

The Influence of Public Opinion and Media on Judicial Decision-Making: Elite Judges' Perceptions and Strategies



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ABSTRACT

Numerous studies have established that public opinion and the media influence judges in their decision-making. Previous research has relied predominantly on quantitative approaches. This paper brings a new perspective by employing a different strategy. Based on in-depth interviews with justices of the Czech Constitutional Court, it shows how elite judges think about public opinion and media, and the influence of these on judicial decision-making. The paper creates a typology of different judicial styles and attitudes towards media and public opinion. It shows that one polar category of judges employs deliberate strategies to affect the media and draw public opinion on their side. In contrast, the opposite one seeks to minimize or even avoid public and media exposure.

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“No judge lives in isolation. Therefore, I am conscious of public opinion polls, various petitions, newspaper articles, discussions, proclamations of politicians and lawyers, and public assemblies... Judges in democracies cannot win public trust by seeking publicity and following public moods. They can win trust only by deciding according to law, without regard to public opinion.”¹

This quote, from a former Slovak Constitutional Court President, represents the position of many judges across the globe – they live ordinary lives just as other people do. However, when deciding cases, they should forget about the outside world and strictly follow the law. Nevertheless, various strands of sociolegal literature have documented how extralegal factors affect judicial decision-making. Most prominently studied influences include the political ideology of judges,² judges’ strategic considerations,³ structural political determinants,⁴ and public opinion and media.⁵

Despite the immense volume of research on judicial decision-making, scholars rarely engage directly with judges to learn about their perceptions of various phenomena. This paper focuses on the influence of public opinion and media on judicial decision-making. Following Epstein,⁶ the relationship between judges on one hand, and public opinion and media on the other hand is treated as bidirectional. Not only do

1 Separate opinion by Ivetta Macejková, judgment of the Slovak Constitutional Court, PL. ÚS 7/2017-159, 31 May 2017.

2 Lee Epstein and others, ‘Ideology and the Study of Judicial Behavior’ in Jon Hanson and John Jost (eds), *Ideology, Psychology, and Law* (Oxford University Press 2012); Jeffrey A Segal, ‘Judicial Behavior’ in Daniel R Kelemen and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2010); Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002); Cass R Sunstein, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Brookings Institution Press 2006).

3 Lee Epstein and Tonja Jacobi, ‘The Strategic Analysis of Judicial Decisions’ (2010) 6 *Annual Review of Law and Social Science* 341 <<https://www.annualreviews.org/doi/10.1146/annurev-lawsocsci-102209-152921>> accessed 25 April 2023; Jeffrey R Lax, ‘The New Judicial Politics of Legal Doctrine’ (2011) 14 *Annual Review of Political Science* 131; Gretchen Helmke, ‘The Logic of Strategic Defection: Court–Executive Relations in Argentina Under Dictatorship and Democracy’ (2002) 96 *American Political Science Review* 291; Josephine De Jaegere, *Judicial Review and Strategic Behaviour: An Empirical Case Law Analysis of the Belgian Constitutional Court* (Intersentia 2019).

4 Howard Gillman, ‘Courts and the Politics of Partisan Coalitions’ in Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2010); John Ferejohn, ‘Judicializing Politics, Politicizing Law’ (2002) 65 *Law and Contemporary Problems* 41; Julio Rios-Figueroa, ‘Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002’ (2007) 49 *Latin American Politics and Society* 31.

5 Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux 2009); Lee Epstein and Andrew D Martin, ‘Does Public Opinion Influence the Supreme Court – Possibly Yes (But We’re Not Sure Why)’ (2010) 13 *University of Pennsylvania Journal of Constitutional Law* 263; Christopher J Casillas, Peter K Enns and Patrick C Wohlfarth, ‘How Public Opinion Constrains the U.S. Supreme Court’ (2011) 55 *American Journal of Political Science* 74; Ben Johnson and Logan Strother, ‘The Supreme Court’s (Surprising?) Indifference to Public Opinion’ (2021) 74 *Political Research Quarterly* 18; Philipp Meyer, ‘Transparency and Strategic Promotion: How Court Press Releases Facilitate Judicial Agenda-Building in Germany’ (2022) 48 *Public Relations Review* 102228.

6 Lee Epstein, ‘Some Thoughts on the Study of Judicial Behavior’ (2016) 57 *William & Mary Law Review* 2017, 2067–69.

public opinion and media affect judges, but judges can also influence media and, consequently, public opinion. The research on the “public opinion–media–judges” triangle has so far employed predominantly quantitative methods, most often finding that media and public opinion indeed influence judges in their decision-making (see the following section). Although very valuable, these studies can only speculate on how judges perceive the pressure of media and public opinion and how they respond to them. To answer these questions, a different research strategy seems to be better suited. Our article fills this gap by analyzing the personal views of elite judges on the influence of selected extralegal elements on their work.

This article, first, clarifies how judges themselves perceive the influence of public opinion on their decision-making. Bearing in mind the close link between public opinion and the media, the analysis secondly sheds light on whether and how judges communicate with media about their own decisions.

To learn more about judicial perception of media and public opinion, top-level judges of the Czech Constitutional Court (“the Court”) were interviewed. The judges fall into several groups, holding varying opinions across the whole spectrum of possible positions. We point out that this can create tension among judges within the Court. In addition to the Court’s media approach, which seeks to deliver understandable information to lay journalists, some judges pursue their own strategies, focusing on different audiences they consider the most important recipients of their messages.

The findings of this study contribute not only to the literature on the public opinion–media–judges nexus, but also to legal debates on judicial independence and judicial politics. Strict legal canon commands judges to stay impartial and independent from extralegal influences such as public opinion or political pressure.⁷ Nevertheless, this paper shows that some judges do not consider themselves mere umpires,⁸ hidden behind the walls of court buildings. They do not apply rules in a deterministic way and are not ignorant of the extralegal factors while deciding the cases. Hence, this paper considers additional evidence that the judicial process cannot be fully explained and understood in purely legalistic terms.⁹

The article proceeds as follows. The subsequent section reviews the literature analyzing the relationships between our key phenomena, namely the public opinion, media, and the judiciary. It examines how closely public opinion and media are intertwined with the judiciary. The literature review further explores the existing research on the reverse side of the relationship, i.e., how judges reach out to the media and the public. The next section presents our empirical analysis based on the interviews with judges of the Czech Constitutional Court. After describing the method and data collection, the paper then focuses on elite judges’ perceptions of media and public opinion. On the one hand, we zoom in on the extent to which judges admit exposure to the influence of media and public opinion, and, on the other hand, how they seek to actively influence the coverage of media on the Court and individual judges. The final section concludes with discussing of our contribution to the ongoing scholarly debate on the topic.

7 Tom S Clark, *The Limits of Judicial Independence* (Cambridge University Press 2010).

8 Richard A Posner, *How Judges Think* (Harvard University Press 2008).

9 Matthew A Baum and Tim Groeling, ‘New Media and the Polarization of American Political Discourse’ (2008) 25 *Political Communication* 345.

COURT'S AGENDA, COMMUNICATION OF JUDGES AND PUBLIC OPINION

The judiciary has been still considered the least dangerous branch despite decades of the expansion of judicial power¹⁰ documented, for example, by the increasing number of states adopting strong courts with judicial review powers,¹¹ enabling these courts to exercise a constitutional veto over majoritarian politics. On the other hand, courts lack the constitutional authority of enforcement and rely on action by the other branches to give effect to judicial decisions. The courts do not wield power to influence policy changes without political will, which is further determined by public will,¹² and shaped by the media. Hence, courts can exercise more power if backed by public opinion which would make any political intervention against courts costlier.¹³

Public opinion is a significant determinant of judicial decision-making,¹⁴ as courts rely not only upon support from the elected branches of government to use their power,¹⁵ but also on the reservoir of public support.¹⁶ Previous research has shown that depictions of the decision-making process in high courts do matter for the perceived fairness of decisions and their acceptance by citizens.¹⁷ Although scholars increasingly acknowledge a contemporaneous relationship among media, public opinion, and top-level decisions, debate continues as to why this relationship exists¹⁸ and what its impact on case law is.

There is a clear relationship between the media and the public. The media bring information to the public – they set the agenda by selecting what to report about, and further shape public opinion by choosing the tone of reporting and by offering opinion pieces.¹⁹ At the same time, the judiciary needs to build its legitimacy, *inter alia*, on public support as a shield against possible retaliation from politicians.²⁰

The article focuses on judges' perception of the influence of public opinion and media with respect to their decision-making. Moreover, it analyzes the issue of how judges utilize the potential of favorable public opinion and media for judicial empowerment. The article examines judges' media consumption routines and rationalization behind

10 Chester Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995).

11 Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 *The Journal of Law, Economics, and Organization* 587.

12 Clark (n 7).

13 Georg Vanberg, 'Constitutional Courts in Comparative Perspective: A Theoretical Assessment' (2015) 18 *Annual Review of Political Science* 167, 177.

14 Friedman (n 5); Epstein and others (n 2).

15 John A Ferejohn, Frances McCall Rosenbluth and Charles R Shipan, 'Comparative Judicial Politics' (Social Science Research Network 2004) SSRN Scholarly Paper ID 1154123 <<https://papers.ssrn.com/abstract=1154123>> accessed 15 April 2018.

16 Clark (n 7).

17 Pedro C Magalhães and others, 'Beyond the Myth of Legality? Framing Effects and Public Reactions to High Court Decisions in Europe' (2023) 56 *Comparative Political Studies* 1537.

18 Casillas, Enns and Wohlfarth (n 5).

19 Michael A Zilis, *The Limits of Legitimacy: Dissenting Opinions, Media Coverage, and Public Responses to Supreme Court Decisions* (University of Michigan Press 2015).

20 Jeffrey K Staton, *Judicial Power and Strategic Communication in Mexico* (Cambridge University Press 2010).

their (lack of) media strategies. It seeks to find regularities in elite judges' responses to questions inquiring about their attitudes and practices towards media and public opinion.

The article does not examine the use of social media by judges or by courts. Although becoming an increasingly important issue,²¹ the key interest lays not on the individual communication of judges on their social networks but on judicial interactions with public opinion mediated through mass media serving as an important intermediary.

Judges are expected to deliver unbiased and independent decisions. In the Czech context, judge of the Czech Constitutional Court shall refrain from any conduct that "lowers the esteem and dignity of his office or tends to undermine confidence in the independent and impartial decisionmaking of the Court."²² Even though there is not any binding ethical code²³ that would give detailed instructions it is usual that judges of the Constitutional Court typically act in a rather restrained manner when speaking publicly or to media.

Simultaneously, judges need to stay in contact with the media, citizens, and society if they are to demonstrate the judiciary's openness and transparency, while maintaining a good reputation of themselves and of the judiciary as a whole.²⁴ Their communication can be also perceived as strategic to showcase which cases or policy issues are more important than others.²⁵ This means judges must strike a reasonable balance between their public involvement (including the media). On the contrary, judges must preserve their reputation as independent and impartial professionals in the discharge of their duties.²⁶ Another point of view says that because the legal trial is a process concerned with the 'production of juridical truth', other humans not involved in it should be informed about its context.²⁷

MEDIA: POWERFUL STAKEHOLDER IN THE RELATIONSHIP OF JUDICIARY AND PUBLIC OPINION

Sometimes called the Fourth Branch or the Fourth Estate,²⁸ mass media serves several critical functions within the context of government policymaking or judicial

21 Judith Gibson, 'Social Media and the Electronic "New World" of Judges' (March 2016) *International Journal for Court Administration* 1.

22 Para 133 section 1 of the the Constitutional Court Act, the Act no. 182/1993 Coll.

23 There are two ethical codes in Czechia that are aimed primarily on the judges of ordinary courts. One has been published by Soudcovská unie České republiky (Czech Association of Judges) which is an NGO which membership is about one third of judges of Czech ordinary courts (primarily from district and regional courts). Cf. Kosař D, *Perils of judicial self-government in transitional societies: holding the least accountable branch to account* (Cambridge: Cambridge University Press, 2016) 179. Another ethical code has been prepared by judges of the Czech Supreme Court. This code has been approved as an internal directive of the president of the Czech Supreme court (for this institution only) and distributed among other court presidents of the ordinary courts. For more details cf. Hapla M and Friedel T, *Profesní etika právníků*. (Nugis Finem Publishing, 2022) 245.

24 Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015).

25 Meyer (n 5).

26 Friedman (n 5); Epstein and others (n 14).

27 Gary Watt, *The Making Sense of Politics, Media, and Law: Rhetorical Performance as Invention, Creation, Production* (Cambridge University Press 2023) 70–71.

28 Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law* (5th edn, A&U Academic 2014).

decision-making. They give citizens the necessary information for effective citizenship participation and provide a forum for debate on public issues. Crucially, media also help the judiciary circulate information about its work and hence can contribute to its legitimacy. Without the public trust in the system, judiciary could hardly function in a satisfactory way.²⁹

Media acts as one of the powerful external mechanisms for oversight of judicial accountability. Through their interest and professional questioning, the media can increase pressure on the accountability of judges and thus further enhance the legitimacy of courts.³⁰

In addition, media can also manipulate, persuade, mock, amuse, or shock.³¹ Media coverage significantly influences which issues people think are essential, thus having the ability to not only tell people *what* to believe but also regulate public attention on selected topics.³² Media framing affects how much importance the brain attaches to specific ideas. It thus influences opinions by “stressing specific considerations, endowing them with greater apparent relevance to the issue than they might appear to have under an alternative frame”.³³ If mass media repeatedly mentions two or more elements together, the audience will ultimately perceive these elements as interconnected.³⁴

It is an established claim that the media shape public opinion to a great extent. Media plays a central role in allocating public attention and informing the public about activities of state powers.³⁵ Citizens do not directly monitor such institutions themselves but allow the media to do this work instead. Thus, individuals’ attitudes can be largely shaped by the media’s decisions regarding which judicial issues are covered or not, which extends to the content itself and the tone of the coverage.³⁶ Above that, media can also emphasize procedural elements that boost or hinder fairness perceptions in the pre-decision part of the process.³⁷ This could strongly influence decisions’ acceptance by the general public.

29 Zilis (n 19).

30 Vicki C Jackson, ‘Judicial Independence: Structure, Context, Attitude’ in Anja Seibert-Fohr (ed), *Judicial Independence in Transition*, vol 233 (Springer Berlin Heidelberg 2012) 61.

31 Watt (no 26) 19.

32 Tamar Liebes, ‘Inside a News Item: A Dispute Over Framing’ (2000) 17 *Political Communication* 295; Stefaan Walgrave and Peter Van Aelst, ‘The Contingency of the Mass Media’s Political Agenda Setting Power: Toward a Preliminary Theory’ (2006) 56 *Journal of Communication* 88; Elizabeth M Perse and Jennifer Lambe, *Media Effects and Society* (Routledge 2016); Logan Strother, ‘How Expected Political and Legal Impact Drive Media Coverage of Supreme Court Cases’ (2017) 34 *Political Communication* 571.

33 Thomas E Nelson, Rosalee A Clawson and Zoe M Oxley, ‘Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance’ (1997) 91 *American Political Science Review* 567.

34 Lei Guo, Hong Tien Vu and Maxwell McCombs, ‘An Expanded Perspective on Agenda-Setting Effects Exploring the Third Level of Agenda Setting.’ [2012] *Revista de Comunicación*.

35 Sigrid Koch-Baumgarten and Katrin Voltmer (eds), *Public Policy and the Mass Media* (Routledge 2010).

36 Maxwell McCombs, *Setting the Agenda: Mass Media and Public Opinion* (John Wiley & Sons 2014); Strother (n 32).

37 Magalhães and others (n 17).

Furthermore, several authors have demonstrated that the media may influence public attitudes about future court decisions in some cases.³⁸ It has also been proposed that the key to public persuasion by a particular court decision lies in media contextualization of the topic, i.e. by its overall framing, language tone and selection of information included in media coverage.³⁹ This signifies one of the key reasons to examine the mutual relationship between the judiciary and the media: If the judges do not try to understand the media system, negative consequences for the media coverage of the judicial performance and subsequently for the judiciary's reputation could occur.

Media represent a powerful link between political institutions and the general public. A solid theoretical understanding of the media's role in the process of creation of the relationship between public opinion and the judiciary is necessary for any theory of courts' impact on the general public.⁴⁰ In the end, how the public views the judiciary critically depends on the media's depiction of the judiciary and its members.⁴¹ However, this puts judges in somewhat of a predicament. They need to attend to "popular" views and understand them in order to earn public trust, but they also must avoid coming under the influence of these views. Otherwise, they risk undermining their own reputation or even reputation of the judiciary as a whole.

If we are to deepen our understanding of media and public opinion influence on judicial decision-making, we must look at the essential role of judges and their own involvement in the public opinion formation through interaction with media. Top level courts' decisions have gotten longer, more complicated and ultimately more difficult for public to decipher. The justices therefore should articulate publicly in comprehensive and accessible language at least the crucial content and context of their rulings, as, e. g., constitutional principles on which their judgments rest. Courts cannot maintain that the quality of media reporting on judicial work is the media's responsibility alone rather than an issue in which both courts and the public are heavily invested.⁴² Despite its importance, the personal views of judges themselves on relationship among media, public opinion and courts remain largely unexplored.

RESEARCH ON PUBLIC OPINION, COURTS AND MEDIA

Existing research has mostly concerned the US Supreme Court although several papers have also covered international courts⁴³ and prominent European courts, such

38 Richard Davis, *Justices and Journalists: The U.S. Supreme Court and the Media* (Cambridge University Press 2011); Clark (n 7); Zilis (n 19); Mikael Rask Madsen and others, 'Sovereignty, Substance, and Public Support for European Courts'.

39 Rosalee A Clawson and Eric N Waltenburg, 'Support For A Supreme Court Affirmative Action Decision: A Story in Black and White' (2003) 31 *American Politics Research* 251, 251.

40 Strother (n 32).

41 Rorie Spill Solberg and Eric N Waltenburg, *The Media, the Court, and the Misrepresentation: The New Myth of the Court* (1 edition, Routledge 2014).

42 Barry Sullivan and Ramon Feldbrin, 'The Supreme Court and the People: Communicating Decisions to the Public' (8 February 2022) <<https://papers.ssrn.com/abstract=4043189>> accessed 17 August 2022.

43 Julian Dederke, 'CJEU Judgments in the News – Capturing the Public Salience of Decisions of the EU's Highest Court' (2022) 29 *Journal of European Public Policy* 609 <<https://www.tandfonline.com/doi/full/10.1080/13501763.2021.1872682>> accessed 25 April 2023; Mikael Rask Madsen, Fernanda Nicola and Antoine Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022).

as the German Constitutional Court.⁴⁴ Several studies showed that public support for a court is influenced by process of which cases are decided.⁴⁵ Over a longer period of time, the negative attitude of the public generated by a particular decision tends to fade out as the authority of the court “has the capacity to pull at least some of the disagreeing public toward its decisions”.⁴⁶

The research agenda runs in both directions. Not only courts influence public opinion but also judges tend to change their approach to particular issues in response to public opinion.⁴⁷ Cases brought before the German Constitutional Court by the parliamentary opposition have much higher chance for success if they are supported by public opinion.⁴⁸ Yet another angle has been studied by Ura and Wohlfarth. They suggest that congressional support for the US Supreme Court grows along with the rise of public support for the Congress.⁴⁹

All the above-mentioned studies were conducted using the quantitative research design. There are only few interview-based qualitative studies on the relationships among public opinion, media and the judiciary, and they partially corroborate the voluminous quantitative research findings. For example, the Supreme Court of Canada justices unanimously denied the direct influence of public opinion on their decision-making. At the same time, they acknowledged that public opinion sometimes indicates societal values. Canadian justices were arguably sensitive to the critique of their judicial activism and hence reluctant to depart too far from majoritarian views, which could impair the Court’s legitimacy. Some Canadian justices voiced caution about being held captive to public opinion, while others stressed that the Court should not make law but apply the law made by the elected authorities.⁵⁰ We infer from these findings that individual justices’ approach depends on their perception of the mission of the court and their own role within the court.

The Canadian Supreme Court justices were critical of the media coverage of their work, and the Court set up various activities to improve the quality of media reporting. Greater openness of the Court towards the media and general public was intended to contribute to the Court’s legitimacy.⁵¹ There is also a trend in judiciary writing of

44 E.g., Sebastian Sternberg and others, ‘Zum Einfluss Der Öffentlichen Meinung Auf Entscheidungen Des Bundesverfassungsgerichts. Eine Analyse von Abstrakten Normenkontrollen Sowie Bund-Länder-Streitigkeiten 1974 – 2010’ (2015) 56 *Politische Vierteljahresschrift* 570 <<http://www.nomos-elibrary.de/index.php?doi=10.5771/0032-3470-2015-4-570>> accessed 25 April 2023.

45 Casillas, Enns and Wohlfarth (n 5); Joseph Daniel Ura, ‘Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions’ (2014) 58 *American Journal of Political Science* 110 <<https://onlinelibrary.wiley.com/doi/10.1111/ajps.12048>> accessed 25 April 2023; Sternberg and others (n 44).

46 Ura (n 45) 111.

47 Roy B Flemming and B Dan Wood, ‘The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods’ (1997) 41 *American Journal of Political Science* 468 <<https://www.jstor.org/stable/2111773>> accessed 25 April 2023.

48 Sternberg and others (n 44).

49 Joseph Daniel Ura and Patrick C Wohlfarth, “‘An Appeal to the People’: Public Opinion and Congressional Support for the Supreme Court’ (2010) 72 *The Journal of Politics* 939 <<https://www.journals.uchicago.edu/doi/10.1017/S0022381610000459>> accessed 25 April 2023.

50 Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (UBC Press 2013) 172–175.

51 *ibid* 176–181.

shifting from impersonal discourse to the author-centred style, resulting in being also more comprehensive for the media and public.⁵² Hence, we observe deliberate efforts on the side of courts to work with the media so that the public receives relevant and more accurate information (at least from the perspective of the given court).

THE RESEARCH DESIGN

The goal of this paper is to examine the relationship of constitutional judges vis-à-vis public opinion and the media, while explaining the motivations of these judges. The text spotlights whether and how the media and public opinion can influence judges and their independence while deciding judicial cases, and, conversely, judges' role in shaping public opinion through the media.

We decided to interview top-level judges because the effect of extralegal factors can be examined especially at the top courts deciding “hard cases”.⁵³ Constitutional courts in particular have fewer legal constraints and more discretion, making them an ideal arena for analysing the influence of extralegal factors. While the law clearly determines the result in “easy cases,” in “hard cases,” the outcome depends on the consideration of abstract principles, where judges enjoy broader discretion and law itself ceases to play its determining role. Thus, in this discretionary room for maneuver, the effects of extralegal factors can appear much more significant.

The Czech Constitutional Court is said to be among the most powerful courts in the world.⁵⁴ It was designed according to the German model and combines the ability to strike down legislation with the power to hear individual cases, enabling it to overturn ordinary courts' decisions and function as the highest court in Czechia. Domestic politics has been characterized by long-term fragmentation,⁵⁵ which has shielded the Court from court-packing and other retaliatory attempts.⁵⁶ The Czech Court has demonstrated much higher level of resilience than its Polish or Hungarian counterparts.⁵⁷ The Czech Court is not that well established, compared, for example, to the German Constitutional Court. Therefore, it is much more likely that the Court will need some strategy to cooperate with media in order to gain public trust.

The empirical part of the paper builds on in-depth interviews with the judges of the Czech Constitutional Court.

52 Szczyrbak Magdalena, *Evidentiality in US Supreme Court opinions: focus on passive structures with say and tell*. 'Stanisław Goźdz-Roszkowski and Gianluca Pontrandolfo (Eds.): Law, Language and the Courtroom—Legal Linguistics and the Discourse of Judges, Routledge, Abingdon, 2022, 36 International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique 369.

53 Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057.

54 Zdeněk Kühn, 'The Czech Constitutional Court in Times of Populism: From Judicial Activism to Judicial Self-Restraint', *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge 2021).

55 Hubert Smekal, Jaroslav Benák and Ladislav Vyhnaněk, 'Through Selective Activism towards Greater Resilience: The Czech Constitutional Court's Interventions into High Politics in the Age of Populism' (2022) 26 The International Journal of Human Rights 1230 <<https://www.tandfonline.com/doi/full/10.1080/13642987.2021.2003337>> accessed 11 March 2023.

56 Georg Vanberg, 'The Politics of Constitutional Review in Germany' (Cambridge University Press 2004); Arthur Dyevre, 'Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour' (2010) 2 European Political Science Review 318–319 <<https://www.cambridge.org/core/journals/european-political-science-review/article/unifying-the-field-of-comparative-judicial-politics-towards-a-general-theory-of-judicial-behaviour/5E9483B673AEB2AC4321E7B55988922E>> accessed 24 August 2021.

57 Smekal, Benák and Vyhnaněk (n 55).

This paper aims to uncover how elite judges think about the influence of media and public opinion on judicial decision-making and how (if at all) judges try to shape public opinion. Do judges desire popularity or public praise? Do judges refrain from following public opinion and isolate themselves from the rest of society? In this regard, the case study examines the perception of the judicial role, judges' approach to their relationship with the media, and whether and to what extent judges are led by considerations about the potential impact and consequences of media and public opinion influence.

The sample used for this case study is composed of judges of the Constitutional Court who served their term between 2017 and 2019. All fifteen judges on the bench back then were asked to participate in interviews. Ten of them consented and were consequently individually interviewed. The interviewees were promised strict confidentiality in order to facilitate their openness in answers.

Interview questions included both direct and indirect questions on the media and public opinion. All interviews were led as semi-structured. Judges were asked about role of public opinion when deciding upon their cases and how they dealt with it. The interview also addressed how the judges approached their relationship to the media, particularly attitudes towards meeting journalists, summarizing and explaining their rulings to media, instead of mere referring to the reasoning in the judgments or press releases.

ANALYSIS AND DISCUSSION

The analysis of the elite interviews with Czech constitutional judges revealed a multitude of opinions concerning the influences of public opinion and media on judicial decision-making, and approaches to how judges deal with media. Until now (April 2023), the Court itself has not published any official media strategy. Individual judges rely on their own ways how to reach out to the media and general public. However, only a minority of these judges have a more methodical approach towards their media activities.

As noted above, public opinion is a major extralegal influence on judicial decision-making. The interviewed constitutional judges socialized into a civil legal system with the law as the essential lead when deciding cases. They typically admit the interest in public opinion but supposedly ignore it in their judgments. However, interesting variations in answers emerged. Respondents were presented with a quote from a separate opinion, written by a Slovak constitutional judge and the President of the Slovak Constitutional Court at the time,⁵⁸ in a highly political case concerning the Prime Minister's amnesty for the kidnappers of the Slovak President's son.

By asking about a specific case outside the Czech jurisdiction, this aimed to nudge our interview partners into disclosing their sincere views on the influence of public opinion on judicial decision-making. The Slovak Constitutional Court President's quote specifically contemplated the position of a judge in modern society as a person who does not live in isolation and is well aware of public opinion polls, and political and media discussions. However, she reaffirmed that judges should decide according to law and not follow public opinion. When the public sees judges as independent, impartial, and objective, it will respect the judgments, even though it may disagree with them, according to Macejková.⁵⁹

⁵⁸ The separate opinion of Judge Ivetta Macejková, President of the Slovak Constitutional Court, decision of 31 May 2017, PL. ÚS 7/2017-159.

⁵⁹ See an excerpt from the quote in the Introduction to this paper.

Our respondents' answers about the influence of public opinion on judicial decision-making can be structured into three levels. First, all judges perceived the topic as significant. But, second, only some of them were interested in public opinion on a given issue. Third, judges either admitted that public opinion could influence their decision-making, or they considered themselves immune to the voice of the people. Only one judge openly replied that he did not care about public opinion. He felt shielded in the Constitutional Court's building ("in an ivory tower"), away from the outside world's influences. In contrast, most judges stated that they did not live in isolation ("at a glasshouse") and recognized external influences and pressures.

The other dividing line splits judges among those who conceded that public opinion might influence judicial decision-making and a larger group that denied such influence. One judge opined that judicial decisions should resonate with public opinion, while others admitted negative pressure in cases followed extensively by media. One judge revealed that public opinion influences how carefully he substantiates his decisions. The largest group included judges who denied that public opinion affected their work. Judges expressed, for example, that they should decide according to law, and not according to the public opinion, because "the voice of the people is not the voice of God," and that a high level of immunity against public opinion is an important attribute of Constitutional Court judges. One judge pointed out that, typically, it is members of minorities that suffer from rights violations. Therefore, simply following majority public opinion might lead to detrimental conditions for minorities.

In summation, three groups of judges emerged regarding judicial perceptions of public opinion's influence on decision-making. The first group, quite exceptional, indicated that they do not care for public opinion, because they feel isolated from the outside world. The second, and the most populated group, aware of public pressure, however, they actively try to filter it out. Finally, the third group admits that public opinion might affect judicial decision-making.

The public typically learns about court decisions through the media. We were therefore also interested in interactions between judges and the media including the judges' consumption of media, and especially their approach towards possible use of the media to spread a given judge's message. Two groups emerged here – one which did not have time to read media, and second, slightly larger, which found some time to do so. Those judges following media either subscribe to one weekly magazine they like or they read ideologically diverse periodicals to grasp opinions' plurality. A clear majority of judges pay attention to the media after passing an important judgment to monitor its reception. Interestingly, all judges who said they did not have time to follow media were interested in what the media had to say after their judgments were handed down.

Except for a single judge, all interview partners talked about negative media experience and criticized the media's methods and quality. Most often, judges disapprovingly evaluated media reporting as trivializing or oversimplifying, or even misrepresenting. Some responses deserve quoting to illustrate judicial attitudes towards the press.

So I issue a decision, they stick microphones under my nose, and I talk.... In the end, one or two sentences are used, even though I talked for perhaps ten minutes. They extract two trivial sentences; this is not a real comment. For comparison, I saw a judge on an Austrian TV channel who talked about his decision and its consequences for an hour. We do not have anything like that in our country.

Other judges confirmed the two criticisms included in the previous quote. First, judges are relegated to roles of “talking heads” whose elaborated speeches are cut into one or two sentences in the media. Second, they point to examples of neighboring countries, such as Austria and Germany, where either the judges get more space, or the journalists have higher legal expertise and time to cover judicial issues more profoundly.

Given Czech constitutional judges’ prevailing critical stance towards media, an important question arises – is there any variation in interactions with media among members of the judiciary? Despite the almost unanimously negative evaluation of media work with the judiciary, a high diversity of judges’ approaches towards media was found, which were distributed nearly evenly. Two polarized positions emerged, with a few remaining answers dispersed in between.

Two judges, both very critical of media, adopted an *all-refusing approach*. “At the beginning of my term, I told the secretary that I was not interested in any communication with media. If they call, she just conveys that message to them. I do not even know anymore if any journalists call or not,” said one judge, who very rarely publicly comments on decisions he writes when acting as the judge rapporteur. “The Court’s press officer drafts a press release and asks me to check whether it captures the judgment, that’s all.” The second refusing judge maintains a principled opposition towards interactions between judges and media, saying, “I do not support the approach of some of my colleagues who appear in the media frequently.” He then added, “The judgment’s reasoning should speak for the judge itself.” This quote sums up a broadly persisting position on the Court that those interested in the judgment will find everything necessary in there, and, hence, judges do not need to explain their decisions further; the press officer serves as a filter protecting the judge against unwanted media interest.

Even more open judges also used verbatim the above-quoted maxim about the self-sufficiency of judgments. However, they acknowledged that some interaction with the media has become inevitable and that they have adjusted their behavior accordingly. This quote captures the judges with the so called *necessary-evil position* towards the media:

I do not like commenting on my own decisions. However, I know that in the nowadays world, full of fleeting ideas that almost no one listens to the next day, a judge has to be, to a large extent, an interpreter of his own opinions. A judge can’t formulate decisions completely simplistically, he can’t follow the non-legal, easily understandable needs of the public. I consider comments on the decisions I wrote as judge rapporteur as a necessary evil. I try to emphasize certain aspects of the decision, even at the cost of some vulgarization.

Judges with the necessary-evil approach to media coverage do not seek media attention, but they do not turn journalists down when asked for a comment or an interview either. The explanation rationale dominated in this group as judges want to explain their decisions to the public. Hence, they use more simple language when talking to journalists hoping that the message will not get lost.

The third group of judges forthcoming to media disapprove the abovementioned “the-decision-speaks-for-me” approach of judges refusing to talk to journalists. One judge considered it explicitly “bad,” “outdated,” and “unprofessional,” because talking to media “is a part of judicial work.” These medially more active judges stressed that they did not *impose* themselves on the media. Still, when journalists contacted them, they

usually agreed to give an interview provided that they had enough information, e.g., about the TV show, the background and the topics or questions, and they considered it appropriate. Judges forthcoming to media carefully weighed the broader context in which the Court acts, and found it necessary to explain their decisions to the public:

The Court is part of the political environment, cases are sometimes political. Therefore, I am not a fan of those blunt references to the judgments' reasonings. I think that every judge should be able to explain his decision to the public in three sentences – not just say that he has written myriads of pages in the judgments which are necessary to read in their entirety.

Czech constitutional judges typically do not have a distinct media strategy. They largely rely on the Court's press officer, who drafts press releases, which judges may modify if necessary. However, some judges contact the press officer proactively to point out noteworthy judgments. One judge occasionally writes newspaper articles when he fears that he might be misquoted or that an interview has been excessively edited so that the main messages and reasoning could get lost. Only one judge seems to see other values to interact with media beyond the straightforward simplified explanation of a judgment. This judge posited that "selling the decision to the public is equally important as issuing a good decision" because the openness towards the public increases the Court's legitimacy, which in turn gives judges greater protection from political attacks.

The last point is considered particularly important. Judges who refuse interactions with the media risk distortions of their decisions by lay journalists. Such judges can only reach a very limited range of audiences. Merely legal professionals and academics with a clear interest in the issue read whole judgments; other legal professionals and lay audiences rely on summaries of decisions translated by media. Those judges who at least cooperate on press releases and provide their own summaries of judgments have better control over transmitting their version of the decision to the interested audiences, because journalists typically make use of those "pre-cooked" press releases (which indeed play a significant role in consequent media framing). Judges forthcoming to media can fully address a wide range of audiences by setting an agenda and transparently explaining their positions. Of course, if constitutional judges aim for strictly legal audiences, particularly judges of lower courts or academics, non-cooperation with the media does not pose a problem. However, those judges considering the position of the Constitutional Court in the broader political landscape may find it helpful to leave their comfort zone and reach out to non-legal audiences, which can supply them with diffuse support.

Although our interview data do not show a clear pattern in judges' perceptions of various phenomena, we can observe several links between the forthcoming approach to media and the position on the relevance of public opinion for judicial decision-making. The judges who admitted that public opinion affected judicial decision-making typically belonged to the group of judges forthcoming to the media. This characterization coincided with higher numbers of such judges' judgments covered on the front pages of newspapers.⁶⁰ Assuming equal distribution of noteworthy

60 Monika Hanych, 'Zobrazování Práva v Médii: Mediální reprezentace rozhodování vrcholných českých soudů ve vybraných médiích' (Masarykova univerzita 2020) <<https://is.muni.cz/auth/th/gribt/>>.

cases among judges,⁶¹ it is the open approach towards the media which explains more frequent and more prominent media coverage of judge rapporteur's decisions. Those judges who either claimed not to care about public opinion or actively tried to immunize themselves from its influence typically belonged to the group of judges refusing interactions with the media or the group in between the two polarized positions. An apparent rift existed on the Court as regards the presence of judges in media. Both groups holding opposite views – The first in approval of judges commenting on their cases in media, and second which limits communication to being only through judgments – openly disapproved the other group's practice.

From the interviews further follows that even judges friendly to media mentioned some thematic red lines which they did not cross when approaching the media. Commenting on pending political quarrels stood prominently amongst such no-go issues. Hence, these judges did not hesitate to criticize quite brusquely the Constitutional Court's President, a former important politician, who occasionally publicly shared his views on current politics back then. Judges critical towards the Court's President emphasized that judiciary should stay away from politics and cultivate its image of independent arbiters of disputes.

CONCLUSION

Despite being a key judicial institution of the country, the Czech Constitutional Court's judges have no unified strategy regarding media communication and work with public opinion. In-depth interviews with elite judges have shown a significant difference in how the judges perceive their relationship to public opinion and media.

The results of this case study further show that judges tended to form two polarized groups, where on the one side, there are more open and pro-media-oriented judges. On the other side, there are more traditionalist judges who reject any media relationships. There is also an obvious disagreement in the perception of individual judges about judicial independence in connection to media. This conflict can create tension both inside the work of the Constitutional Court and outside in relations with the public, the media, politicians, or other groups, thus harming citizens' trust in the justice system. Because, as pointed e.g. by Sullivan and Feldbrin, judges should be able, at minimum, to formulate the basic principles and thoughts on their cases in a comprehensive manner to public in order to maintain basic understanding of their work and thus build a reservoir of public support.⁶² This is even more important in the time of growing illiberal threats to the role of courts, where one of the strategies by populist leaders to diminish resistance to court-packing and institutional changes designed to neuter high courts is to portray themselves as victims of partisan and politicized judicial institutions.⁶³

The evidence furthermore indicates that the judges are largely aware of the importance the media play in shaping public opinion concerning the Constitutional Court, which can lead to their strategic behavior in this regard. Several judges mentioned conscious and continuous approach to their presentations of judicial decision-making, while others (but still those cooperating with the media) described cooperation with media as necessary evil.

⁶¹ The assignment of case rapporteurships is random.

⁶² Sullivan and Feldbrin (n 42).

⁶³ Magalhães and others (n 17).

As to the potential of media to influence judicial independence, one indicator can be derived from the findings regarding the judges' responses about their consumption of media, especially news about the decisions they authored. Although several of the judges used their initial answers to claim that they did not care about the media and consumed them very little, when answering the other question, all of them except one admitted they followed the news about the cases they decided. Although this does not prove their desire to resonate with public opinion, it is definitely a sign that they actually *do* care what was mentioned in the media about *their* cases and how. Such an inference is further supported by judges' claims about the acceptance of the judicial decisions by the public.

To sum up, if judges are to serve people, they should not remain isolated from society. Keeping the well-performing judiciary open and transparent can raise its public legitimacy and help it retain public support and a reservoir of public goodwill. These factors can also shield the judicial institutions from interferences by other state branches. Moreover, judges able to speak clearly and comprehensibly have a great potential to be seen by the public as judges impervious to undue pressure. An open relationship with the media on the part judges thus can contribute to strengthen judicial independence.

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