

DETERMINANTS OF JUDICIAL DECISION-MAKING: THE STATE OF THE ART AND THE CZECH PERSPECTIVE

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Abstract: *This article aims to answer a key question in modern jurisprudence – which factors influence judicial decision-making? It starts with an introduction breaking the question down into two contrasting possibilities. Is judicial decision-making determined purely by law or can we trace the influence of various extra-legal factors? In order to answer these questions, the article provides an overview of the current state of the art in international (mainly US) literature and its historical development. Based on an interpretation of the current state of the art, it reaches an intermediate conclusion: that especially in hard cases, there is (practically speaking) considerable space for judicial discretion, and that, as a matter of fact, decisions in these cases are influenced by various extra-legal factors. Given that most of the literature is of US origin, the article further discusses the possibility of “proving” this in Czech conditions. In this regard, the article arrives at a position of moderate methodological skepticism – i.e. that for many reasons, it is hard to do so, even though the aforementioned conclusions should – in principle – be generally applicable.*

Keywords: *judge, decision-making, ideology, extra-legal factors, interpretation, discretion, courts, judicial legitimacy*

I. THE BIG QUESTION

What determines judicial decision-making? Despite the fact that this question has enjoyed a good deal of interest – from researchers and practitioners alike – in recent decades, it still remains a puzzle and a controversy. Even in the homeland of these debates, the United States, researchers who provided alternatives to the traditional answers² have found themselves under fire.

One example of such a heated debate is the one started by Richard Revesz³ – an environmental law expert – who set out to see whether ideology explains decision-making in environmental cases in the US Court of Appeals for the District of Columbia Circuit.⁴ He chose to look at cases in which the D.C. Circuit reviewed the work of Environmental Protection Agency (EPA). In all of the cases Revesz studied, a party was challenging a decision of the EPA: either an industry group was arguing that the EPA had gone too far, or an environmental group was arguing that the agency had not gone far enough. In each case, the court had to decide whether the EPA or the challenger should win. In his study, Revesz

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² By the “traditional answer,” we refer to the *legalistic model* that we define below at the end of this section.

³ We are grateful to Barry Friedman for pointing us toward this debate and emphasizing its importance.

⁴ REVESZ, R. L. Environmental Regulation, Ideology, and the D.C. Circuit. *Virginia Law Review*. 1997, Vol. 83, No. 8, pp. 1717–1772.

compared the percentage of cases where the decision of the EPA was overturned (on both industry and environmental challenges) by judges appointed either by a Democratic or Republican president.⁵

What he found out was very intriguing: in a majority of the observed periods, Republican appointees were more likely to reverse the decision than their Democratic counterparts were when industry presented the challenge. And, in every time period, Democratic appointees were more likely than their Republican colleagues to reverse decisions when an environmental group challenged the EPA.⁶ Moreover, in many periods, the difference between Republican and Democratic appointees was statistically significant, and thus unlikely to be caused by random chance.

Revesz' account of judicial decision-making in environmental cases was immediately challenged by a judge of the federal court for the D. C. Circuit – Harry Edwards. He described the purpose of his critique as follows:

“This essay... aims to debunk the myth that ideology is a principal determinant in decision making on the United States Court of Appeals for the D.C. Circuit... I will show that, even when one looks carefully at the so-called ‘empirical studies’ that purport to analyze the work of my Circuit, it is clear that, in most cases, judicial decision making is a principled enterprise that is greatly facilitated by collegiality among judges.”⁷

Edwards continued by saying that the article written by Revesz had the potential to create serious confusion over judicial decision-making. And that it may mislead the public into thinking that “judges are lawless in their decision making, influenced more by personal ideology than legal principles.”⁸ Edwards countered by repeating that rather than political endeavor, judging is fundamentally a principled practice based on the interpretation of law.

Even though we refer to this specific debate, we use it rather as an example (a very eloquently stated one) of the two views of judicial decision-making. On the one side, there is an empirical scholar who has tried to determine the extra-legal factors that influence judicial decision-making, usually by applying statistical tools, or more generally, by social science methods. On the other hand, there is an experienced lawyer who points out that deciding cases (by interpreting and applying law) is an immensely complex enterprise, and that by reducing judicial decision-making to a single dimension (for example the ideological one), one distorts the complex and elusive reality.

Judge Edwards, just like any other judge, has an additional reason to be critical or at least suspicious of the answers presented by some empirical scholars. The view that judges simply *apply law* and that judicial decisions *are determined by law* is an important traditional legitimation narrative. It is a reply to a political-philosophical concern that judges, unlike the representatives of the legislative and executive branches, should not be policy-makers, and they should be bound by the rules which form the legal system. As such, it is

⁵ This is obviously a very crude – yet clear and user-friendly – measure of a judge's ideology; many of the more recent studies use more sophisticated approaches to this issue (see Section III.1 for more).

⁶ REVESZ, R. L. *Environmental Regulation, Ideology, and the D.C. Circuit*, pp. 1739–1743.

⁷ EDWARDS, H. T. Collegiality and Decision Making on the D. C. Circuit. *Virginia Law Review*. 1998, Vol. 84, No. 7, pp. 1335–1370, at p. 1335.

⁸ *Ibid.*, p. 1337.

a part of modern constitutional thought at least since The Federalist Papers. As Alexander Hamilton put it in defense of the position of the federal judiciary,

“The judiciary... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”⁹

Even modern judges often go to great lengths to convince the public and other institutions that they are simply humble servants of law. The soon-to-be Chief Justice of the United States Supreme Court (hereinafter also referred to as SCOTUS) attempted to convince the Senate that judges were like umpires in baseball or tennis: they simply state which side of the line the ball fell on, and it does not really matter who they are as persons.¹⁰ This position (or rather myth) is still alive and well, and remains at the center of heated debate.¹¹

Throughout this article, we will refer to this position as the “legalistic model.” It rests on the premise that judicial decision-making is determined only by law and its interpretation, and that other factors, such as the identity of a judge or public opinion, are virtually irrelevant. This position is not necessarily based on a robust theory or widely defended in current literature, but it still is an enormously important position for several reasons. First of all, it serves as a basis for the aforementioned legitimation narrative. Secondly, it has been attacked by many of the authors (and their theories) that we engage with in the following text. And last but not least, we believe that it is the position that is still intuitively entrenched in many judges’ perception of their work and its nature,¹² especially in continental Europe.

Which account of judicial decision-making is the correct one, then? And it is even possible to find out, or are we simply doomed to agree to disagree? We believe – and we will try to convince our readers in this article – that the answer lies somewhere in between. On the one hand, almost each case is unique in its own way, and it would be imprudent to reduce judicial decision-making to one dimension (such as ideology). Moreover, the law is (or can be, given the conditions) the chief factor in judicial decision-making and creates real constraints for judges and courts. On the other hand, in many cases law simply cannot determine everything, and judges have – as a matter of fact – some discretion when deciding cases. The really hard question then is which factors operate in this space of discretion, and how can we ever be sure about that.

In order to substantiate this first claim of our article – that it is not *only* law but *also* other factors that influence judicial decision-making – we first take a historical approach.

⁹ HAMILTON, A. The Federalist 78. In: *Constitution Society* [online]. 18. 10. 1998 [2020-03-23]. Available at: <<https://www.constitution.org/fed/federa78.htm>>.

¹⁰ Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States. Hearing before the S. Comm. on the Judiciary, 109th Cong. 55, 56 (2005) (Statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

¹¹ See for example IULIANO, J. The Supreme Court’s Noble Lie. *UC Davis Law Review*. 2018, Vol. 51, No. 3, pp. 911–977.

¹² See the – in our opinion still partly valid – “accusation” by Jerome Frank. FRANK, J. *Law and the Modern Mind*. New Brunswick: Transaction Publishers, 2009, p. 10.

We show the contrast between a rigid, “preordained” legalistic model of judicial decision-making on the one hand, and the first social-scientific attempts to “debunk” the myth of such decision-making’s strictly legalistic nature on the other. However, these initial attempts – often labeled as the “attitudinalist” school – are now generally considered overly simplistic – a conviction that we share as well.

Therefore, we continue our article by giving an overview of the current state of the art in the field, which goes far beyond the legalistic and attitudinalist approaches that dominated for the better part of the 20th century. The current state of the art, as we interpret it, shows that law indeed plays an obvious and extremely important part in the process of decision-making. Nevertheless, we claim that in many cases, law leaves judges with considerable discretionary space in which various extralegal factors operate – both on a conscious and unconscious level.

The second claim of this article is that, despite most of the relevant literature being American, the aforementioned determinants of judicial decision-making generally operate in virtually every jurisdiction.¹³ There are, however, issues with many jurisdictions – including the Czech Republic – when applying the current state of the art and its methodological approaches. Therefore, in the following part of our article, we identify the general methodological problems and challenges that researchers of judicial decision-making face in the Czech Republic (as well as in many other continental jurisdictions).

We have several reasons to believe that it is important to make these claims in a Czech journal that is, however, also aimed at an international audience. First of all, judicial decision-making, especially its extra-legal dimension, is still considerably understudied in the Czech Republic. Although there have been important legal theoretical contributions to the field¹⁴ and several recent studies concerning extra-legal influences on judicial decision-making,¹⁵ we are concerned that there is no theoretical consensus (and even no thorough theoretical debate) regarding the theoretical foundations for the study of judicial decision-making. This lack of a shared theoretical foundation – a paradigm – obviously may lead to misunderstandings and/or lack of meaningful communication between “pure legal theorists” and social science researchers. Our article aims to remedy that by offering an interpretation of the current state of the art that can bridge this gap and serve as a starting point for building a robust theoretical foundation for holistic research on judicial decision-making.

At the same time, we are convinced that stressing the importance of extra-legal determinants of judicial decision-making is not purely academic. A better and more complex

¹³ Of course, the relative weight of the individual determinants can vary. For example, in jurisdictions with no guarantees of judicial independence, the influence of the ruling class/party can overshadow all other determinants including law. Therefore, we generally only consider jurisdictions in which judicial independence is guaranteed and judges can act on their preferences.

¹⁴ Most importantly perhaps KÜHN, Z. *Aplikace práva ve složitých případech. K roli právních principů v judikatuře*. Prague: Karolinum, 2002, or HOLLÄNDER, P. *Ústavněprávní interpretace. Ohlédnutí po deseti letech Ústavního soudu*. Prague: Linde, 2003. These books, however, offer an almost exclusively “internal” legal account of judicial decision-making, as opposed to an external one that would account for both legal and extra-legal determinants.

¹⁵ Most importantly CHMEL, J. *Politika na Ústavním soudě: první část. Časopis pro právní vědu a praxi*. 2013, Vol. 21, No. 2, pp. 178–185; CHMEL, J. *Politika na Ústavním soudě: druhá část. Časopis pro právní vědu a praxi*. 2013, Vol. 21, No. 4, pp. 475–483; PAPOUŠKOVÁ, T. – PAPOUŠEK, J. *Ústavní soudci v kvantitativní perspektivě. Časopis pro právní vědu a praxi*. 2017, Vol. 25, No. 1, pp. 73–92.

understanding of judicial decision-making is also important for policymakers who – armed with a deeper knowledge of the process – can set the rules governing judicial decision-making in a way that reflects its complexity and helps them to reach a desired outcome.¹⁶

II. JUDGES AS NEUTRAL ARBITERS? A CRITIQUE OF THE LEGALISTIC MODEL AND ITS HISTORICAL ORIGINS

We start this section with a relatively uncontroversial statement, namely that *judges apply law*. This statement, however, is obviously not the final word, but merely a starting point of a complex discussion. What does it actually mean that judges (and courts) apply law? And does judicial decision-making really amount *only* to the application of law, or are there some other factors that determine a particular judicial decision? Is the image of a judge as a neutral arbiter a fitting description of reality of judicial decision-making – or a mere legitimization myth?

II.1 The realist and attitudinal revolution

Perhaps the most straightforward challenge to the classical legalistic (or formalist) account of judicial decision-making¹⁷ was formulated by a group of authors that are now collectively known as “legal realists.” Prominent lawyers such as Oliver Wendell Holmes, Karl Llewellyn and Jerome Frank, while not a completely homogenous group, generally shared certain convictions. The main feature of the realist attack on legal formalism can be summed up as follows. First of all, law is (in some cases more than in others) indeterminate, and the application of law is not a mathematic-like exercise in which one could “prove” a certain correct answer based on some axioms.¹⁸ Some authors went even further and claimed that judicial decision-making is based on judges’ maximization of their preferences, and that the law and the legal interpretation in their reasoning were just a “fig leaf” covering the real reasons of a decision, and that in many cases, powerful and concealed psychological prejudices of the decision-makers determined the outcome.¹⁹

The origins of the field of judicial politics within political science appeared as a part of the behavioral revolution of the 1960s and particularly focused on studying the voting

¹⁶ There are numerous potential examples. For example, if the policymaker is aware that ideology influences the decision-making of a judge of a constitutional court, the rules of appointment may be adapted accordingly. Knowledge that a certain approach to collegiality and the internal rules of cooperation on a judicial panel leads to less predictable case law could also be used to improve the system. Awareness of the fact that the gender of the judge influences his/her decision-making in family matters might motivate the policymaker to create a more balanced judicial body, etc.

¹⁷ Grey, for example, defined the formalist position as follows: “The legal formalist believes that the office of a judge is to apply preexisting law to facts. Judges can and must find existing law that will decide cases in a determinate way.... [J]udicial opinions about policy and fairness have no proper place in the decisional process if the Rule of Law is to be respected.” GREY, T. C., *Molecular Motions: The Holmesian Judge in Theory and Practice*. *William & Mary Law Review*. 1995, Vol. 37, No. 1, pp. 19–45, at p. 21.

¹⁸ See HOLMES, O. W. Jr. *Privilege, M., and Intent*. *Harvard Law Review*. 1894, Vol. 8, No. 1, pp. 1–14, especially p. 3.

¹⁹ See FRANK, J. *Law and the Modern Mind*. pp. 6–8. See also the opinion of Lawrence Friedman that “No serious scholar treats the lawmaking power of judges as anything but an established fact.... The judges themselves are not entirely candid. Some of the most blatant lawmaking... gets covered by the fig leaf of ‘interpretation.’” Quoted via IULIANO, J. *The Supreme Court’s Noble Lie*. p. 925.

behavior of individual judges.²⁰ Since then, the topic has been dominated by US scholars, and research on US Supreme Court. The attitudinal model is one of the prominent streams of such research on the judicial behavior. Attitudinalists in short posit that a court “decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices,”²¹ and judges therefore closely follow their policy preferences when deciding on cases before them. Attitudinalists do not claim that judges decide cases exclusively according to their policy preferences; they admit that their model depends on the institutional context, which is particularly favorable in the case of the US Supreme Court. This court enjoys the top position at the judicial hierarchy; public support for independent judiciary, limiting legislative strikes; docket control; life tenure; and the perception of the position as a Justice as a career peak.²² This concession regarding the importance of institutional context partially reconciles attitudinalists with strategic approaches, which become relevant when the Court deviates from the political mainstream and may have to face Congressional constraints.²³

The cornerstone of attitudinalist publications appeared in 1993²⁴ and despite some doubts by critics, its coauthor Jeffrey A. Segal still believes in its explanatory power. Segal-Cover scores have performed particularly well recently when they have almost perfectly predicted the votes of US Supreme Court justices.²⁵ Segal even suggests that the attitudinal model can easily survive the current replication crisis in the behavioral sciences and the findings of psychological research, which holds that relationship between attitudes and behavior is fairly weak.²⁶ However, the attitudinal model has been subjected to various other attacks that have criticized both its validity and usability beyond the peculiar situation of the US Supreme Court.

The first attacks came from legal scholars, which have included not only traditional legalists,²⁷ but also more current “postpositivist” legalists (as Howard Gillman calls them). Postpositivists assume that judges’ state of mind means “a sense of obligation to make the best decision possible in light of one’s general training and sense of professional obligation”²⁸ (as opposed to the traditional legalist approach that has stressed obedience to con-

²⁰ WHITTINGTON, K. E., KELEMEN, R. D., CALDEIRA, G. A. The Study of Law and Politics. In: K. E. Whittington – R. D. Kelemen – G. A. Caldeira (eds.). *The Oxford Handbook of Law and Politics*. Oxford: Oxford UP, 2010, p. 9.

²¹ SEGAL, J. A., SPAETH, H. J. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge UP, 2002, p. 86.

²² SEGAL, J. A. Judicial Behavior. In: K. E. Whittington – R. D. Kelemen – G. A. Caldeira (eds.). *The Oxford Handbook of Law and Politics*. Oxford: Oxford UP, 2010, p. 25; SEGAL, J. A., CHAMPLIN, A. J. The Attitudinal Model. In: R. M. Howard – K. A. Randazzo (eds.). *Routledge Handbook of Judicial Behavior*. 2017, pp. 19–22.

²³ SPILLER, P. T., GELY, R. Strategic Judicial Decision-Making. In: K. E. Whittington – R. D. Kelemen – G. A. Caldeira (eds.). *The Oxford Handbook of Law and Politics*. Oxford: Oxford UP, 2010, pp. 40–41.

²⁴ SEGAL, J. A., SPAETH, H. J. *The Supreme Court and the Attitudinal Model*. Cambridge: Cambridge UP, 1993.

²⁵ SEGAL, J. A. All Relationships Dissipate Except This: The Attitude-Behavior Link on the Roberts Court. *Wash. UJL & Pol’y*, 2017, Vol. 54, pp. 190–191.

²⁶ SEGAL, J. A. *All Relationships Dissipate Except This*. pp. 181–186.

²⁷ Traditional legalists were especially galvanized when the first behavioralist studies appeared in 1960s, as one of their pioneers, H. J. Spaeth, recalled (SPAETH, H. J. Reflections about Judicial Politics. In: K. E. Whittington – R. D. Kelemen – G. A. Caldeira (eds.). *The Oxford Handbook of Law and Politics*. Oxford: Oxford UP, 2010, pp. 756–757).

²⁸ GILLMAN, H. What’s law got to do with it? Judicial behavioralists test the “legal model” of judicial decision making. *Law & Social Inquiry*. 2001, Vol. 26, No. 2, p. 486.

spicuous rules). Legally motivated decisions are those based on judges' sincere belief on what the law requires. Postpositivists insist that one cannot infer from the attitudinal descriptions of decision-making patterns an absence of legal motivations behind the decisions.²⁹ The problem thus lies in determining what the sources of attitudinalist "subjective preferences" are, which can then be also an "honest attempt to apply consistent interpretive philosophy to the facts".³⁰ Segal responds that then "virtually any decision can be consistent with the legal model; and any decision is consistent with it so long as the judge has sincerely convinced herself that the decision is legally appropriate."³¹ But then the basic problem is that the legal model is not falsifiable, because "it is impossible to know whether judges believe they are judging in good faith."³² Moreover, legal theorists criticize an overly formalistic and simplistic (and therefore easily refutable) way in which behavioralists conceptualize legal interpretation.³³

Legalist scholars, on the other hand, have contended that too much attitudinal research focuses on hard constitutional cases, which are just a small drop in the ocean of legal disputes. And even in hard cases, the law structures constitutional conflicts – after all, constitutional norms are the departure points for a constitutional debate in which interpretative disagreements may arise.³⁴ It was Harry Edwards and Michael Livermore who crafted probably the most elaborate legal critique of the attitudinal approach. They addressed a wide spectrum of shortcomings, ranging from simplistic assumptions about the nature of law, to insufficient consideration for the role of the law and judicial deliberation, to questionable assumptions about judicial views and preferences, to measurement³⁵ and coding issues, to important yet unaddressed independent variables.³⁶

Advocates of strategic approaches disagree with attitudinalists on some issues. For example, Lee Epstein noted two key distinctions – the role of interdependent choice and institutions. Models incorporating strategic approaches include the preferences of other relevant actors that goal-oriented justices take into account, while attitudinalists only consider the preferences of justices themselves. Moreover, strategic models have included more institutions, especially ones that prevent justices from voting simply as they'd like (e.g. the lack of an electoral connection). These most prominently (but also controversially) include precedents, which constrain justices from acting solely on their personal preferences.³⁷

²⁹ GILLMAN, H. *What's law got to do with it?* pp. 486–487.

³⁰ ROSENBERG, G. The Supreme Court and the Attitudinal Model. *Law and Courts*. 1994, Vol. 4, p. 7.

³¹ SEGAL, J. A. *Judicial Behavior*. pp. 20–21.

³² SEGAL, J. A. *Judicial Behavior*. p. 21.

³³ GILLMAN, H. *What's law got to do with it?* p. 468, 497.

³⁴ GRABER, M. A. Constitutional Law and American Politics. In: K. E. Whittington – R. D. Kelemen – G. A. Caldeira (eds.). *The Oxford Handbook of Law and Politics*. Oxford: Oxford UP, 2010, pp. 303–310.

³⁵ Issacharoff adds a point, noting that attitudinalists exclude unanimous decisions; however, when these are included, the model performs worse. See ISSACHAROFF, S. What Does the Supreme Court Do? New York University Public Law and Legal Theory Working Papers. In: SSRN [online]. 22. 9. 2017 [2020-05-19]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040308>.

³⁶ EDWARDS, H. T., LIVERMORE, M. A. Pitfalls of empirical studies that attempt to understand the factors affecting appellate decisionmaking. *Duke L. J.*, 2008, Vol. 58, No. 8, pp.: 1895–1989.

³⁷ EPSTEIN, L. The U.S. Supreme Court. In: K. E. Whittington – R. D. Kelemen – G. A. Caldeira (eds.). *The Oxford Handbook of Law and Politics*. Oxford: Oxford UP, 2010, pp. 496–497.

The New Institutionalism has tried to take the best of the main competing approaches in recent decades to show that judicial behavior is not determined by either law or politics, but by law and politics. New Institutionalists have turned their attention to how and under what conditions law matters. Any grand synthesis between various approaches is still far from likely,³⁸ although some attempts are currently already underway.³⁹

Second, the attitudinal model might face some troubles when transplanted outside the peculiar case of the US Supreme Court. The US Supreme Court is one of the most observed and politicized judicial bodies in the world, which goes hand in hand with its regular major interference in crucial political and moral questions. One of the key measures of judicial preferences (Segal-Cover scores) adopted by attitudinal researchers makes use of editorials on the US Supreme Court nominees in important newspapers⁴⁰ to predict how an individual judge will vote on cases. The attitudinal model would thus face difficulties not only within the United States when applied to lower levels of the judiciary,⁴¹ but also and especially outside the United States, where even constitutional courts do not enjoy a similarly strong position and newspapers do not bother to dissect every individual nominee for a constitutional court. Nevertheless, this does not mean that attitudinalist framework would not work outside the US Supreme Court (or somewhat similar settings such as in Canada) at all: for example, justices' attitudes in Israel have had a very strong influence on their votes on the merits,⁴² and similarly, studies in some European jurisdictions have lent support to the attitudinalist approach.⁴³ However, the attitudinalist model (like other dominant models in US Supreme Court scholarship) has to be adjusted to local conditions, and even then may bring about satisfactory results only in some time periods and in some types of cases.⁴⁴ Different country-case studies also found determinants such as ideational factors, public support, political fragmentation, supranational political structures,⁴⁵ informal deliberations,⁴⁶

³⁸ WHITTINGTON, K. E. Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics. *Law & Social Inquiry*. 2000, Vol. 25, No. 2, pp. 601–634. What has become more common is systematic empirical examinations showing that the impact of attitudes or the law differs across types of cases. See BARTELS, B. L. The constraining capacity of legal doctrine on the US Supreme Court. *American Political Science Review*. 2009, Vol. 103, No. 3, pp. 474–495.

³⁹ DYEVE, A. Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour. *European Political Science Review*. 2010, Vol. 2, No. 2, pp. 297–327.

⁴⁰ The Segal-Cover scores originated from a 1989 article (SEGAL, J. A., COVER, A. D. Ideological values and the votes of US Supreme Court justices. *American Political Science Review*. 1989, Vol. 83, No. 2, pp. 557–565) and now score both the qualifications and the ideology of the US Supreme Court nominees.

⁴¹ Here, even Segal admits some possible impact of law on judicial behavior (SEGAL, J. A. *Judicial Behavior*. p. 24). Generally, one can find more robust support for ideological and policy-related influences at higher levels of the judicial hierarchy; see ZORN, C., BOWIE, J. B. Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment. *The Journal of Politics*. 2010, Vol. 72, No. 4, pp. 1212–1221.

⁴² WEINSHALL MARGEL, K. Attitudinal and Neo Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel. *Journal of Empirical Legal Studies*. 2011, Vol. 8, No. 3, pp. 556–586. The paper, however, also lends some support to the neoinstitutional claim that the law matters.

⁴³ DYEVE, A. *Unifying the field of comparative judicial politics*. pp. 301–302.

⁴⁴ ROUX, T. American ideas abroad: Comparative implications of US Supreme Court decision-making models. *International Journal of Constitutional Law*. 2015, Vol. 13, No. 1, p. 91.

⁴⁵ ROUX, T. *American ideas abroad*. pp. 93–94.

⁴⁶ DYEVE, A. *Unifying the field of comparative judicial politics*. p. 303.

networks,⁴⁷ etc. to be relevant. Nevertheless, in many European countries, such as e.g. France, where the political ideologies of judges are not identifiable and decisions are attributed to the court as a whole while individual votes remain unknown, quantitative attitudinal testing is barely even possible.⁴⁸

II.2 Rejecting the extremes: Appreciating the importance of law in judicial decision-making

The pure attitudinal model and the extreme form of legal realism are now generally seen as dubious, and have been rejected by most legal scholars.⁴⁹ Those social science scholars who focus mainly on the outcomes of legal decisions (which they see as a result of preferences of judges) and tend to disregard law as an important factor have faced criticism. For example, Barry Friedman asserted that: “reflecting an almost pathological skepticism that law matters, positive scholars of courts and judicial behavior simply fail to take law and legal institutions seriously. This failure accounts for methodological shortcomings that diminish the value of the entire positive endeavor.”⁵⁰ There seems to be an overwhelming consensus that law really does matter and that it indeed influences judicial decisions in a meaningful way.⁵¹ Yet in the social science scholarship, “it is considered the common sense of the discipline that Supreme Court justices... should be viewed as promoters of their personal policy preferences rather than as interpreters of law.”⁵² Most social scientists do not discard legal factors, but perceive them as constraints on judges rather than motivating forces.⁵³

Therefore, at this point we can reject both of the extreme positions. On the one hand, it seems impossible to claim that a judge with the cognitive limitations of a human can arrive at *the single right answer* dictated by law. Moreover, even if this were possible, we simply know that reasonable lawyers and reasonable judges often disagree about what the “right” answer is. In other words, law is (probably) theoretically and (definitely) practically indeterminate.

On the other hand, law has a normative force, and it does independently influence how judges decide cases. It is hard to tell whether the practical force of the law is based on judges’ internalization of the importance of law,⁵⁴ on strategic “utilitarian” considera-

⁴⁷ DRESSEL, B., SANCHEZ-URRIBARRI, R., STROH, A. The Informal Dimension of Judicial Politics: A Relational Perspective. *Annual Review of Law and Social Science*. 2017, Vol. 13, pp. 413–430.

⁴⁸ BLEICH, E. Historical Institutionalism and Judicial Decision-Making: Ideas, Institutions, and Actors in French High Court Hate Speech Rulings. *World Politics*. 2018, Vol. 70, No. 1, pp. 61–62.

⁴⁹ See IULIANO, J., The Supreme Court’s Noble Lie. *U.C. Davis Law Review*. 2018, Vol. 51, pp. 938–940.

⁵⁰ FRIEDMAN, B. Taking Law Seriously. *Perspectives on Politics*. 2006, No. 2, p. 262.

⁵¹ See, for example, KIM, P. T. Lower Court Discretion. *New York University Law Review*. 2006, Vol. 82, No. 2, pp. 383–442, especially Part D “Law as a normative force,” or NEWMAN, J. O. Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values. *California Law Review*. 1984, Vol. 72, No. 2, pp. 200–216.

⁵² GILLMAN, H. *What’s law got to do with it?* p. 466.

⁵³ EPSTEIN, L. et al. Ideology and the Study of Judicial Behavior. In: J. Hanson (ed.). *Ideology, Psychology, and Law*. Oxford: Oxford UP, 2012, p. 706.

⁵⁴ In other words, judges, at least partly through a process of socialization and training, internalize and adopt a view of their position that includes a duty to obey the law.

tions,⁵⁵ or on a combination of these, but nevertheless, the law still has some bite. As Paulin Kim puts it:

Although no definitive explanation exists for the formation of legal preferences, several plausible theories have been advanced in the literature. Some scholars argue that the socialization process involved in professional training or the role perceptions of judges shape their legal preferences. Others contend that judges have self-interested reasons for following precedent, such as ensuring respect for their own decisions or for the judiciary more generally. Judge Posner has suggested that judges gain inherent utility from following precedent, analogizing doctrine to the rules of a game to which they must adhere to make the game meaningful. In any case, the assumption that judges have legal preferences is at least as plausible as the theory that they have policy preferences.⁵⁶

But even if law (or legal text) has – as we believe – an undisputable impact on judicial decision-making, the formalist legalistic model is untenable. The insufficiency of natural language used in legal documents to theoretically or practically determine a single “correct” answer is nowadays undisputable. Many theorists have pointed this out, including legal theorists such as Herbert Hart⁵⁷ and philosophical hermeneuticists such as Hans-Georg Gadamer. Gadamer, as well as those who followed him,⁵⁸ stressed that a text, as an object of interpretation, only provides us with a partial set of instructions for the norm’s reconstruction.⁵⁹ Also, very importantly for the purposes of our article, he emphasized the role of the subject (in other words the one who interprets, such as a judge) and her prior ideational commitments (or “pre-understanding”, *Vorverständnis*) for the actual act of interpretation.⁶⁰

The current state of the art thus favors the middle ground.⁶¹ At the same time, our reconciliation of the legalistic model with its alternatives still needs to account for the fact that not all cases of judicial decision-making are the same. While in some cases, there is virtually no space for extra-legal factors to meaningfully influence their outcome,⁶² in

⁵⁵ Tom Ginsburg, amongst others, has put forward the concept of “judicial utility.” He has suggested that there are psychological reasons to respond to incentives: “Judges, like most everyone, care about their utility and respond to incentives. Hence, their reputation is an important social and economic asset to the extent that it helps them to achieve their goals and maximize their utility. Reputation provides a credible signal of high quality, which allows judges to fulfill professional duties and achieve career goals.” See GINSBURG, T., GAROUPA, N. *Judicial Audiences and Reputation: Perspectives from Comparative Law*. *Columbia Journal of Transnational Law*. 2009, Vol. 47, No. 3, pp. 457–490, at p. 458. Therefore, following the law can be seen as an attempt to protect the judge’s reputation before the public or the professional community. In this view, following the law is not a matter of internalization but a matter of responding to external incentives.

⁵⁶ KIM, P. T. *Lower Court Discretion*. p. 406.

⁵⁷ See mainly HART, H., L. A. *The Concept of Law*. 2nd ed. Oxford: Clarendon Press, 1994, pp. 128–136.

⁵⁸ In our opinion, one fascinating account of the importance of text, the limits of interpretation, and the importance of the interpreter that is highly relevant even for lawyers has been developed by Umberto Eco. See, amongst others, ECO, U. *The Limits of Interpretation*. Bloomington: Indiana University Press, 1994, or ECO, U. *Šest procházek literárními lesy*. Olomouc: Votobia, 1997.

⁵⁹ GADAMER, H.-G. *Truth and Method*. 2nd rev. ed. New York: Crossroad, 1989, pp. 306–337.

⁶⁰ *Ibid.*, pp. 265–270.

⁶¹ As an example of such an approach, see IULIANO, J. *The Supreme Court’s Noble Lie*. pp. 967–977.

⁶² For example, this could occur when the interpretation of the text is too trivial (and the practical uncertainty of the legal text is too low) to allow for any leeway.

other cases, the situation is completely different. In other words, just as there is an agreement that law is indeterminate, there is also a general consensus that the level of indeterminacy varies from case to case. In theory, cases are often divided in two categories, namely easy cases and hard cases. In easy cases, discernible legal commands (coupled with a set of facts) determine the outcome of the case to a high degree; the outcomes of hard cases cannot be determined solely by a trivial interpretation of law.

There are two basic approaches to defining such a hard case: the input-based approach, and the output-based approach. The input-based approach focuses on 1) the nature of the legal rule or principle at hand, 2) the individual facts of the case, and possibly 3) other, accidental, factors.⁶³ Norms with an “open texture”⁶⁴ generally tend to create hard cases. In this sense, hard cases include the application of principles, the resolution of conflicting principles, or the interpretation and application of very vague “(semi-)open” concepts, such as “good morals” or “just resolution.” We can call these “normatively hard cases,” because it is the texture of the legal command that makes them hard.

However, for the purposes of our article and for the purposes of empirical studies of judicial decision-making generally, it is pointless to dwell much on an analysis of the specific inputs that make a case hard.⁶⁵ For a researcher who takes the perspective of “studying what judges do,” it is not important whether the case is hard because it involves either A) a vague, open-texture concept (such as good morals), B) proportionality analysis, C) a duty to interpret a rule in light of constitutional principles, or it is D) the notorious “no vehicles in the park” case. The fact that even good-willed, well-trained, and experienced lawyers often disagree about the outcome of a case shows that law, *practically speaking*, is not completely determinate. The *practical* existence of a hard case does not depend entirely on the nature and texture of the norm at hand, but also on the subjects (i.e. the ones who interpret, such as judges), their ideational premises of the legal text, etc. Consequently, if there are cases where judges disagree (and where it is not a case of a simple mistake), even if they work with the same legal text, it means that law does not practically determine the outcome and hence, something else must enter the picture. This, we believe, is the space where extra-legal factors operate.

It is not surprising in this regard that most of the studies dealing with extra-legal influences on judicial decision-making focus on high-level courts. The dockets of constitutional courts, supreme courts, and international courts contain – by the very nature of their existence and the logic of procedural rules that limit access to them – a very high ratio of (both practically and normatively) hard cases, and thus the extra-legal factors have enough space to become noticeable. On the other hand, especially in the case of lower courts, most legal cases should be practically easy, as the legal-judicial system would collapse otherwise (or at the very least, it would be a waste of resources), and it would fare very poorly in terms of strengthening aggregate legal certainty.

This phenomenon also explains why the decision-making of the top courts (and among them, the US Supreme Court in particular) attracts the most attention from scholars. In

⁶³ See KÜHN, Z. *Aplikace práva ve složitých případech*. p. 45.

⁶⁴ See supra HART, H., L. A. *The Concept of Law*. pp. 128–136.

⁶⁵ Especially considering that the inputs have been thoroughly analyzed in the Czech literature by Kühn.

the case of the Czech Republic, we could likewise assume that the dockets of the Constitutional Court, the Supreme Court, and the Supreme Administrative Court would include the highest ratio of practically hard cases and are thus the best fit for the study of extra-legal determinants of judicial decision-making. On the other hand, the position of the top courts in this regard is a very complex one. The cases decided by the US Supreme Court are hard almost by definition, as cases involving disagreement amongst federal courts are usually granted certiorari. The filtering procedure at the Czech Supreme Court is of course significantly different, but considering the current admissibility rules,⁶⁶ the judgments (decisions on merits) usually involve a practically hard case. At the Czech Constitutional Court, the situation is obscured by the relatively broad admissibility of constitutional complaint – while most of the cases decided by judgements (*nález*) will be practically hard, the ocean of cases decided by a decision that dismisses a complaint as manifestly ill-founded will show a lot of variety in this regard (i.e. their docket will include a few hard cases and many easy cases). But we must emphasize that in the case of constitutional courts in general, the vague nature of constitutional texts is an extremely important factor and this fact contributes to the number of hard cases decided by those courts.

Considering all of the above, we feel confident enough to claim that while judges do apply law in a meaningful sense, there is more to judging than simply applying the law, and that, consequently, other factors than the law itself contribute to the outcome of cases. This in turn means that the decision-making of the top courts in particular is an interesting object of research.

III. DETERMINANTS OF JUDICIAL DECISION-MAKING: INTERPRETING THE CURRENT STATE OF THE ART

At this intermediate point, we can thus claim that there is a general consensus in the literature (which we share) that law meaningfully constrains judges in their decision making, but it does not explain the whole decision-making process and all outcomes of cases. What is, however, the ratio of legal and extra-legal factors involved in judicial decision-making?

It seems then that, especially in hard cases, there is a wide space for factors other than law to influence judicial decision-making. In this section, we include an overview of extra-legal influences⁶⁷ that have been identified in the literature⁶⁷ in order to present a coherent sketch of the current understanding of judicial decision-making and its extra-legal determinants.

There are of course many ways of structuring and framing extra-legal influences. Richard Posner, for example, has identified eight (not counting the legal model) overlapping, incomplete theories of judicial decision-making: attitudinal, strategic, sociological,

⁶⁶ See § 237 of Act No. 99/1963 Sb., Code of Civil Procedure, as of 30 June 2019.

⁶⁷ Most of this literature, regrettably, concerns American courts. This creates some problems for generalizations and theory-building. We are, however, aware of this problem and will take it into account in the following sections.

economic, psychological, organizational, pragmatic, and phenomenological.⁶⁸ For the purposes of this specific article, however, it is not essential for us to subscribe to one of the theories or to create a new, coherent, theory.⁶⁹ Instead, our aim is to present an overview of the current empirical knowledge by simply “putting the pieces together.” At this point in time, there is ample evidence⁷⁰ suggesting that various factors have a noticeable impact on judicial decision-making, including the identity of a judge (judicial ideology) public opinion, institutional relations within the separation of powers or the judicial hierarchy, informal relations, the availability of resources, collegiality, and other aspects.

III.1. The identity of a judge, including ideology

There are two main ways to measure judicial ideology – exogenously and endogenously – which differ based on the source of measurement. Endogenous measures infer judicial ideology from the decisions themselves, while exogenous measures use sources other than judicial outputs to measure ideology. Exogenous measures serve especially well when a study has causal ambitions, while endogenous measures benefit from greater precision.⁷¹

The application of endogenous measures faces two challenges. First, using votes to measure ideology and then applying those ideology scores to predict votes suffers from the problem of circularity, unless older scores are used to predict new votes. Second, and more importantly, ideology scores do not tell us anything about why individual judges decided in the way they did.⁷² Still, the endogenous measure of judicial ideology is useful for locating judges in ideological space, which can be either unidimensional (typically left-right, or liberal-conservative), or multidimensional (adding other dimensions). Probably the most used measures of judicial ideology are “Martin-Quinn” scores, which line up US Supreme Court justices on an ideological continuum.⁷³ This unidimensional solution might become problematic in cases which deal with multiple issues, or for cases without a clear ideological dimension.⁷⁴

⁶⁸ POSNER, R. A., *How Judges Think*. Cambridge: Harvard University Press, 2008, p. 19.

⁶⁹ However, our aim is indeed to provide a coherent and holistic theory in a future article.

⁷⁰ Most of the studies we refer to in this article have been conducted in the United States, and one needs to be extremely careful before applying the conclusions to a continental European (or even simply non-American) context.

⁷¹ EPSTEIN, L. et al. *Ideology and the Study of Judicial Behavior*. p. 708.

⁷² SEGAL, J. A., CHAMPLIN, A. J. *The Attitudinal Model*. p. 25.

⁷³ Martin-Quinn scores. In: *University of Michigan* [online]. [2020-03-23]. Available at: <<http://mqscores.lsa.umich.edu/>>. For an easy-to-read description and a legalist critique of Martin-Quinn scores, see FARNSWORTH, W. The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift. *Nw. UL Rev.* 2007, Vol. 101, pp. 143–154. Ho and Quinn reemphasized the fact that spatial models such as Martin-Quinn scores do not necessarily measure ideology, although it can serve as a very simplified shortcut for understanding the underlying logic of what is being measured. Rather, the measures are “a descriptive summary of the voting patterns”; see HO, D. E., QUINN, K. M. How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models. *California Law Review*. 2010, Vol. 98, No. 3, p. 839.

⁷⁴ BONICA, A., et al. Measuring Judicial Ideology Using Law Clerk Hiring. *American Law and Economics Review*. 2017, Vol. 19, No. 1, pp. 133–134.

The most straightforward, yet widely and still used exogenous measure of judicial ideology is the political affiliation of the nominating body.⁷⁵ Again, such a measure functions fairly well in the comparably clear-cut political arena in the US, where Republican (conservative, right-leaning) presidents nominate ideologically allied candidates for the Supreme Court (and vice versa),⁷⁶ but it has troubles in multiparty systems, where political loyalties are moreover not necessarily based on ideological proximity, but on personal ties.

The Judicial Common Space synthesizes Martin-Quinn scores and a measure capturing the ideology of the political actors involved in the nomination process of judges to build an accurate measure of judicial ideology.⁷⁷ Michael Bailey points that while the Judicial Common Space scores are not completely trustworthy for the 1950s and the 1960s, from 1980 on, possibly after the nomination of Judge Bork, they perform quite plausibly.⁷⁸

Another example of the exogenous method for measuring judicial ideology are Segal-Cover scores, based on analyses of newspaper editorials discussing the ideological positions of Court nominees. Although the risks of relying on the perceptions of authors of editorials when measuring of justices' attitudes appear obvious, the Segal-Cover scores have worked well, at least for attitudinal research (see also *supra*). There clearly is a relationship between exogenously determined scores of a judge's ideology and her voting.⁷⁹ A related alternative for measuring judicial ideology relies on justices' pre-nomination speeches.⁸⁰ Here, the trouble appears when the public expression of preferences is not sincere, which arguably happens from time to time.⁸¹ Moreover, the score for the judge building on the pre-appointment measurement, based either on the editorials or on her speeches remains stable over time,⁸² which fails to reflect the possibility of changes in ideology as the judge matures.

One way to overcome stability of e.g. Segal-Cover scores has been the introduction of the new "first dynamic ideology measure," which covers the lower levels of the US judiciary. The measure builds on a text analysis of tens of thousands of expert-led qualitative judicial evaluations published in the Almanac of the Federal Judiciary. Its authors believe that using the opinions of legal experts as a basis for constructing the measure will help in bridging the legal and political approach. Moreover, another advantage of the measure

⁷⁵ In the US context, the researchers distinguish between justices appointed by Democratic or Republican presidents. See e.g. EPSTEIN, L., LANDES, W. M., POSNER, R. A. When It Comes to Business, the Right and Left Sides of the Court Agree. *Washington University Journal of Law & Policy*. 2017, Vol. 54, pp. 33–49.

⁷⁶ Still, critics have pointed out the challenges of determining presidents' ideologies and possibly large differences in the ideological leanings of presidents from the same party; moreover a president may not automatically want to appoint a judge who reflects his ideology. See EPSTEIN, L. et al. *Ideology and the Study of Judicial Behavior*. pp. 707–708.

⁷⁷ EPSTEIN, L., et al. The Judicial Common Space. *The Journal of Law, Economics, and Organization*. 2007, Vol. 23, No. 2, pp. 306–309.

⁷⁸ BAILEY, M. A. Measuring ideology on the courts. In: Robert M. Howard – Kirk A. Randazzo (eds.). *Routledge Handbook of Judicial Behavior*. 2017, pp. 86–107.

⁷⁹ SEGAL – CHAMPLIN, *The Attitudinal Model*. pp. 25–29.

⁸⁰ EPSTEIN, L., MERSHON, C. Measuring Political Preferences. *American Journal of Political Science*. 1996, Vol. 40, No. 1, p. 264.

⁸¹ DYEYRE, *Unifying the field of comparative judicial politics*. p. 301.

⁸² EPSTEIN, L., MERSHON, C. *Measuring political preferences*. p. 281.

is its multidimensionality, taking into consideration judicial ability, temperament, trial practice/oral argument, ruling/opinion quality, and ideology.⁸³

Other exogenous measures of judicial ideology include hiring decisions or political donations. Bonica et al. constructed a measure of judicial ideology based on the ideology of the law clerks that judges hire. The measure is based on the assumption that judges hire ideologically like-minded law clerks, and therefore it is possible to infer judge's ideology based on the ideology of her clerks.⁸⁴ The measure allows a more dynamic estimation of judicial ideology, because judges must regularly make new hiring decisions.⁸⁵ Finally, Adam Bonica and Michael Woodruff have recently introduced a noteworthy exogenous measure of judicial ideology using data from the financing of judicial campaigns. In their view, data on donors can tell us something about ideology of state judges.⁸⁶ Unfortunately, outside the (American) context of elected judges, such scores do not have much use.

Because higher courts are usually collegial bodies, the research on judicial ideology also deals with the question of how the ideology of individual judges affects their colleagues. Findings have shown ideological dampening in cases of ideologically diverse panels, but also ideological amplification when all judges share the same ideological views.⁸⁷

Another strand of research seeks to study the influence of judge's personal characteristics on their decisions. Basic demographic characteristics, such as religion, sex, race, and past employment matter. Catholic and Evangelical judges are more likely to rule against gay rights and obscenity relative to other judges, but are more moderate in capital cases, which corresponds to papal teachings. The sex of a judge matters in cases dealing with workplace discrimination and harassment. Similarly, the race of a judge has the greatest impact when race is a key issue in the case.⁸⁸

In sum, while ideology is perhaps the most studied, it is far from the only relevant aspect of a judge's identity that can influence judicial decision-making. Other important factors include the gender of a judge or his/her previous professional experience, such as whether the judge previously served as an attorney, a judge or an academic.

⁸³ COPE, K. L., FELDMAN, A. Estimating Judicial Traits Using Text Analysis of Expert Evaluations. In: *Kevin Cope* [online]. 5. 7. 2018 [2020-05-19]. Available at: <<http://kevincope.com/wp-content/uploads/2018/07/AFJ-Article-MC2.pdf>>. Clearly, judicial ideology has been the subject of interesting current debate; for an overview, see JOHNSTON, C. D., MAK, M., SIDMAN, A. H. On the Measurement of Judicial Ideology. *Justice System Journal*. 2016, Vol. 37, No. 2, pp. 169–188. For a thorough discussion of the problems related to judicial ideology and its measurement, see FISCHMAN, J. B., LAW, D. S. What Is Judicial Ideology, and How Should We Measure It. *Washington University Journal of Law & Policy*. 2009, Vol. 29, No. 1, pp. 133–214.

⁸⁴ However, note the occasional intentional practice of hiring “counterclerks” to challenge judge's arguments: SEINFELD, G.. The Good, the Bad, and the Ugly: Reflections of a Counterclerk. *Mich. L. Rev. First Impressions*. 2015, Vol. 114, pp. 111–123.

⁸⁵ BONICA, A., et al. Measuring Judicial Ideology Using Law Clerk Hiring. *American Law and Economics Review*. 2017, Vol. 19, No. 1, pp. 129–161.

⁸⁶ BONICA, A., WOODRUFF, M. J. A Common-Space Measure of State Supreme Court Ideology. *The Journal of Law, Economics, and Organization*. 2014, Vol. 31, No. 3, pp. 472–498.

⁸⁷ EPSTEIN, L. et al. *Ideology and the Study of Judicial Behavior*. pp. 721–722.

⁸⁸ RACHLINSKI, J. J., WISTRICH, A. J. Judging the Judiciary by the Numbers: Empirical Research on Judges. *Annual Review of Law and Social Science*. 2017, Vol. 13, pp. 203–229.

III.2. Public opinion

In addition to the factors operating at the level of the individual judge (the identity of a judge) and within the court (collegiality), there are also external extra-legal factors worth considering. Even though the constitutions of liberal democratic countries recognize the value of judicial independence,⁸⁹ the impact of public opinion can be mitigated, but never completely avoided. The hypothesis that public opinion has an impact on judicial decision-making is especially promising in “salient cases,” i.e. in cases that are considered important by the media and the public, and that do not fly under the radar. These might include 1) top-level politically salient cases, such as *Brown v. Board of Education* or *Roe v. Wade* in the American case or, for example, *EET* or *Regulation Fees* in the Czech case, as well as 2) publicly salient issues such as the severity of criminal penalties, cases pertaining to aliens/migrants, regulations on abortion, etc.

More often than not, the top courts can find themselves under increased pressure from the public, because salient cases form a relatively bigger chunk of their docket, and these cases are usually more prominent in the media.⁹⁰

The most studied court in this regard is yet again the US Supreme Court. Barry Friedman,⁹¹ based on qualitative historical analysis, has claimed that the SCOTUS has actually always followed the “Will of the People” in the long run, and that public opinion has significantly shaped its case law. Moreover, he has suggested that its Justices are aware of this – they are aware that they cannot be completely out of touch with the convictions of the public, since they would lose the public support and legitimacy that they sorely need to perform their function effectively.⁹²

Friedman’s claims were later scrutinized by Epstein and Martin,⁹³ who showed that changes in public mood (liberal/conservative) were followed by the corresponding shifts in the SCOTUS’s case law. Although the correlation was quite clear, the question of causality (why or how judicial decisions are influenced by public opinion) has remained a mystery. There are several competing explanations of this phenomenon.

The first possible hypothesis is that since judges are first and foremost people – and, in a way, members of the public – similar factors that cause shifts in the public mood in general could also influence judges. This perspective would be consistent with behavioral/attitudinal accounts of judicial decision-making, because external factors (here, public opin-

⁸⁹ Even at the statutory level in the Czech Republic, the law states that judges may not let themselves be influenced by, *inter alia*, media or public opinion [§ 80 of the Law on Courts and Judges (zákon č. 6/2002 Sb., o soudech a soudcích, ve znění pozdějších předpisů)].

⁹⁰ See BENÁK, J., HANYCH, M. Public Opinion, Media Coverage and Czech Constitutional Judges. In: *ECPR General Conference* [online]. 2018 [2020-03-23]. Available at: <<https://ecpr.eu/Events/PaperDetails.aspx?PaperID=43033&EventID=115>>.

⁹¹ FRIEDMAN, B. *The Will of the People*. New York: Farrar, Straus and Giroux, 2009.

⁹² This interpretation is supported by the Justices themselves. Friedman quotes Sandra Day O’Connor, who stressed that: “[w]e don’t have standing armies to enforce opinions.... [W]e rely on the confidence of the public in the correctness of those decisions. That’s why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust.” FRIEDMAN, B. *The Will of the People*. p. 371.

⁹³ EPSTEIN, L., MARTIN, A. Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why). *Journal of Constitutional Law*. 2010, Vol. 13, No. 2, pp. 263–281.

ion) would not have a direct impact on judicial decision-making; rather, they are internalized and shape the outcome of a judicial decision through the personality/identity of a judge. Another reasonable hypothesis is that public opinion has a direct influence, since judges are concerned about their legitimacy and public support.⁹⁴

Furthermore, there are dozens of more specific studies showing the influence of media⁹⁵ (as a proxy for public opinion) or the influence of more specific versions of public opinion, such as a judge's reputation in the community of legal experts.⁹⁶

III.3. Collegiality

Yet another generally accepted set of factors with a significant impact on judicial decision-making can be collectively labeled as “collegiality.”

First of all, as Harry Edwards emphasized in his critique of Revesz's article, judges on higher courts (appellate and higher) usually decide as a part of a bigger body of judges. These judges discuss the case, its outcome, and the reasoning behind it, and this competitive cooperation between judges with different points of view and experience forces the final decision to come out balanced and legally sound. However, an attitudinalist would remain unconvinced. A dogmatic attitudinal position would claim that the outcome of the decision would have been determined by the intersection of the ideological preferences of the majority judges. In other words, if we had a panel composed of two judges who have stereotypical left-wing ideological preferences and one judge with a stereotypical right-wing preference, the attitudinal model would expect the decision to be stereotypically left-wing, since the two leftist judges have the majority.

This dogmatic attitudinal view is inconsistent not only with the claims of judges, such as Edwards, but also with the accounts of some empirical scholars. One prominent example of the latter category is a study by Pauline Kim.⁹⁷ In her research, partly reminiscent of the Revesz article that we discussed in Section I of this paper, Kim set out to explore the interplay between ideological preferences and collegiality (which she termed *panel effects*). She explored decision-making at the United States Courts of Appeal in sex discrimination cases.⁹⁸ In order to observe panel effects, she divided the panels in four categories:⁹⁹ 1) panels with three “Republican” judges, 2) panels with a 2:1 “Republican”

⁹⁴ This explanation would be consistent with the abovementioned Friedman/O'Connor account.

⁹⁵ See for example LIM, C., S. H. Media Influence on Courts: Evidence from Civil Case Adjudication. *American Law and Economics Review*. 2015, Vol. 17, No. 1, pp. 87–126. Lim showed that in areas with frequent newspaper coverage of courts, there is little difference in damage awards between conservative and liberal districts. In contrast, in areas with little newspaper coverage, liberal districts tend to grant substantially larger damage awards than conservative ones do. She suggests that the presence of active media coverage may enhance consistency in the civil justice system.

⁹⁶ GINSBURG, T., GAROUPA, N. *Judicial Audiences and Reputation*. pp. 457.

⁹⁷ KIM, P. T. Deliberation and Strategy on the United States Courts of Appeals. *University of Pennsylvania Law Review*. 2009, Vol. 157, No. 5, pp. 1319–1381.

⁹⁸ The selection of these cases was motivated by the fact that ideological preferences could be considered an important factor that would lead a particular judge to prefer a narrow or broad understanding of the prohibition of sex discrimination.

⁹⁹ In her study, Kim employed the crude but reliable proxy of “party affiliation of the appointing President”.

majority, 3) panels with a 2:1 “Democratic” majority and 4) panels with three “Democratic” judges. A dogmatic attitudinal model would expect compositions 1+2 and 3+4, respectively, to decide in the same way, because it only takes two votes to reach a majority decision. Therefore, if two members of the panel are ideologically in the same boat, the identity of the third one should not matter

Nevertheless, the results were strikingly different. Kim’s analysis showed that compositions 2) and 3) tended to behave in a more moderate manner. It is also quite significant that collegiality influenced the voting patterns of both the majority¹⁰⁰ and the minority judge.¹⁰¹ Based on these results, it is also possible to come to the conclusion that panel effects cannot be explained by purely strategic accounts, and that other accounts, such as the influence of the deliberative process, are at play.

Obviously, if the deliberative account was valid, it would depend heavily on the quality of the deliberation. The value of collegial decision-making rests on the presumption that communication between judges is guided by a bona fide attempt to decide the case at hand in a correct way. As Harry Edwards puts it, collegiality means that judges “are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered.... [C]ollegiality plays an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.”¹⁰²

However, for collegiality to work in this (desired) way, several conditions must be met. First of all, the bench should be diverse; otherwise, there can be no influencing, no mitigating, no covering for each other’s blind spots. In this regard, the selection of judges and the composition of panels should be conducted with great care.¹⁰³

From another point of view, even the formal structure of the deliberation process makes a great difference. There is an obvious difference between A) panels where judges meet regularly, possess symmetrical case information,¹⁰⁴ and engage in in-depth discussions, and B) panels where a judge rapporteur simply circulates a draft decision, the other members of the panel have very asymmetrical case information, and simply just check for obvious mistakes. Current research of the Czech Constitutional Court (though by no means

¹⁰⁰ I.e. the “Republicans” in a panel with Republican majority voted in a significantly more “Democratic” way and vice versa.

¹⁰¹ I.e. the “Republican” in a panel with Democratic majority voted in a significantly more “Democratic” way and vice versa.

¹⁰² EDWARDS, H. T. The Effects of Collegiality on Judicial Decision Making. *University of Pennsylvania Law Review*. 2003, Vol. 151, No. 5, pp. 1639–1690, at p. 1645.

¹⁰³ It is no surprise that even in the case of the Czech Constitutional Court, some attention has been paid (and should be paid) to diversity in terms of former professional experience (judges, academics, attorneys etc.). See also KOSAR, D., VYHNÁNEK, L. Senát a výběr soudců Ústavního soudu. In: J. Kysela. *Dvacet let Senátu Parlamentu České republiky v souvislostech*. Praha: Leges, 2016, pp. 196–198.

¹⁰⁴ I.e. they know the case file to the same or at least very similar extent. This can be ensured in more than one way. One way might be to have a SCOTUS-style session where cases are discussed prior to their assignment to a certain judge, while another might be the practice of deep and objective memos, sometimes even hundreds of pages long, that are circulated amongst the judges, such as in the case of the German Constitutional Court.

conclusive at this point) hints that the difference-mitigating aspect of collegiality leaves a lot to be desired.¹⁰⁵

Variability regarding the aforementioned factors that influence the way collegiality works (or does not work) should be considered yet another factor that determines the outcome of judicial decision-making.

III.4. Institutional relations

Judicial decision-making might further be influenced by both horizontal (*vis-à-vis* other branches of government) or vertical (within the judicial hierarchy) institutional relations.

The horizontal impact should be mitigated by the safeguards of judicial independence, even though they do not guarantee complete insulation.¹⁰⁶ In the case of the Czech Constitutional Court, for example, the reappointment of Justices is a notorious problem. The renewable term undermines their judicial independence, as incumbent Justices may want to increase their chances to be reappointed by strategic maneuvering towards the end of their term. Even at the very first turnover of the Czech Constitutional Court in 2003, two Justices of Havel's Court who sought reappointment to Klaus' Court adjusted their behavior towards the end of their term,¹⁰⁷ but the corrosive effect had not yet become visible, as both of them were eventually reappointed. The problems burst out fully in the next overhaul in 2013–2015, when far more incumbent Justices from Klaus' Court ran for reappointment to Zeman's Court, and several of them failed. The voting in the Senate showed a clear pattern. It made clear that those incumbent Justices who voted on key judgments towards the end of their term along the lines with the majority of the Senate (at that time with the Social Democrats) were eventually rewarded by reappointment. In contrast, those who voted against the views of Social Democratic senators were *de facto* "punished" for their decision-making, and the Senate rejected them.¹⁰⁸ This sent a clear signal to the Justices that if they wished to be reappointed, they should be mindful of their decision-making and how those decisions appear to political actors. While the Justices may of course resist the temptation, this example goes to show that a back door for inter-institutional influence may be found even in systems based on judicial independence.

It is also possible to examine horizontal institutional relations in a broader sense. Numerous studies have suggested that SCOTUS Justices are influenced by the current political composition of Congress when reviewing the constitutionality of statutory legislation, probably because they are mindful of Congressional reaction, which might be even further from their actual preferences than the reviewed legislation. Nevertheless, there does not seem to be a general consensus about the causes, or even the extent of such a phenomenon.¹⁰⁹

¹⁰⁵ CHMEL, J. Zpravodajové a senáty: Vliv složení senátu na rozhodování Ústavního soudu České republiky o ústavních stížnostech. *Časopis pro právní vědu a praxi*. 2017, Vol. 25, No. 4, pp. 739–758.

¹⁰⁶ Moreover, the *de facto* quality of judicial independence might be an important extra-legal factor that determines judicial decision-making as well.

¹⁰⁷ See NĚMEČEK, T. Klaus vybírá do Brna. *Respekt*. 2003, No. 22; a NĚMEČEK, T. Sbohem, ctihodnosti, vítějte. *Respekt*. 2003, No. 30.

¹⁰⁸ For further details, see KOSAŘ, D., VYHNÁNEK, L. *Senát a jmenování soudců Ústavního soudu*. pp.193–195.

¹⁰⁹ See SEGAL, J. A. Separation-of-Powers Games in the Positive Theory of Congress and Courts. *The American Political Science Review*. Vol. 91, No. 1, pp. 28–44.

Relationships between different layers of the judicial system may play a similarly important role, as shown in literature concerning the relationship between higher and lower courts; wide-ranging extra-legal variables influence the extent to which lower courts actually follow the case law of the higher courts, or the extent to which they tend to differ.¹¹⁰

III.5. Resources and other factors

The factors mentioned so far are perhaps the most researched ones, but the list is by no means exhaustive. One often overlooked set of factors that influences judicial decision-making concerns resources in the broad sense of the term.¹¹¹ These may include time, technical equipment or software, the availability of personnel (clerks, assistants, etc.) and many other advantages.

The availability of resources may have impact on judicial-decision making in a number of ways. Resource constraints, for example, can persuade a judge to prefer a less costly (in terms of resources) way of deciding the case. In this regard, Kornhauser makes a case that if a judge feels pressured by time constraints, he or she will prefer an “easier” solution: i.e. opting for a broader reading of a precedent and consequently following it, rather than looking for more costly alternatives, such as differentiating it from other cases.¹¹²

A completely different example of resources having an impact on judicial decision-making is the rise in the application of ECtHR case law by the Czech Constitutional Court, which was arguably closely connected to the availability of previously unavailable resources.¹¹³

This list is by no means exhaustive,¹¹⁴ but it should provide the reader with a solid overview of the current state of knowledge concerning the existence and significance of extra-legal determinants of judicial decision-making.

IV. GENERAL THEORY, OR AMERICAN EXCEPTIONALISM? EXTRA-LEGAL FACTORS IN THE CZECH REPUBLIC AND METHODOLOGICAL CHALLENGES TO ITS CONFIRMATION

As readers have probably noticed (and as we have repeatedly stressed), an overwhelming part of the literature that examines the importance of extra-legal determinants of judicial decision-making is of American provenance, while the European and especially continental European accounts are much rarer. This raises at least two questions.

¹¹⁰ See KIM, P. T. *Lower Court Discretion* or the article by Kornhauser that we refer to in the following footnote.

¹¹¹ See for example KORNHAUSER, L. A. Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System. *S. Cal. L. Rev.* 1994, Vol. 68, p. 1605 et seq.

¹¹² *Ibid.*

¹¹³ See VYHNÁNEK, L. A Holistic View of the Czech Constitutional Court Approach to the ECtHR's Case Law. *Heidelberg Journal of International Law. Zeitschrift für ausländisches öffentliches Recht und Völkerrecht.* 2017, Vol. 77, No. 3, pp. 715–744.

¹¹⁴ Even seemingly random and more elusive factors, such as the judge's mood, may definitely play a role. A famous – if slightly controversial – study for example has claimed that there is a statistically significant difference between “hungry” judges and judges after lunch when it comes to outcome of parole hearings. See DANZIGER, S., LEVAV J., AVNAIM-PESSO, L., Extraneous factors in judicial decisions. *Proceedings of the National Academy of Sciences.* 2011, Vol. 108, No. 17, pp. 6889–6992.

The first question concerns the ambitions of the proposed theoretical account of judicial decision-making. Is the importance of extra-legal factors just an American peculiarity, or can we claim that the picture painted above is an element of judicial-decision making as such? Based on our understanding of the current theoretical knowledge, we are convinced that the latter holds true. The basic building blocks of the current theories and empirical research seem to be general. First, the “practical hard cases” that leave a judge with some *de facto* discretion as to their outcome are a natural and necessary occurrence in every existing legal system. Second, we find it uncontroversial that judges – no matter the thoroughness of their professional training and socialization – would retain certain characteristics of their identity that would influence their decision-making.¹¹⁵ The structure and dynamics of collegial deliberations in judicial panels are also general determinants of judicial decision-making that are arguably present in any system that employs collegial decision-making (which holds true in virtually all jurisdictions). Furthermore, there is nothing inherently American about the notion that judges have certain extra-legal preferences, and/or may (consciously or otherwise) react to certain incentives such as promotion, reappointment, or positive reactions from the professional legal community. Therefore, we assume that the position that judicial decision-making involves some extra-legal factors operating within the constraints of law is generally applicable, even though the relative weight of individual factors will of course differ from system to system, from court to court, and even from case to case.

The second and perhaps even more complicated question is, however, whether the effect of extra-legal determinants can be readily and conclusively proven in Czech (or similar) settings, or whether we have to be content “only” with promising hypotheses. The answer to this question is, in our opinion, fairly complicated, and the key to the problem is a methodological one. A short and unsatisfactory answer is that it depends: while some extra-legal influences can arguably be measured in a methodologically sound manner, a significant part of the existing research simply cannot be replicated in current Czech conditions.

The first principal issue is not surprisingly the *availability of data* in the broadest sense. This especially concerns quantitative empirical approaches to the study of judicial decision-making that form a crucial aspect of the current state of the art in the field. The nature and legal regulation of judicial decision-making in the Czech Republic and many other jurisdictions make it virtually impossible to measure any single-judge-level extra-legal influences simply because there is no comprehensive information about the judges’ votes. While information about votes in panel decisions is readily available in some jurisdictions

¹¹⁵ Even though this has perhaps not yet been accepted as a “theoretical truth,” there are ample anecdotal evidence and accounts. Biographies and autobiographies of some Justices of the Czech Constitutional Court are a case in point. A few very interesting passages attesting to this can be found, for example, in PROCHÁZKA, A. *V boji za ústavnost* [In the Battle for Constitutionality]. Brno: CDK, 2008. Procházka emphasized the splits between “natural law” and “positive law” proponents, and at many points shed light on how some identity-forming experience influenced his value orientation and decision-making. Jiří Baroš [In: J. Baroš (ed.). *Vladimír Čermák. Člověk – filozof – soudce* [Vladimír Čermák: Man, Philosopher, Judge]. Brno: Masarykova univerzita, 2009, pp. 19–98] then documented how Vladimír Čermák’s political and social philosophy heavily influenced his decision-making.

(such as in the United States), this is not the case in many European countries, including the Czech Republic. Dissenting opinions are only allowed in the case of the Czech Constitutional Court and (to a certain extent) at the Supreme Administrative Court,¹¹⁶ but a judge has no duty to actually write a dissenting opinion (or to make his or her vote public in any other way) if he or she votes against the majority opinion.¹¹⁷ This makes it close to impossible to conduct any research where the vote of a judge is a dependent variable. Hence, studies which use the “next best thing,” i.e. information about published dissents, as a measure of individual votes¹¹⁸ can shed some light on the leanings of individual Justices, but they cannot be considered methodologically flawless.

It can be claimed that this is “a feature, not a bug” of the culture of judicial decision-making in many jurisdictions, including the Czech Republic. The lack of availability of information concerning individual votes can be understood as a shield against external pressure and/or the politicization and personalization of judicial decision-making¹¹⁹ that is well documented in US settings.¹²⁰

There are some exceptions in this regard, but their practical importance is – for various reasons – rather small. We obviously have perfect information about cases decided by a single judge. But in the case of top courts,¹²¹ individual judges only issue decisions in a very limited number of cases concerning simple procedural issues.¹²² While it is still theoretically possible that even in such cases, extralegal factors might play a role,¹²³ their relative significance would probably be much lower than in the case of (typically “hard-case”) judgments of the Constitutional Court or the Supreme Court. Similarly, in the case of the Czech Constitutional Court, we can be sure about individual judges’ votes in decisions that dismiss a petition as manifestly ill-founded,¹²⁴ because such decisions require unanimity. However, the problem remains that studying such decisions (without

¹¹⁶ See § 55a of the Act. N. 150/2002 Sb.

¹¹⁷ Our interviews with Justices of the Czech Constitutional Court have shown that writing or joining a dissenting opinion is not even considered a generally accepted informal duty, even if a Justice votes against the majority opinion.

¹¹⁸ CHMEL, J. *Politika na Ústavním soudě: druhá část*. pp. 475–483. Still, these studies are possibly the best quantitative approximation one can get in the Czech (and similar) conditions.

¹¹⁹ This is a well-known explanation concerning the European Court of Justice; see DUNOFF, J. L., POLLACK, M. A. The Judicial Trilemma. *American Journal of International Law*. 2017, Vol. 111, No. 2, pp. 225–276. Onida and Silvestri, two former judges of the Italian Constitutional Court, commented on the grounds of non-disclosure of dissenting opinions in the case of the Italian Constitutional Court in the following way: “some fear that dissenting opinions would lead to an excessive ‘personalisation’ of constitutional judgements, to the exposure of individual judges to external pressures.” See The Italian Constitutional Court. In: *Corte Costituzionale* [online]. 28. 3. 2012 [2020-03-23]. Available at: <https://www.cortecostituzionale.it/documenti/download/pdf/Cc_Checosa_2013_UK.pdf>. p. 51.

¹²⁰ Many of the above-cited sources attest to this. See for example BONICA, A., WOODRUFF, M. *A Common-Space Measure of State Supreme Court Ideology* or the Segal-Cover scores. In the USA, judges are commonly described as liberal or conservative, and many of them are – in a way – quasi-political figures.

¹²¹ As we have noted above, top courts are a logical object of research of determinants of judicial decision-making, if only for the fact that there is a higher ratio of hard cases in which extra-legal factors can be found.

¹²² See for example § 43(1) of the Act n. 182/1993 Sb.

¹²³ BENÁK, J. Mají soudci českého Ústavního soudu prostor pro strategický výběr případů k projednání? *Jurisprudence*. 2018, Vol. 27, No. 2, pp. 32–38.

¹²⁴ See § 43(2)(a) of the Act n. 182/1993 Sb.

taking into account judgments where we are uncertain about individual votes) makes little sense.

Yet another issue concerning the availability of data concerns data that is *theoretically* accessible, but not readily available as a *practical* matter. For example, the fact that we cannot access information concerning individual votes does not prevent us from replicating the research of Epstein and Martin¹²⁵ concerning public opinion's impact on the case law of a court as such. Such research, however, would require consistent and long-term measurement of public opinion and its leanings¹²⁶ which is not available in a suitable form in the Czech Republic. In more general terms, the current level of knowledge concerning judicial decision-making in the US or at international courts has been made possible by decades-long, incremental interaction between legal academics and social scientists – a head-start that is unlikely to be overcome in the Czech conditions.

Finally,¹²⁷ some of the “American” examples cannot be followed because of differences in the legal or political culture. An US-inspired researcher might be tempted, for example, to use the appointing president as a proxy for the political ideology of the appointed judge of the Constitutional Court. This, however, would not work in the Czech case. The experience with three waves of nominations show that Czech presidents have tended to nominate very different Justices, and that ideological proximity to the president's position is not a dominant factor.¹²⁸

At the current time and for most purposes, we are thus left with few options outside of employing qualitative methods, such as interviews with principal actors (judges, attorneys, etc.), that have their own share of problems. The first and foremost limitation of these approaches is obviously that they can only address what the actors have to say about themselves or the others (be it in decisions or in interviews), and such accounts inevitably carry a degree of subjective distortion.

None of this means that the empirical study of judicial decision-making is impossible in the Czech Republic¹²⁹ and in similar legal systems, but these challenges definitely create obstacles that hinder researchers from reaching the same complexity of understanding of judicial decision-making as in the US and similar jurisdictions.

V. CONCLUSION

Even though this article cannot be considered a completely exhaustive account of extra-legal determinants of judicial decision-making, we believe that we have provided a suffi-

¹²⁵ See supra section III.2.

¹²⁶ Such as Stimson's annual measure of the “public mood” used by Epstein and Martin (EPSTEIN, L., MARTIN, A. *Does Public Opinion Influence the Supreme Court?*) which could be used as a proxy for public opinion.

¹²⁷ For the purposes of our article; we do not claim that the list is objectively exhaustive.

¹²⁸ For example, Kateřina Šimáčková and Radovan Suchánek were both appointed by Miloš Zeman; Václav Klaus also appointed an ideologically diverse bench (with such contrasting figures as Jiří Musil and Pavel Rychetský on the one side, and Stanislav Balík on the other side), as documented by the narrow splits in cases such as the *Regulation fees* case (judgement of 20 May 2008, Pl. ÚS 1/08, n. 251/2008 Sb.).

¹²⁹ We actually aim to fill in the gap (though only partially) in our upcoming book BENÁK, J., HANYCH, M., JANKŮ, Š., SMEKAL, H., VYHNÁNEK, L. *Mimoprávní vlivy na rozhodování Ústavního soudu*. Muni Press, 2020.

ciently rich overview of the current state of the art, and that we have coupled it with enough of our own arguments to answer the initial big question.

At this point, we are confident in stating that the view that judging consists only of the interpretation of the law is nothing more than a legitimization myth. It is almost a matter of simple logic. If the law is to a certain degree inherently indeterminate, and thus leaves space for discretion, something else other than the law logically operates in this space. The current research strongly suggests that a number of extra-legal factors, including the ideology of a judge, the availability of resources, public opinion, vertical and horizontal institutional relations and/or collegiality all significantly influence judicial decision-making. At the same time, radical realist and attitudinal approaches must be rejected – the law is still a key determinant of judicial decision-making, but especially in hard cases, it is simply not enough.

We do not consider this answer a delegitimizing one. Quite the opposite: an enduring view of judicial legitimacy must be based on an honest reflection of what judging really is and what it can realistically aspire to be. Courts are institutions made by humans, and since judicial decision-making is performed by people – with all their strengths, weaknesses, and inherent limits – it can never be an automaton-like process of following clear instructions. The judges' perspectives, preferences, or cognitive limits will always find a way into their decision-making. There will always be efforts, of course, to try to control it, mitigate it, or simply account for it (either by researchers or even by the judges themselves), but it can hardly ever be eradicated.

Still, we do not know the exact formula of how much of the judicial decision-making is “the law” and what exact combination of extra-legal determinants influences the outcome of a legal case. And despite the existence of numerous studies and many competing theories, we believe that no researcher, past or current, is anywhere near such a discovery.

First of all, the better part of current research has only been conducted in specific circumstances, and as we have shown, empirical research of decision-making in Czech courts (including the Constitutional Court) faces many methodological obstacles. But perhaps more importantly, the discovery of an exact formula, a perfect understanding of causality, is beyond doubt an unrealistic goal. Incrementally improving our understanding of the processes involved in judicial decision-making, on the other hand, is definitely within our reach and much of the research conducted in the past few decades has shown this.