal law settings and from different disciplinary perspectives.

On the one hand, formality is essential in ensuring due process and fulfilling the requirements of rules of procedures throughout prosecution, as well as to legitimize the institution of criminal justice (Capus, 2018). The formalization of action and interactions, through norms of behavior and documentation fosters important rule of law principles such as legal certainty and the prevention of arbitrariness, transparency, or equality of arms.

On the other hand, criminal law in action, that is its concrete implementation, relies by nature on the informality of social interactions, for instance, between the suspect and the police, between the defense and the prosecution, among colleagues, among jury members, or between authorities in different states involved in the same procedure. The increasing number of procedural requirements for formalization through documentation is often considered a burden on procedural actors, especially those conducting the investigations. At a systemic level, this burden also weighs negatively on the efficiency of criminal justice, as formalization is resource-intensive.

3. The politics of (in)formality in the criminal procedures

In this special issue, *Ahmed Ajil and Silvia Staubli* explore the complex interplay between formality and informality in the context of predictive policing in Switzerland (Ajil and Staubli, 2023).

The authors argue that predictive policing plays a formalising role as it aims both at reducing the discretionary power of the human agent and objectifying decision-making by focusing on numeric datasets and quantitative risk scores. At the same time, proactive policing – of which predictive policing is an integral part – is a domain characterised by informal decision-making based on experience and intuition of the police officer. The way predictive policing tools are used is therefore deeply influenced by the user’s decision on balancing formality (data-based decision making) and informality (human decision-making). This process is framed in Switzerland, as the authors note, by a dominant narrative that downplays the potentially harmful consequences of predictive policing instruments and the formality that comes with it and instead emphasises the role of the human agent and therefore the role of informality.

Focusing as well on the field of police work, *Cornelia Griebel and Franziska Hohl-Zürcher* analyze situations in which police officers must make decisions on how much informality they introduce into a workflow that is highly formalized (Griebel and Hohl-Zürcher, 2023). The authors examine daily practices of intercept interpreters in Switzerland in the context of police investigations. Intercept interpreters ensure the interlinguistic transfer from oral conversations wiretapped by the police into written evidence.

There is a quite formalistic legal framework governing the work of intercept interpreters, mainly defined through jurisprudence of the Swiss Federal Supreme Court (FSC). The core message of the FSC’s case law is that the prosecutor’s office and police must have full authority over an investigation.

However, as Griebel and Hohl-Zürcher show in their study that is based on interviews and on-site observations, in fact, the rules governing the relationship between intercept interpreters and the police are impossible to implement in the daily practice of criminal investigations. This is mainly due to a practical imbalance between the two groups: only the intercept interpreter understands the content of wiretapped record and is therefore the only person able to perform tasks that would be the exclusive authority of the police, such as selecting the criminally relevant parts of the record (triage) and interpreting them. However, this reality is not disclosed in the final production of the formal evidence.

Griebel and Hohl-Zürcher’s study is therefore an example of a diffuse and uncertain distinction between informality and formality in the collaboration between actors of the criminal justice system.

¹ This special issue originated from two research projects led by Nadja Capus at the University of Neuchâtel, Switzerland: ‘Intercepting with Interpreters – The work of interpreters during the interception of communications in the framework of criminal investigations’ funded by the Swiss National Science Foundation (grant number: 100011_184896) and ‘Revamping Anticorruption Criminal Law – Strategies and Consequences (RevACLaw)’ funded by the European Research Council (grant number: 864498). The authors of this introduction and guest editors of the special issue are listed alphabetically.

Changing the scenery to the courtroom, *Lucy Welsh's* contribution (Welsh, 2023) is based on the observation that informality is at the core of cooperation between the different courtroom actors in English and Welsh magistrates' courts. Magistrates' courts have an extremely high volume of cases managing them through summary criminal proceedings, i.e., without a full trial. Non-legally qualified magistrates make the decisions in magistrates' courts, assisted by a legally qualified adviser.

Through her qualitative study, the author reveals that efficient processing of caseloads depends on a cohesive network of cooperation among the workgroup in the courtroom, meaning prosecutors, defence lawyers, court legal advisers to the magistrates and – to a lesser extent – magistrates themselves. While proceedings are actually subject to nuanced uses of legal and procedural provisions, the workgroup is so familiar with the formal legal rules and procedures that a more relaxed, informal approach can be taken to actual implementation of rules. In fact, according to Welsh, efficient case-handling depends on this culture of informality.

The downside of this process of informalizing legal rules is that it undermines defendants' ability to understand and participate properly in proceedings against them. Welsh demonstrates this – what she calls – 'by-product' of the culture in which actors in magistrates' court perform their roles using two features of summary criminal justice as examples: case management and plea negotiations.

The author concludes that the reality of how magistrates' courts operate means that the perception that magistrates' courts are courts of common sense that do not require the same formalities as other courts is misguided. In magistrates' courts, informality operates as a barrier to accessibility in the very courts that are supposed to be more accessible than higher criminal courts. *Moa Bladini, Sara Uhnoo and Åsa Wettergren* (Bladini et al., 2023) address the act of presenting and evaluating evidence in criminal trials in rape cases in Sweden. They challenge the common perception that judging is an objective action, based on rationality and reason and where emotions are put aside. They hold that in practice, criminal procedure is performed as a relationship between the formal and the informal, with formal regulation being implemented through informal social action.

The authors explain that while a criminal trial follows formal principles and rules that aim to ensure fairness, in certain types of cases, informal features of the trial play a pivotal role. Their example – rape cases – differs from most other types of crimes insofar as, to prove guilt, the focus is on the subjective elements of crime and the main part of the evidence consists of oral statements in word-against-word situations.

In their study, which is based on trial observations and interviews, Bladini et al. find that – due to this particularity of rape trials – empathy work performed by legal actors inside the courtroom (the prosecutor, the defence lawyer and the victim's counsel) during the presentation of evidence becomes particularly important. It is an important strategy to incite feelings of empathy with the judge during the translation of the experiences made by victims and accused into legal logic and concepts. Counsel do that by framing their clients as credible by describing their actions as rational, normal and common sense, and the counterpart as irrational, abnormal and acting unnaturally. The authors call this performance the "informal embodiment of the formality, i.e. the formal rules of criminal and procedural (evidentiary) regulation" (Bladini et al., 2023: 2).

Thus, while emotions are conventionally seen as intruding on and disturbing the rational process performed by legal professionals during a trial, in rape cases, they seem indispensable for the success of either party. A conclusion from this study is thus that empathy improves and strengthens objectivity among legal actors. Bladini et al.'s study thereby shows how informality can be an important aspect in the courtroom performance of legal professionals, or – as the authors say – how they make "the informal formal" by reframing everyday life experiences into legal facts and concepts (Bladini et al., 2023: 11).

4. Perspectives on studying (in)formality

This special issue underscores that going beyond a simple dichotomy between informality and formality within criminal justice systems allows to shed light on the complexities of their inner workings. By doing so, the contributions also emphasise the methodological challenges of such research as the continuum between formality and informality turns out to manifest itself in different dimensions – legal frameworks, social practices and interactions, and narratives. This requires not only in-depth interdisciplinary research skills, but also gaining wide access to the field, its actors and its artefacts.

These characteristics allow the contributors to offer original perspectives and precious insights into areas that are difficult to access for researchers. The two articles on policing go far behind the scenes of traditional police work and explore how (in)formality unfolds in more elusive areas, on previously unexplored fields such as data-driven predictive policing and the use of interpreters in secret communication monitoring. Meanwhile, the two articles on court proceedings provide fascinating insights into the ways actors function within criminal trials at courts.

A concurring diagnosis of all the articles is that resorting to informality is a powerful coping strategy. The researchers have found that criminal justice actors, including police officers, prosecutors, defense lawyers, clerks, and judges, resort to informal practices to achieve goals that would be difficult or impossible to attain without these practices, when the difficulties encountered in their daily work present insurmountable obstacles. From the actors' perspective – which the researchers take into account – the use of informality is positively regarded and seen as a solution that enables them to make the criminal justice system work.

The reasons for the identified difficulties are diverse, with the lack of resources (especially time and personnel) being an important factor. Another critical factor is the goal itself. In this context, the research presented illustrates, for example, the extremely difficult requirement at the police level to detect and respond appropriately to crimes that have not yet been committed in order to prevent their occurrence, or at the court level, to reconstruct retrospectively the sequence of events in an intimate two-person offense, and based on the often contradictory party accounts, draw a fair conclusion about the accused perpetrator's inner attitude and the credibility of the statements. Informal methods provide relief. In this way, we retain the main take away that informality occurs when formal rules and the lack of resources do not provide an adequate framework to handle demanding tasks. Informality appears to offer solutions to

problems that occur in areas which are difficult to govern.

However, the presented findings suggest that informality can have negative consequences for defendants and the criminal justice system as a whole. Informality can lead to disparities in the treatment of defendants, erode defendants' rights, and result in wrongful procedural decisions and convictions. Therefore, policymakers and criminal justice practitioners should carefully consider the impact of informal practices and ensure that defendants' rights are protected, and decisions are made in a transparent and accountable manner. In fact, informality can reduce transparency and accountability, making it difficult for the public to understand the functioning of the criminal justice system and eventually to hold officials accountable for their actions. This, in turn, can erode trust in the criminal justice system and impede efforts to address misconduct.

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