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ARTICLE

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

Superjudges and the Separation of Powers: A Case Study of Judicial Informality in Czechia

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Abstract
Examining the practices of i) the selection of judges, ii) panel composition and case assignment, and iii) judicial off-bench activities, the article argues that some Czech judges, most often court presidents and apex court judges, use informal judicial institutions as tools to increase their influence on judicial administration and the decision-making of courts. As a result, these judges have far greater influence than the formal account of their roles might suggest. The article explores the context which facilitated the informal rise of these "Superjudges", asserting that the key factors were institutionally independent judiciaries with individually dependent judges, the absence of a shared understanding of fundamental constitutional concepts, and the underperformance of Czech legal academia. The article then contends that while Superjudges may contribute to an informed, effective, and politically independent functioning of the judiciary, they also risk eroding important divisions of power which, in turn, might compromise the integrity of the judicial process, undermine the authority of courts, and disconnect the content of the law from the general interest.

Keywords: Superjudges; separation of powers; judicial informality; Czechia; judicial administration

A. Introduction

In a continental jurisdiction such as Czechia, a somewhat simplified but widely shared textbook picture of the judiciary looks something like this. The judiciary is one of the three branches of power, beside the legislature and the executive. The task of the legislature and the executive is to create and enforce legal norms, while the task of the judicial branch is to decide individual disputes according to those norms. The judiciary is an independent but accountable branch. It is independent because neither the executive nor the legislative branch can interfere with it at their political will. It is accountable because it is the executive—the Minister of Justice and the directly elected President of the Republic—that selects the judges, a fact which gives the judiciary a chain of democratic legitimacy.

However convenient it may be, the problem with this picture is that it does not entirely correspond to reality. As with the discovery that underneath a painting is hidden a whole other one which has been painted over, the real picture of the Czech judiciary consists of not only what the public eye can see—the formal rules—but also what is often hidden—informal institutions and practices. Without looking at informal judicial institutions one cannot really understand the Czech judiciary. As we will show in this article, in Czechia informal institutions significantly

determine some of the most important issues of the constitutional system, such as who selects the judges, according to what standards judges are assigned to decision-making panels, or who the main drivers determining the content of the law are.

Fortunately, we are not completely in the dark when it comes to informal judicial institutions in Czechia. As a result of the significant attention that the CEE judiciaries have received in recent years, particularly in connection with judicial councils and judicial governance in general,[1] the existence and functioning of many informal judicial practices have been well documented. This literature, however, usually treats them only as a part of the explanation or exploration of different topics and issues, like judicial governance, the roles and positions of court presidents, or judicial independence. What is missing is a more thorough and focused analysis of informal judicial institutions: What is the nature and content of these institutions? Why and how have they emerged? And what are their consequences for the functioning of the Czech judiciary?

This article examines three sets of the most important informal judicial institutions in Czechia, concerning i) the selection of judges, ii) panel composition and case assignment, and iii) judicial off-bench activities. Based on the three case studies, the article argues that particular judges, most often court presidents and/or apex court judges, use informal judicial institutions as tools to acquire an influence that is far greater than the formal picture of their roles suggests. This leads to the emergence of what we call *Superjudges*—a relatively small class of judges who, through the use of informal practices, enhance their already formally strong positions and wield immense influence on the functioning of the judiciary in both its administrative and decision-making dimensions.[2] Further, we identify three factors which have allowed the Superjudges to informally rise to power in Czechia, namely an institutionally independent judiciary with individually dependent judges, the absence of a shared understanding of fundamental constitutional concepts, and the underperformance of Czech legal academia. Each of the three factors has contributed to the emergence of "power vacuums," which were then informally filled by the Superjudges. Finally, we argue that while Superjudges may contribute to an informed, effective, and politically independent functioning of the judiciary, they also risk eroding important divisions of powers—between the first instance and appeal courts, between the legislature and the judiciary, and between the act of judging and academic scrutiny of legal practice. The riddle of Superjudges lies in capitalizing upon the benefits they may bring without jeopardizing the system's foundational principles.

The article proceeds as follows. Part B summarizes our current understanding of court presidents and explains how their formal and informal powers combine and manifest in the process of selecting judges. Part C argues that the power of court presidents extends beyond judicial governance and administration into the realm of judicial decision-making. It demonstrates this claim through examining work schedules, documents that define panel composition and specialization, and rules for case assignment. Part D then analyzes how some

[1] *See, e.g.*, Adam Blisa, Tereza Papoušková & Marína Urbániková, *Judicial Self-Government in Czechia: Europe's Black Sheep?*, 19 GERMAN L.J. 1951 (2018) at 1951–76; David Kosař, *Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law Between Court Presidents and the Ministry of Justice,* 13 EUR. CONST. L. REV. 13, 97 (2017) [hereinafter Kosař, *Politics*]; DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016) [hereinafter KOSAŘ, PERILS]; Michal Bobek, *The Administration of Courts in the Czech Republic: In Search of a Constitutional Balance*, 16 EUR. PUB. L. 251 (2010); Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GERMAN L.J. 1257 (2014); Zdeněk Kühn, *Judicial Administration Reforms in Central-Eastern Europe: Lessons to be Learned*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 613 (Anja Seibert-Fohr ed., 2012).

[2] Note that Kosař uses this term to denote judges who joined the executive for a time and then returned to the judiciary, and thus have special influence due to the contacts they gained in this way. *See* KOSAŘ, PERILS, *supra* note 1, at 173. We apply this term more broadly to any judge who, by using one or, often, a combination of several informal practices, significantly improves his already formally strong position and wields immense influence on the functioning of the judiciary. While the status of being a Superjudge requires a certain level of overall informal influence, we do not aim to define here the exact threshold at which one becomes a Superjudge. Throughout the article we refer to Superjudges in the masculine, for they are almost invariably men. *See* Barbara Havelková, David Kosař & Marína Urbániková, *The Family Friendliness That Wasn't: Access, but Not Progress, for Women in the Czech Judiciary*, 47 L. & SOC. INQUIRY 1106 (2022).

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judges through informal consultations, extrajudicial writings on legal issues, or the drafting of legislation wield extra influence on how other judges within the system decide. The last two parts then provide generalizations. Part E deals with characteristics of the analyzed informal practices, their consequences, and the historical factors of their emergence. Part F then concludes by assessing the impact Superjudges have on key constitutional values.

B. Who Gets in? Court Presidents as the Judiciary's Gatekeepers

The court administration in Czechia follows the ministerial model.[3] This means that it is the executive—the government, the Ministry of Justice, and the President of the State—that the law envisions as the central actor of judicial governance. In reality, however, the formal model of judicial governance in Czechia has been substantially amended by informal rules.[4] The key players in this regard are court presidents who, by virtue of their formal powers and other factors like information asymmetry, wield significant informal powers over judicial careers, court administration, and judicial policy-making.[5] In this part we examine how court presidents benefit from the informal institutions in one of the most important dimensions of judicial governance—the selection of judges.[6]

According to the law it is the President of the Republic who appoints judges, with the Minister of Justice then assigning them to a concrete court.[7] However, neither the President nor the Minister actually selects the majority of candidates for judges' posts.[8] Instead, it has been the court presidents who have played a crucial role in selecting candidates by de facto providing the Minister of Justice with the names of individuals who are subsequently formally proposed by the Ministry of Justice to the President of the Republic for appointment.[9] This has happened partly because for a long time the law listed with precision only the very basic criteria which candidates for judicial office had to fulfill, such as age, citizenship, or passing the judicial exam.[10] It was, however, silent both on the qualities sought for in candidates as well as on the procedure by which these qualities were to be tested for. This allowed court presidents to establish their own informal rules.

Eventually, several models evolved. In each of them court presidents assumed an important role. Some court presidents simply opted for picking candidates who had served as law clerks or judicial trainees at the court in question. By completing their training there, candidates supposedly proved to be both suitable and prepared for the position,[11] a view which, of course, could be potentially problematic regarding the quality and independence of the candidates.[12] Another informal model that emerged was more transparent. To obtain a position at a court that followed this model, candidates had to pass a written test prepared by the Judicial Academy. The most successful ones would then be interviewed by a panel of five judges,[13] who created a list of

[3]Kosař, *Politics*, *supra* note 1, at 99.

[4]*See* Kosař, *Politics*, *supra* note 1; KOSAŘ, PERILS, *supra* note 1, at 173–81.

[5]Kosař, *Politics*, *supra* note 1, at 99.

[6]*Id.* at 98–99.

[7]Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic] art. 63.1(1)(i); Zákon o soudech a soudcích [Law on Courts and Judges], Zákon č 6/2002 Sb. (Czech).

[8]KOSAŘ, PERILS, *supra* note 1, at 189–90.

[9]Adam Blisa & David Kosař, *Court Presidents: The Missing Piece in the Puzzle of Judicial Governance*, 19 GERMAN L.J. 2032, 2043 (2018); Kosař, *Politics*, *supra* note 1, at 110; Kühn, *supra* note 1, at 612. The Minister of Justice's power to nominate the candidates to the President is based on a constitutional convention: *see* Kosař, *Politics*, supra note 1, at 102.

[10]*See* Law on Courts and Judges, art. 60 (Czech).

[11]Kristián Léko, *Výběr českých soudců ovládá chaos*, LIDOVÉ NOVINY (Czech), June 5, 2017.

[12]Kristián Léko & Kateřina Kolářová, *Při výběru soudců se může dít úplně cokoliv*, LIDOVKY.CZ (May 25, 2017), https://ceskapozice.lidovky.cz/tema/pri-vyberu-soudcu-se-muze-dit-uplne-cokoliv.A170523_135629_pozice-tema_lube.

[13]During this phase, it was still possible to tip selection in favor of certain candidates. Some candidates who participated in such selection process reported to the authors that they were asked questions about the internal functioning of the specific courts which only candidates from within the courts could possibly have answered.

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recommended candidates which was then accepted by the court president who submitted it to the Minister of Justice.[14] Other court presidents combined the two models and required candidates who succeeded in the competition to serve as law clerks for another six to twelve months, and only then, if they proved to be competent, proposed them to the Minister of Justice for appointment.[15]

Fragmentation, opacity, and resulting uncertainty eventually led to reform. Since 2022, the law has stipulated that all judges of the lower courts are selected through a process involving a written test and an interview before a panel of five, three members being judges—often court presidents or vice presidents—and two being employees of the Ministry of Justice.[16] While the reform has formally removed the unfettered discretion of the court presidents, *informally* court presidents still managed to get some of their power back. This is because, in parallel with the reform, they managed together with the Minister of Justice to sign a "memorandum" which stipulates that (i) the Minister of Justice will nominate candidates for judicial office only on the basis of a proposal made by the president of the regional court in question, (ii) that without such a proposal the Minister can select a person to become a judge only "exceptionally" and after consulting the court president in question, (iii) that court presidents may require the candidates who have succeeded in the competition to serve, "usually" for six months, as law clerks at the court in question, and (iv) that the court presidents, in determining the candidates for judicial office, will proceed not only on the basis of the result of the competition determined by the five-member panel, but also with regard to "which court the candidate is supposed to be assigned to" as well as how the candidate was evaluated during his or her potential "training" period mentioned above.[17] What is more, court presidents were also charged with "making sure that the candidates fulfill all legal criteria for becoming judges" which include, inter alia, the task of ascertaining that "the candidate's experience and moral qualities guarantee that he will perform his function properly"[18]—a criterion that one might think had already been assessed by the commission. The result of the memorandum, therefore, is that despite the partial formalization court presidents have still managed to informally retain an important say in who in the Czech Republic becomes a judge.

Informality in the selection of judges exists also at the highest echelons of the judiciary. A prime example is the Supreme Administrative Court. Due to the lack of specific criteria for selecting judges, in 2012 the then court president, Josef Baxa, created an informal selection process which is set out in a publicly available document titled *Memorandum on the selection of candidates for the position of a judge of the Supreme Administrative Court* ("Memorandum").[19] The Memorandum sets out the qualities that are sought in the candidates and it establishes the selection procedure. The court president first assesses the qualities of a potential candidate. If the court president deems a candidate suitable, the candidate presents themself before a plenary session of the court and faces questions from the judges, as well as from guests from other institutions.[20] The court president has the final say, however, because the law stipulates that judges can be assigned to the apex courts

[14]Léko, *supra* note 11.

[15]*Id.*

[16]Law on Courts and Judges, art. 112(1), 116 (Czech).

[17]*See* Ministerstvo spravedlnosti České republiky, *Memorandum Between the College and the Minister of Justice*, FACEBOOK (Mar. 24, 2022), https://www.facebook.com/ministerstvospravedlnosti/photos/pcb.5086023291466397/5086023124799747/. Note that this document, which has significant effects on the careers of many candidates for the position of judge, is simply a deal, written but informal, between the court presidents and the Minister of Justice. The only place where it is currently publicly available is the Facebook page of the Ministry of Justice.

[18]*See* Law on Courts and Judges, art. 60(1) (Czech).

[19]Josef Baxa, *Memorandum on the Selection of Candidates for the Position of a Judge of the Supreme Administrative Court,* NEJVYŠŠÍ SPRÁVNÍ SOUD (2012), https://www.nssoud.cz/o-soudu/soudci/memorandum-o-vyberu-kandidatu-na-soudce. The Supreme Court followed suit and created a similar document. *See* Nejvyšší Soud, *Rules for the Selection of Candidates for Supreme Court Judges*, https://www.nsoud.cz/judikatura/ns_web.nsf/0/F29D344D03E4E51DC12585E50044C923/$file/Pravidla%20pro%20v%C3%BDb%C4%9Br%20kandid%C3%A1t%C5%AF%20na%20soudce%20NS.pdf.

[20]Baxa, *supra* note 19.

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only with his consent.[21] The process described in the Memorandum has been consistently adhered to not only by the court president who established the informal rules but also by all his successors. In fact, the existence of the Memorandum was even formally recognized by law when a 2022 amendment to the law on Courts and Judges stipulated—without specifying the content of the rules—that both apex court presidents should publish on the respective court's website the rules for the selection of candidates.[22] In this regard, formal rules ex post facto accepted, or even made room for, informally developed practices.

There are several possible reasons why, despite Czechia formally following the ministerial model, the court presidents assumed the role of gatekeepers to the judiciary.[23] First, court presidents are usually in post for much longer than highly volatile Ministers of Justice.[24] This allows the court presidents to establish strong informal networks of influence, develop a longstanding vision of who should become judges, and effectively use that to amend lacking or terse formal rules. The second related aspect concerns information asymmetry.[25] By being insiders and by holding their positions for a longer time, court presidents (are considered to) know best what happens in the judiciary and thus are also capable of selecting candidates that suit the courts' practical needs. Furthermore, court presidents also pool and increase their power by associating in informal platforms like the College of Presidents of Regional Courts or the Judicial Six,[26] through which they exert a significant influence on judicial policy.[27] All this suggests that the reasons for the court presidents' strong informal role in selecting judges reflect a deeper, pre-existing power imbalance between them and the organs of the executive. In this regard, informal institutions seem to amplify already existing factual differences.

C. Who Gets to Decide What? Case Assignment and Panel Composition

Important informal institutions in Czechia exist also when we move closer to decision-making itself. Two circumstances related to the organization of Czech courts are important here. First, Czech judges are not generalists, but specialize either in a particular field or even a selected subfield of civil, criminal, or administrative law. Second, except for the constitutional court, Czech courts never sit en banc, but decide either by a single judge or a panel, in most cases composed of three members.[28] This implies that there needs to be (i) a method of determining the composition and specialization of individual decision-making units in each court, as well as (ii) a method for assigning individual cases to the relevant judges or panels. The two issues sit on the border between judicial administration and judicial decision-making, as they may influence not only the

[21]Law on Courts and Judges, art. 70 (Czech); Zákon soudní řád správní [Code of Administrative Justice], Zákon č. 150/2002 Sb., art. 121(2) (Czech).

[22]Law on Courts and Judges, art. 117(a) (Czech). The law provides that the court presidents are required to 'consult' with other judges of the court in a plenary session.

[23]Kosař, *Politics*, *supra* note 1, at 100.

[24]*See* Kosař, *Politics*, *supra* note 1, at 106 (reporting that between 1993 and 2015 the average length of term of a minister of justice was less than two years). In contrast, the court presidents are appointed for seven years in the case of the lower courts and ten in the case of the supreme courts. *See* Law on Courts and Judges, arts. 102–05 (Czech); Code of Administrative Justice, art. 13(3) (Czech). Court presidents can be removed only by a disciplinary panel.

[25]Kosař, *Politics*, *supra* note 1, at 99.

[26]An informal body composed of the presidents of the supreme courts, a representative of the presidents of regional courts, representatives of the Union of Judges and the Union of State Attorneys, and the Supreme State Attorney.

[27]Kosař, *Politics*, *supra* note 1, at 100; Katarína Šipulová, Marína Urbániková & David Kosař, *Nekonečný příběh Nejvyšší rady soudnictví: Kdo ji chce a proč ji pořád nemáme?* 29 Časopis pro právní vědu a praxi 87, at 98 (2021); David Kosař, *Rozvrh práce: Klíčový nástroj pro boj s korupcí soudců a nezbytný předpoklad nezávislosti řadových soudců*, 153 Právník 1060, 1058–59, 1062–63 (2014); Barbara Havelková, David Kosař & Marína Urbániková, *The Family Friendliness That Wasn't: Access, but Not Progress, for Women in the Czech Judiciary*, 47 L. & Soc. Inquiry 1106 (2022).

[28]Law on Courts and Judges, art. 3 (Czech).

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quality and effectiveness of the courts' overall performance or the careers of individual judges, but also how the courts interpret and apply the law.

There are almost no statutory rules on these issues. Rather than providing the rules itself, the law refers to "work schedules," documents that divide each court into specialized panels or divisions,[29] assign judges to those panels/divisions, and establish rules on case assignment that determine which panel or judge should decide a case when it arrives at the court.[30] The actor responsible for drawing up the work schedule is the president of the relevant court, who has a duty only "to consult" on the schedule with an organ representing the judges of that court.[31] Even here, therefore, the key actors determining the two issues are court presidents, with the law giving them little, if any, substantive criteria regarding how they should approach the task. This necessarily creates room for the presidents to exert strong formal as well as informal influence.

Consider the issue of panel composition first. With specific formal criteria for approaching the task entirely lacking,[32] court presidents have a free hand to assign and reassign a judge to a division or panel and determine her specialization. Numerous informal factors may play a role in deciding how individual panels should be organized: These include the skill and experience of the judges, their efficiency, the personal chemistry among the judges who are to sit together, a balanced distribution of the court's workload, or simply the practical necessity of securing some type of agenda. Court presidents may use their power to (re)assign judges to different divisions or panels also as a way of influencing the courts' output, or even as a form of reward or punishment.[33] Judges may become buried in mundane cases, or they may be given an interesting and prominent agenda that will make them stand out and be noticed in higher places. Resisting (re)assignment is possible only under very specific circumstances.[34] Assignment to a panel is therefore a powerful tool that can significantly influence a judge's career.

From the perspective of jurisprudential influence, one of the most important practices relates to the composition of Grand Chambers. A Grand Chamber is a special, extended judicial formation, created at both the Supreme and Supreme Administrative courts. Its task is to decide legal issues when there is internal disagreement among interpretations made by individual three-judge panels of the particular court. The solutions adopted by Grand Chambers are binding for the relevant courts' subsequent practice. This means that on many questions of law it is the Grand Chamber that has the last word both at the respective court and within the whole of the judiciary.[35] As a result, Grand Chambers have immense power and can be considered hierarchically superior to ordinary panels of the same supreme court. At both courts, the composition of these bodies is again within the discretion of the court's president.[36] In practice, the judges who sit in the Grand Chambers are those that are considered—necessarily in the eyes of the court officials—to have a broad range of knowledge and influence on the development of the law and who are willing to invest their energy into the extra work required by that body which is not compensated for by

[29]Czech courts are organized into divisions (soudní oddělení) that may consist of more than three judges. These judges are then further grouped into panels (senát) typically comprised of three judges, who collectively decide specific cases. *See* Law on Courts and Judges, art. 40 (Czech).

[30]Law on Courts and Judges, art. 41 (Czech).

[31]*Id.* at art. 41(2).

[32]*See id.* at arts. 41, 42 (Czech).

[33]David Kosař, *Rozvrh práce: Klíčový nástroj pro boj s korupcí soudců a nezbytný předpoklad nezávislosti řadových soudců*, 153 Právník 1060, 1058–59, 1062–63 (2014); Kosař, Perils, *supra* note 1, at 320–21 (discussing the abuse of this mechanism by Š. Harabin in Slovakia).

[34]Rozsudek Nejvyššího správního soudu České republiky ze dne 26.05.2022 (NSS) [Judgment of the Supreme Administrative Court of May 26, 2022], čj. 6 As 22/2022-58 (Czech).

[35]*See* Ondřej Kadlec, Role velkých senátů v rozhodování vrcholných soudů České republiky XII (2019); *see generally* Michal Bobek, *What Are Grand Chambers For?*, 23 Cambridge Yearbook Eur. L. S. 1 (2021).

[36]Law on Courts and Judges, arts. 40–42 (Czech). At the Supreme Court, which has criminal and civil law divisions, each having its own grand chamber, the court president selects the judges for the grand chambers on the basis of a proposal by the president of the respective division. *See* Jednací řád [Order of Proceedings], art. 5(1) (Czech).

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extra pay or by a reduction in the ordinary workload.[37] Allowing court officials to hand-pick those few selected judges sitting in the Grand Chamber is important, as it allows the court officials to give certain judges greater capacity to influence the development of the law, which in turn allows the court president himself to indirectly influence the substantive development of an entire area of law.

After dividing the court into specialized panels or divisions and assigning judges to them, court presidents must also determine the rules for the assignment of individual cases. Because the potential to influence cases in this way is much more direct than in panel composition, the rules are stricter and discretion narrower. The safeguard here is the right to a lawful judge, a principle entrenched in the Czech Charter of Fundamental Rights and Freedoms[38] as a reaction to egregious manipulations during the communist era.[39] The purpose of the principle is to prevent the arbitrary manipulation of cases and ad hoc case assignments in order to achieve a particular outcome.[40] To achieve that goal, the law requires that there be concrete and objective ex ante rules which determine the court, the panel, and the judge that will decide each case.[41] So much for theory.

In reality, the approach to case assignment, as well as the room for informality, has developed significantly over time. While the formal rules for case assignment have become gradually stricter, they have still allowed considerable room for discretion. Until recently, panel presidents at the Supreme Court had the authority to select three judges from the division's pool of around eight judges to hear and decide specific cases.[42] This discretion was possible because all the judges in the division were considered lawful judges according to the work schedule.[43] This practice, common in the lower courts as well,[44] gave the presiding judges a tool to influence how a case was decided, as it allowed them to alter the composition of a panel even during the proceedings on the basis of an expected or even expressed opinion on the merits of the case of the judges assigned to the division in question. Similarly, while the rules for initial case assignments were tightened up, considerable room was still left for subsequent discretionary reassignments.[45] For a long time, for example, a sufficient justification for reassigning a case was that reassignment was necessary for the judges' workload to be balanced. These and other gaps in the formal rules led to instances of case manipulation with, for example, court presidents cherry-picking easy cases for themself to keep their workload as small as possible while statistically being "productive," an explicit rule in a work schedule that a vice-president could arbitrarily change the rules for case assignment and reassignment, or instances of manipulation in bankruptcy cases in which attorneys intentionally

[37]*See* Zdeněk Kühn, *Rozšířený senát Nejvyššího správního soudu: pohled teoretika a insidera,* 5 JURIS. 10, 13 (2021); *see* KADLEC, *supra* note 35, at 45, 94–95.

[38]Vojtěch Šimíček, *Právo na zákonného soudce v České republice*, 156 PRÁVNÍK 825 (2017); Kosař, *Rozvrh práce*, *supra* note 33, at 1057.

[39]Kosař, *Rozvrh práce*, *supra* note 33, at 1057; KOSAŘ, PERILS, *supra* note 1, at 109; Judgment of the Constitutional Court of 7 July 1994, Case No. I. ÚS 2/93.

[40]Nález Ústavního soudu ze dne 21.01.2015 (ÚS) [Judgment of the Constitutional Court of Jan. 21, 2015], sp.zn. II. ÚS 1589/13, para. 36 (Czech); Nález Ústavního soudu ze dne 08.01.2009 (ÚS) [Judgment of the Constitutional Court of Jan. 8, 2009], sp.zn. II ÚS 1009/08 (Czech); Nález Ústavního soudu ze dne 22.10.2009 (ÚS) [Judgment of the Constitutional Court of Oct. 22, 2009], sp.zn. IV ÚS 956/09 (Czech).

[41]Nález Ústavního soudu ze dne 17.12.1998 (ÚS) [Judgment of the Constitutional Court of Dec. 17, 1998], sp.zn. III. ÚS 200/98 (Czech).

[42]*See e.g.*, Nález Ústavního soudu ze dne 09.04.2019 (ÚS) [Judgment of the Constitutional Court of Apr. 9, 2019], sp.zn. III.ÚS 1872/16, para. 25 (Czech).

[43]Nález Ústavního soudu ze dne 15.06.2016 (ÚS) [Judgment of the Constitutional Court of June 15, 2016], sp.zn. I. ÚS 2769/15 (Czech).

[44]A common practice at the time, approved even by the Supreme Court. *See e.g.*, Rozsudek Nejvyššího soudu ze dne 28.05.2014 (NS) [Judgment of the Supreme Court of May 28, 2014], sp.zn. 21 Cdo 2048/2013 (Czech).

[45]Courts and Judges, Law No. 335/1991 Coll., at art. 4a; Courts and Judges, Law No. 6/2022 Coll., art. 41(2); Article 42(2) until 2019; Law on Courts and Judges, art. 42c(1) (Czech) since 2019; Kosař, *Rozvrh práce*, *supra* note 33, at 1053.

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moved the registered office of a company to a different region in order to have the bankruptcy adjudicated on by a pre-determined, more friendly judge.[46]

After making several critical rulings without much practical effect,[47] the Constitutional Court ("CC") took a final swing at these informal practices in 2016 and pushed the ordinary courts into formalizing the case assignment rules and making them more transparent and less discretionary.[48] Perhaps from the perspective of the right to a lawful judge the CC's intervention could be considered justified and satisfactory. From the perspective of the courts' practical operation, however, the CC's requirement proved to be too stringent. Contrary to the general principles set out by the CC, in practice the court presidents still exercise discretion which allows them to flexibly react to the demands of the day-to-day operation of their courts. To prevent undue delays, for example, a court president may need to redistribute the caseload of a judge who is ill for some time or who has an exceptionally difficult case to deal with. Similarly, a court president may want to give new judges coming to a court for an internship a combination of new and old, as well as easy and hard, cases to allow them to start deciding those "ripe," easy cases immediately but also to familiarize themself with pre-decision procedural issues as well as with harder cases on the court's docket.[49] While such ever-present ad hoc interventions in case assignment certainly defy the formal requirements defined by the CC, such practice helps the court to remain flexible or even operational in practice.[50]

In sum, because of the lack of or failure to obey formal rules, informality in judicial administration spills over into decision-making. The main actors and beneficiaries of such informality are again court presidents. The main tension here seems to be between, on the one hand, the requirement of a certain flexibility and capitalization of the managerial insight and skill of the court presidents and, on the other hand, the desire to prevent the court presidents from using their powers improperly. While the capability of the court presidents to influence the outcome of individual cases through case assignment has been gradually reduced through formalizing the issue under the right to a lawful judge, in practice court presidents in both panel composition and case assignment still have powerful tools with which they can shape the careers of individual judges as well as how the respective courts interpret and apply the law.

D. Beyond the Decision: Consulting, Commenting, and Drafting

While some cases of corruption or unsolicited contacts between politicians or their deputies and a judge have been reported,[51] there seems to be general agreement among initiated observers that the Czech judiciary decides independently, free from any undue external influence.[52] A much more diverse and normatively ambiguous set of informal practices can be spotted when one looks *inside* the judiciary. In this section we describe those institutions and practices which seem to be widespread, and which have in common the fact that certain judges can influence judicial decision-making beyond their formally recognized powers.

[46]Kosař, *Rozvrh práce*, *supra* note 33, at 1050, 1064–65.

[47]*See* Nález Ústavního soudu ze dne 15.06.2016 (ÚS) [Judgment of the Constitutional Court of June 15, 2016], sp.zn. I. ÚS 2769/15, para. 30–31 (Czech).

[48]Nález Ústavního soudu ze dne 27.02.2015 (ÚS) [Judgment of the Constitutional Court of Feb. 27, 2015], sp.zn. I. ÚS 1171/14 (Czech); Nález Ústavního soudu ze dne 15.06.2016 (ÚS) [Judgment of the Constitutional Court of June 15, 2016], sp.zn. I. ÚS 2769/15 (Czech).

[49]*See e.g.,* JUDr. Michal Mazanec, *ZMĚNA ROZVRHU PRÁCE NEJVYŠŠÍHO SPRÁVNÍHO SOUDU (NA ROK 2021)* (2021), https://www.nssoud.cz/fileadmin/user_upload/dokumenty/rozvrh_prace/rozvrh_prace_2021_4_zmena.pdf (showing an *ad hoc* change to the work schedule of the Supreme Administrative court).

[50]*See also* Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries,* 14 EUR. PUB. L. 99, 111–12 (2008).

[51]*See e.g.,* Ondřej Kundra & Andrea Procházková, *Pozor, volá Mynář*, RESPEKT, Jan. 5, 2019.

[52]*See* Bobek, *supra* note 50, at 102.

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First, judges talk. It is a widespread practice that, when faced with hard cases, judges seek advice from their colleagues, even if those colleagues are not sitting on the case.[53] The goal is to seek advice on how to proceed "correctly," which at the lower courts often means in such a way as to be acceptable to the appeal court. Such consultation can take the form of an informal meeting or an email. Off-bench consultations often involve judges assigned to the same court, as those are often the most readily available. There have, however, been intense informal exchanges also in a *vertical* direction, that is among judges assigned to different levels of the judicial pyramid. Those judges who are consulted are usually established experts in a certain legal field. Their expertise may stem from their "specialization" in a certain agenda at the higher court, whether formal or de facto, often supported by their publishing and lecturing activities.[54]

As a result, many higher court judges are associated with a certain field of law, and it is not uncommon for judges to target those established informal authorities with inquiries about their opinion on specific legal issues arising in individual cases. Besides these ad hoc, voluntary, and rather entropic informal contacts among judges, there are also more established channels of informal judicial communication. It has been described as a regular practice for Supreme Court judges visit lower courts to "inform" them about the Supreme Court's recent decision-making practice.[55] This is not a secret. When asked about the quality of lower court decision-making, the President of the Supreme Court's criminal division replied that "there is room for improvement, which is, after all, the reason why I and other respective authorized judges of the Supreme Court's criminal division participate in board meetings and training of regional and high courts, where we familiarize [the judges of those courts] with case law and discuss concrete problems."[56] Such practice—also followed by the court's civil division—aims to ensure that decision-making within the entire judicial pyramid is swift, of good quality, and consistent.[57]

Second, besides talking, judges also write, and not just judicial opinions. Judges, and in particular apex court judges, often write academic texts such as articles, books, or legal commentaries. The last format in particular—sometimes even explicitly labeled and sold as "judges' commentary"[58]—is very popular. Virtually all major legal codes have a commentary in which an apex court judge participates as a leading author, often with other judges.[59] A very small area of judicial practice is left untouched by extrajudicial writings of judges.

Of course, neither the advice nor the extrajudicial writing of a judge needs to be strictly followed by his colleagues. Judges may listen to or read the opinion, process it, and then decide on their own, possibly explaining their reasons for not following the guidance. The structure of the judicial environment, however, may make such an approach difficult, especially if the advice comes from a hierarchically higher-placed colleague, as it often does. To appreciate fully what the

[53]Such consultations can take place, for example, during educational courses for judges. *See* Barbora Janáková, *Jak se školí soudci? Přehledy judikátů i lekce, jak odhalit křivé obvinění*, iDNES.cz (Feb. 1, 2018), https://www.idnes.cz/zpravy/domaci/justicni-akademie-justice-vzdelavani-skoleni-soudci-statni-zastupci.A180125_161522_domaci_bja.

[54]The practice of judges giving seminars—open to other judges or, even more broadly, to legal practitioners—concerned with substantive legal issues is widespread in the Czech Republic. On extrajudicial writing see the main text below.

[55]Jan Chmel, *Tiskové zprávy jako nástroj tvorby reputace Ústavního soudu ČR a jeho soudců*, 1 Juris. 25 (2020) (speaking about his experience as a lower court judge); *see also* František Balák, *Ke sjednocování soudní praxe Nejvyšším soudem*, 92 Soudce 2, 3 (2007).

[56]*Rozhovor s JUDr. Františkem Púry*, 6 Soudce 3 (2018).

[57]*See* Balák, *supra* note 55, at 3 (calling the practice an extra-procedural method of influencing judicial practice).

[58]*E.g.,* Jaromír Jirsa, Občanské soudní řízení: soudcovský komentář (3rd ed. 2019).

[59]*See e. g.,* Michal Králík & Jiří Spáčil, Občanský zákoník III. (2nd ed. 2021); Pavel Šámal & Tomáš Gřivna. Trestní řád: komentář (2013); Pavel Šámal, Lukáš Bohuslav, Marek Dvořák, Tomáš Gřivna, Jiří Herczeg, Vladimír Kratochvíl, František Púry, Martin Richter, Stanislav Rizman, Jiří Říha, Milada Šámalová, Petr Škvain, Katarína Tejnská, Helena Válková & Marie Vanduchová, Trestní zákoník (3rd ed. 2023); Zdeněk Kühn, Tomáš Kocourek, Petr Mikeš, Ondřej Kadlec, Karel Černín, Filip Dienstbier & Karel Beran, Soudní řád správní: komentář (2019); Josef Baxa, Ondřej Dráb, Lenka Kaniová, Petr Lavický, Alena Schillerová, Karel Šimek & Marie Žišková, Daňový řád: Komentář (2011).

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opinion of a Supreme Court judge signifies, it is necessary to be mindful of several important contextual factors. First, the agenda at the Supreme Court is assigned on the basis of a narrow specialization, especially in the field of private law.[60] So, for example, only a single selected division of the Supreme Court—currently comprising five judges—has a monopoly over labor law final appeals.[61] This means that it is often known in advance exactly which judges will be responsible for deciding the case on final appeal. In such a scenario, a lower court judge might think twice before rebelling against the opinion of a superior judge. Not following advice increases the chances that his or her opinion will—by the involvement of that very same superior judge—subsequently be quashed on appeal. Lower court judges may also be reluctant to go against the opinion of a superior judge because the latter is often among the judges who can influence lower court judges' career advancements. Finally, and perhaps most importantly, lower court judges work under the immense practical pressure of having to decide tens of cases a month, so whenever there is a legal issue that is not clear or settled in the case law the easiest step is to look for guidance in a commentary and follow it.

As a result, informal consultations and extrajudicial academic writings leave a remarkable mark on the practice of the law. It is possible, for example, to come across a judgment in which lower courts have interpreted the law in a certain way because "it is in line with a common opinion [reached by the board meeting of the court]."[62] Also commentaries are widely used by lower[63] as well as apex courts,[64] sometimes even by the judges who wrote them,[65] either as the sole authority for a certain interpretation of law[66] or to add additional support by showing that the reading of the law adopted by the court is corroborated in the literature.[67] With the prominence of judge-led publications, the result is—as one of the judges of the Supreme Court put it—that extrajudicial writing and judicial lecturing at lower courts is used as "extra-procedural, or not mentioned by law, means through which the Supreme Court—or rather its individual judges—might influence judicial practice, and which as a general rule contribute to its unification."[68]

Third, besides talking and writing extrajudicially, it has also been a longstanding practice in Czechia for *some* judges to write legislation. Again, such practice is not secret and it is suggested that the instances in which judges act as legislators are quite common.[69] In fact, the practice

[60]Tomáš Richter, *Myšlenkové monopoly na vrcholných soudech*, LIDOVÉ NOVINY (June 23, 2014), https://www.advokatni-komora.cz/scripts/detail.php?id=13127.

[61]Helena Bončková & Jan Lasák, *Judikatura v občanském a obchodním právu: Práce s judikaturou Evropského soudu pro lidská práva*, *in* JUDIKATURA A PRÁVNÍ ARGUMENTACE 419 (Michal Bobek & Zdeněk Kühn eds., 2nd ed. 2013); *see also Soudní oddělení a rozhodovací tělesa ("senáty")*, ROZVRH PRÁCE NEJVYŠŠÍHO SOUDU 2022 42 (2022) https://nsoud.cz/judikatura/ns_web.nsf/0/F1695611B723FA15C1258908004F76B3/$file/Rozvrh%20pr%C3%A1ce%20k%201.12.2022.pdf (work schedule of the Supreme Court).

[62]*E.g.*, Decision of the Regional Court in Plzeň of 4 June 2006, Case No. 8 To 324/2003; Decision of the High Court in Olomouc of 28 July 2016, Case No. 8 Cmo 202/2016.

[63]*E.g.*, Decision of the Regional Court in Brno of 25 Oct. 2021, Case No. 74 Co 18/2021; Decision of the High Court in Prague of 30 July 2015, Case No. 4 To 67/2015; Decision of the Regional Court in Hradec Králové of 3 Mar. 2010, Case No. 10 To 170/2010.

[64]*E.g.*, Rozsudek Nejvyššího soudu ze dne 18.03.2009 (NS) [Decision of the Supreme Court of Mar. 18, 2009], sp.zn. 20 Cdo 1414/2007 (Czech); Rozsudek Nejvyššího soudu ze dne 0.12.2016 (NS) [Decision of the Supreme Court of Dec. 1, 2016], sp.zn. 28 Cdo 2807/2016 (Czech).

[65]*E.g.*, Rozsudek Nejvyššího soudu ze dne 30.09.2020 (NS) [Decision of the Supreme Court of Sep. 30, 2020], sp.zn. 5 Tz 26/2020 (Czech); Rozsudek Nejvyššího soudu ze dne 28.05.2008 (NS) [Decision of the Supreme Court of May 28, 2008], sp.zn. 29 Cdo 543/2008 (Czech).

[66]*E.g.*, Decision of the Regional Court in Hradec Králové Case No. 10 To 170/2010 and Decision of the Regional Court in České Budějovice Case No. 7 Co 296/2014.

[67]*E.g.*, Rozsudek Nejvyššího soudu ze dne 31.08.2010 [Decision of the Supreme Court of Aug. 31, 2010], sp.zn. 33 Cdo 1090/2008 (Czech); Rozsudek Nejvyššího soudu ze dne 26.07.2011 [Decision of July 26, 2011, 20 Cdo 2213/2011 (Czech).

[68]Balák, *supra* note 55, at 3.

[69]*See* Jaroslav Kramer, *Justiční ikony na hraně aneb soudci zákonopsavci*, EKONOM (May 15, 2015), https://pravniradce.ekonom.cz/c1-64013230-justicni-ikony-na-hrane-aneb-soudci-zakonopsavci; *see also* Tomáš Gřivna, *K osobě Pavla Šámala, předsedy Nejvyššího soudu*, in POCTA PAVLU ŠÁMALOVI K 65. NAROZENINÁM IX (Tomáš Gřivna ed., 2018) (listing a number of legislative drafts which the judge had authored in a preface to a Festschrift devoted to the then president of the Supreme Court).

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became so regularized that in 2001 it was formalized by law which provided that "to use his experiences" it is possible to temporarily assign a judge with his consent to Ministry of Justice.[70] Often the very purpose of this judicial internship with the executive was the abovementioned drafting of legislation—once the draft was done, the judge returned to judging.[71] The Constitutional Court, however, abolished the law, finding these internships inconsistent with the principle of the personal incompatibility of the judicial function with other public functions, judicial independence, and the separation of powers.[72]

Yet the practice of judges writing legislation continues. The only difference from the previous modus operandi is that judges are no longer temporarily transferred to the executive. Instead, they participate in legislation drafting as members or even chairs of ad hoc expert committees.[73] Just consider the currently ongoing recodification of procedural law, which should lead to the adoption of new codes of civil and of criminal procedure.[74] The person primarily responsible for the criminal code of procedure and chairing the commission is Pavel Šámal, who was a longstanding member of the Supreme Court and, at the time the work was commissioned by the Ministry of Justice, the Court's president.[75] The preparation of the civil code of procedure, in turn, began under the supervision of Roman Fiala, a former vice president of the Supreme Court; it is now chaired by the *current* vice president of the Court, Petr Šuk.[76] When Fiala was asked in 2016 why the commission consisted almost entirely of his colleagues from the Supreme Court, he replied that judicial involvement was the only solution as there were no good legislation drafters at the Ministry of Justice.[77]

The three extra-judicial channels of influence described so far in this section—informal consultations, writing commentaries, and drafting laws—are not used equally by all judges. It is only a relatively small group of judges that use these informal means of communication. When they do use them, however, they tend to use two or even all three of them. Typically, every legal field has one or two such judges and, typically, these judges sit at the apex courts. Very often such judges also hold administrative posts, being vice presidents of a court, or presiding judges of a court's division. As a result, as stated by the Minister of Justice in 2015, in Czechia, "very often, we come across a situation when one person writes a legislation, comments on it, lectures about it, and then adjudicates under it."[78]

In sum, there is much more to judicial communication beyond the dialog created through judicial opinions. Informal consultations, extrajudicial writings on legal issues, or the drafting of

[70]Law on Courts and Judges, art. 68(1) (Czech) (effective until 27 Oct. 2010).

[71]*See* Nález Ústavního soudu ze dne 06.10.2010 (ÚS) [Decision of the Constitutional Court of Oct. 6, 2010], sp.zn. Pl. ÚS 39/08 (Czech) (Musil, J., dissenting) ("[J]udicial internship at the ministry [of justice] has many practical benefits . . . [i]t is profoundly important mainly for preparation of legislative projects . . . .").

[72]*See* Nález Ústavního soudu ze dne 18.06.2002 (ÚS) [Decision of the Constitutional Court of June 18, 2002], sp.zn. I Pl. ÚS 7/02 (Czech); *see also* Nález Ústavního soudu ze dne 06.10.2010 (ÚS) [Decision of the Constitutional Court of Oct. 6, 2010], sp.zn. I Pl. ÚS 39/08 (Czech) (adding a second round of CC intervention, when the CC invalidated almost identical legislation which the legislature had adopted only few years after the CC's first intervention).

[73]*See* Marian Kokeš, *The Czech Republic*, *in* THE CRADLE OF LAWS: DRAFTING AND NEGOTIATING BILLS WITHIN THE EXECUTIVES IN CENTRAL EUROPE 68 (Robert Zbíral ed., 2020) (noting that these committees are "often composed also by judges"); *see also* Kramer, *supra* note 69 (describing the leading role of three such judges on three legislative projects).

[74]Adéla Nekvasilová, *Civilní i trestní právo v novém*, EKONOM (May 10, 2022), https://pravniradce.ekonom.cz/c1-67066300-civilni-i-trestni-pravo-procesni-v-novem.

[75]*Komise pro trestní řád má nového předsedu*, ADVOKÁTNÍ DENÍK (Jan. 15, 2019) https://advokatnidenik.cz/2019/01/15/komise-pro-trestni-rad-ma-noveho-predsedu/.

[76]Eva Paseková, *Místopředseda NS Šuk předsedá nové komisi pro civilní řád soudní,* ČESKÁ JUSTICE (July 21, 2022), https://www.ceska-justice.cz/2021/07/mistopredseda-ns-suk-predseda-nove-komisi-pro-civilni-rad-soudni/; Jaroslav Kramer & Kristián Léko, *Pokus o právní revoluci začíná*, LIDOVÉ NOVINY (Sept. 22, 2014), https://www.cak.cz/scripts/detail.php?id=13430.

[77]Kramer & Léko, *supra* note 76.

[78]Roberta Pelikána, *Slučitelnost funkce soudce s ostatními aktivitam*, 6 SOUDCE (2015); *see also* Pavel Vrcha, *Soudci by zákony psát neměli*, PAVEL VRCHA SOUDCE (Apr. 29, 2016), https://vrcha.webnode.cz/news/a-bude-novy-civilni-procesni-kodex1/ (describing a similar observation by a Supreme Court judge).

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legislation are all channels through which selected judges can, and do, influence their colleagues and the content of the law. Through these extra-judicial channels, selected judges wield more influence than the textbook, formal picture of an adjudicator might suggest.

E. Judge in Books and Judge in Action: Superjudges and the Context of Their Emergence

The three issues dealt with in the previous sections focused in turn on the role of court presidents in selecting judges, the issue of case assignment and panel composition, and the off-bench communications of judges. Despite their diversity, ranging from more administrative issues to those concerned with the handling of individual cases, on an analytical level, the described practices share three related characteristics.

First, all three practices suggest a certain disparity between the formal picture of law and the courts and the reality of how it really works. If the formal picture suggests that the power which judges have is only reactionary, the examples suggest that in reality judges can actively influence the law beyond an individual case, whether it is by deciding on the composition of courts and panels, drafting legislation, writing a commentary, or providing advice to their colleagues. Similarly, if the textbook picture suggests that it is the executive that selects judges and administers the courts, the analysis implies that in reality, the key actors in this regard are the court presidents. And if the formal picture conveys the impression that power within the judiciary is diffused among different tiers and different decision-making units, the analysis suggests that in fact, due to the off-bench activities of various judges or the role of court officials in composing panels and assigning cases to them, the power within the judiciary is more concentrated.

Second, the modification of the formal picture in all three instances follows the same "power vector": in all three instances, the informal judicial institutions and practices empower *judges*, allowing them to wield more influence. This is true from both the court-external and court-internal perspectives. From the external perspective, the informal practices allow the judges to influence agendas formally assigned to the legislature or the executive, whether they concern the power to appoint judges, formally with the executive, or to write legislation, formally the job of the executive and legislative branches. From an internal, within-the-branch perspective, the analyzed institutions constitute means through which individual judges can influence decision-making and the content of the law beyond the individual cases to which they have been formally assigned. In this sense, the informal judicial institutions could be described as tools enabling judges to become more influential, jurisprudentially, politically, and institutionally, with all three dimensions potentially reinforcing each other.[79]

Third, it is not *all* judges who profit from the informal judicial institutions, but only *a few selected* ones. The judges that gain more influence through informal practices are those that share two characteristics: (i) They are at the top of the formal hierarchy, being either court officials—selecting judges, creating panels, previously assigning cases—and/or apex court judges—writing laws, commentaries, advising and instructing lower court judges; and (ii) they are willing to do extra work in order to wield more influence—informally coordinating with other officials, writing commentaries, lecturing, writing laws, or sitting in the Grand Chamber. In this sense, a formal claim to authority and the availability of resources, time and skill, seem to be conducive to profiting from these informal institutions. Formal and informal powers are mutually reinforcing.

The result of the cumulative effect of the practices analyzed is the rise of a new phenomenon: Superjudges. Superjudges are judges who, through the use of informal practices, have enhanced their already formally strong position and wield immense influence on the functioning of the

[79] *See* Rosalind Dixon, *Towering versus Collegial Judges: A Comparative Reflection*, *in* TOWERING JUDGES: A COMPARATIVE STUDY OF CONSTITUTIONAL JUDGES 308, 309–10 (Rehan Abeyratne & Iddo Porat eds., 2021) (discussing these axes of judicial influence).

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judiciary in both its administrative and decision-making dimensions. They are powerful politically—influencing the process of legislating and the selection of judges—judicially—influencing decision-making—as well as jurisprudentially—influencing the content of the law. This extra influence necessarily comes at the expense of the two political branches of government and other rank-and-file judges and results in the emergence of two tiers within the judiciary: the Superjudges who are active and influential outside and inside the judiciary, and those "others," whose formal powers are informally eroded.

After establishing the characteristics and consequences of the three sets of informal institutions and practices, the next natural question to ask is why? Why do they exist and why have they developed in their current shape? What are the factors that determine the exact characteristics of the informal judicial institutions and contribute to their emergence? The short answer is history.[80] The longer answer is that there are three particular historically determined conditions that have enabled the Superjudges to emerge in the way they did.

The first important context of the emergence of Superjudges is high institutional but low individual judicial independence.[81] After the Velvet Revolution of 1989 and as a reaction to the totalitarian past when courts were under the control of the communist party, Czech courts gained strong *institutional* independence.[82] Any external contact with the judiciary was seen to be a priori suspicious, whether or not it was motivated by bad will. This hindered not only corruption, but also proper scrutiny, criticism, and accountability.[83] At the same time, there has been much less emphasis on the *individual* independence of judges. Mentally, the majority of judges still thought like bureaucrats, hierarchically subordinated to higher-ranking judges whose authority derived from their formal position and technical "knowledge" of the law.[84] This led to the emergence of the judiciary as a self-standing, externally unscrutinized political body in which a selected judicial elite finds it relatively easy to rule over the gray majority of rank-and-file judges, who acquiesce in being informally lectured to, getting officially preselected cases, or being sidelined from Grand Chambers.[85]

The second factor leading to the emergence of Superjudges is the absence of shared perceptions of key constitutional concepts among the relevant members of the Czech community. What characteristics should an ideal judge have?[86] What should a Grand Chamber do—represent the views of the most experienced and erudite or the prevailing view of the entire court?[87] Is there a proper role for judges in the process of drafting legislation? None of the questions have reached a consensus in Czechia, with some of them having barely been discussed. Such lack of consensus necessarily leads to "gray zones" where it is not clear how things should be done. This, in turn,

[80]*See* Rehan Abeyratne & Iddo Porat, *Introduction: Towering Judges—A Conceptual and Comparative Analysis*, in Towering Judges: A Comparative Study of Constitutional Judges 1, 13–14 (discussing the influence of historical and political context on the emergence of judicial leaders).

[81]*See* Frank Emmert, *The Independence of Judges—A Concept Often Misunderstood, in Central and Eastern Europe*, 3 Eur. J. L. Reform 405 (2001); Bobek, *supra* note 50.

[82]*See* Bobek, *supra* note 50, at 100 (noting a postrevolutionary swing from zero judicial independence to "200 percent" judicial independence).

[83]David Kosař, *Judicial Accountability in the (Post)Transitional Context: A Story of the Czech Republic and Slovakia*, SSRN Database, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689260.

[84]Zdeněk Kühn, The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation? (2011); Zdeněk Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement,* 52 Am. J. Comp. L. 531 (2004); Bobek, *supra* note 50.

[85]*Compare* Kadlec, *supra* note 35, at 186, *with* Pamela Ann Rymer, *The Limited En Banc: Half Full, or Half Empty?*, 48 Ariz. L. Rev. 317 (2006) (showing the strong reaction of a judge to establishing a much less exclusionary rule for composing a grand chamber in a US appellate court).

[86]*See* Michal Bobek, *Judicial Selection, Lay Participation, and Judicial Culture in the Czech Republic: A Study in a Central European (Non)Transformation*, in Fair Reflection of Society in Judicial Systems—A Comparative Study 121 (Sophie Turenne ed., 2015) (noting the lack of sustained discussion on what the Czech system of judicial appointments ought to look like after the transition to democracy in 1989).

[87]Ondřej Kadlec, *Reakce autora: Sjednocování ano! Ale čeho, kým a jak?*, 5 Juris. 35 (2021).

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allows individual actors who have the resources to come and promote their own perception, a perception which potentially might serve their interest.

The third important factor enabling the emergence of Superjudges is the dire state in which the legal profession was left after the four decades of communism. The old communist cadres were not asked to leave after 1989, an omission which allowed them to prevent any meaningful reform and reproduce the incompetence.[88] Legal education in the Czech Republic is ossified, still very much resembling the education based on memorization which was developed over a hundred years ago.[89] Also, legal academics are in an overall dire position, struggling with low prestige and minimal salaries. Good full-time legal academics are rare. Those that remain are often forced to write highly specialized works in English focusing on transnational issues; scrutinizing Czech case law in the Czech language is not rewarded.[90] In such a situation, critical assessment and further development of the courts' case law is scarce, as it is also hard to come across a drafter capable of writing good legislation. Many of the roles a legal system needs are de facto unfilled. What emerges is, yet again, a sort of vacuum presenting an opportunity—if not a demand—for it to be filled by those lawyers who are willing and able to do so, the judges.

To summarize, the informal practices as they have developed in Czechia are conditioned by the particularities of the Czech context: An institutionally independent judiciary with individually dependent judges, the absence of shared conceptions of key organizational concepts, and the underperformance of Czech legal academia. Each of the three conditions have contributed to the emergence of "power vacuums," which were then easily informally filled by Superjudges.

F. Superjudges and Czech Democracy: 3+1 Separations

Evaluating the impact of the informal institutions and practices analyzed on democracy is not an easy task. Around the world, judges who stand out are both celebrated as potent leaders who can bring about fundamental societal change as well as criticized as highly detrimental to the relevant constitutional system.[91] Much depends on what exactly the judges do to make themselves stand out and in what context this happens. Similarly, a critique in the light of abstract ideals might be easy, but one also needs to consider the alternatives in the particular system, given its peculiar institutional, social, and cultural setting, the very setting from which the informal institutions and practices emerged. Any broad-brush assessment of Superjudges thus could not be persuasive, while an attempt to cover conclusively every aspect of the issue is far beyond a single article. Instead of handing out ultimate verdicts, therefore, we are taking the necessary first step here and identifying the values that Superjudges influence and based on which their role—positive or negative—could and should be discussed. We will first point out three such positives, then deal with three possible dangers.

There are three main positives that Superjudges bring to the functioning of the judiciary or legal system in general: Insight, influence, and autonomy. First, as judges charged with administrative or higher court functions, Superjudges have unparalleled insight into the issues facing the law and the judiciary. Court presidents know exactly where the weak points of the judiciary are. Similarly, higher court judges, overseeing judicial practice from the top, are well aware of where the law causes problems in practice, where courts diverge in their reading of the law, or what questions the practice will have to face in the future. They are also familiar with the shortcomings of legislation and recognize common drafting errors that may lead to future

[88] *See* Aviezer Tucker, *Reproducing Incompetence: The Constitution of Czech Higher Education*, 95 E. Eur. Const. Rev. 94 (2000).

[89] Michal Bobek, *Klepání na nebeskou bránu: o nereformovatelnosti studia práv v Čechách*, 10 Právní rozhledy 365 (2005), 12 Právní rozhledy 446, pt. 2 (2005), 14 Právní rozhledy 523, pt. 3 (2005) and 16 Právní rozhledy 601, pt. 4 (2005).

[90] Part of the problem may stem from a more global issue, where the high specialization of legal scholarship can sometimes result in its decreased relevance to the practical aspects of judicial practice. *See* Eric A. Posner, Divergent Paths: The Academy and the Judiciary (2016).

[91] Abeyratne & Porat, *supra* note 80, at 18–19; Iddo Porat, *Towering Judges and Global Constitutionalism*, *in* Towering Judges: A Comparative Study of Constitutional Judges, 36–38 (Rehan Abeyratne & Iddo Porat eds., 2021).

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problems.[92] In this sense, having Superjudges involved in any of the activities other than judging *stricto sensu*—in selecting judges, drafting laws, or providing views—allows other actors—the executive, the legislator, or their judge colleagues—to draw on their expertise and make better, more informed decisions.[93] The first benefit Superjudges may bring, then, is that they may improve the quality of legislation, judicial decision-making, or court administration.

Second, Superjudges may also be beneficial because they can easily effectuate a change and translate a vision into practice. Informed by the situation on the ground, Superjudges do not have to rely on the formal channels, which are often slow and unwieldy, but can act informally to get things done more effectively: Unify the decision-making of lower courts, initiate legal change by writing legal commentaries, or engage in writing and lobbying efforts to influence legislative changes. They often possess great legal minds, creativity, capacity for persuasive writing and speaking, and broader interpersonal skills. Almost invariably, they are also hard-working people. Such leadership can secure the predictability of law and judicial decision-making or change the content of the law for the better. The capability to get things done swiftly and effectively is thus the second potential benefit that Superjudges bring.

The third advantage of Superjudges is that they are relatively autonomous actors. Czech Superjudges are not—in reality or as perceived—connected to any external political influence. Instead, strictly guarding their non-partisan image, they act on their own, independently of external political influences. In this way they can be perceived as a buffer against political influence. Considering that there is not just one but a multiplicity of Superjudges, all autonomous, Superjudges also provide the judiciary with a degree of resilience against external influences seeking to dominate it. This allows not only the presentation of the administration of the judiciary as an apolitical institution, but also enables the implementation of organizational measures related to the judiciary that could face challenges if attempted by—the suspicious—politicians. Therefore, the third benefit of Superjudges lies in their ability to guarantee and manifest the independence of the judiciary from the political branches, which, in turn, leads to the reinforcement of the second benefit mentioned above—effective governance of the judiciary.

Besides the three benefits brought by Superjudges—insight, influence, and autonomy—there are also problems associated with them. We mention three of them, all broadly related to the issue of the separation of powers. The first is that they may erode basic procedural guarantees underpinning the process of judicial decision-making. The basic feature of the judicial process is that an independent court renders a decision that can then be appealed and reviewed by a higher court. Superjudges introduce several problems to this scheme of things. First, their influence makes it hard for first instance courts to decide independently and in light of the parties' arguments. Regardless of what legal arguments one might present to a first instance judge, if that judge has a Superjudge sitting in the appellate court there is pressure to interpret the law according to the Superjudge's view. After all, the Superjudge may be the person who wrote the law, lectured—the lower-court judge—on it, provided the most relevant legal commentary on it, and who, eventually, may influence the lower-court judge's career. In such a situation the lower court judge does not have many options other than to follow the Superjudge's view.

Problems with the integrity of the judicial process also continue in the appeal courts, the usual habitats of Superjudges. Appellate courts should look at the matter afresh. Typically, they also provide the benefit of collective deliberation: More heads should mean more reason, generate fruitful deliberation, and eliminate the imperfections and biases of individual judges.[94]

[92]Joshua M. Dickey, *Judges as Legislators?: The Propriety of Judges Drafting Legislation*, 29 McGeorge L. Rev. 111 (1997).

[93]Paul Martens, *Solitude du juge et cohérence du droit*, 132 J. des tribunaux 805 (2013).

[94]*See* Andrew F. Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 Ariz. St. L. J. 645, 679–86 (2009); *see* Diego Werneck Arguelhes & Leonardo Molhano Ribeiro, *'The Court, it is I'? Individual Judicial Powers in the Brazilian Supreme Court and Their Implications for Constitutional Theory*, 7:2 Glob. Constitutionalism 236, 255–56 (2018) (speaking on the value of deliberation).

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Superjudges gradually destroy this. By hand-picking which judges should hear particular cases—recall the case assignment at the Supreme Court or the issue of Grand Chamber composition—they can themselves de facto predetermine the results.[95] Also, they can wear away at collective decision-making by dominating it. Deliberation requires a certain level of equality among those who are deliberating. If one of the members of the deciding panel is, *among other things*, the author of the applicable law, other judges on the panel may be too quick to join in his opinion.[96] While such a process may secure a degree of certainty and predictability of the result, it removes the element of collective decision-making as well as the requirement of novel fresh reconsideration.

The second problem is that Superjudges may undermine the very principles underpinning the legitimacy of the entire judicial branch. First, judicial determination of individual rights is considered legitimate because judges decide—and *appear* to do so—according to the law, unaffected by their self-interest or political views. It is this disinterest and subservience to the law which underpins judicial authority. The second source of judicial legitimacy draws on the fact that judges are separate from the legislator.[97] Creating abstract rules and authoritatively interpreting and applying them are distinct government functions that need to be kept separate. This is valuable because having a second set of independent, critical eyes brings an additional guarantee that the legal rules which the legislator has created and which apply to individuals fulfill the requirements of the rule of law—that they are clear, prospective, consistent, and so on—and are in line with substantive constitutional requirements such as human rights.[98]

Both legitimizing principles are challenged by Superjudges. Writing law is an act of a political nature.[99] By drafting law a judge has either to accept political orders from the political branches or deliver political judgments himself and possibly even enter the political arena to push his creation through. When judges become too closely associated with a social or political change, they compromise the judiciary's role as a neutral arbiter of the country's laws.[100] What is more, by drafting legislation the judge also loses the required impartiality and critical judgement in its interpretation, because he gives it implicit approval.[101] Similarly, if a judge writes a commentary on a code, he necessarily has a stake in how the court will decide in the future. These problems may spill over to the whole of the judiciary because lower court judges may tend to decide in line with the wishes of the Superjudge and thus translate all his interests into their decision-making as well.[102]

Third, Superjudges can be detrimental also to the functioning of the entire legal system and the content of the law. Law is ideally created and curated by a multiplicity of forces. The key actors in a modern state are legislators, judges, and legal academics.[103] Each actor has unique capacity. The legislator has the political will and the capacity for democratic deliberation.[104] The judiciary

[95]*See* Benjamin Alarie & Andrew J. Green, Commitment and Cooperation on High Courts: A Cross-Country Examination of Institutional Constraints on Judges 97–122 (2017) (showing empirical evidence from several courts around the world).

[96]A similar problem with highly influential judges arises in common law systems, too, where traditionally the judges are much more independent-minded. *See* Dixon, *supra* note 79, at 326.

[97]*See* Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. Rev. 433, 466 (2013).

[98]*Cf.* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

[99]Dickey, *supra* note 92, at 130.

[100]*See* Dickey, *supra* note 92; Dyson Heydon, *Judicial Activism and the Death of the Rule of Law*, 10 Otago L. Rev. 493, 501–02, 515 (2004); Porat, *supra* note 91, at 38.

[101]Dickey, *supra* note 92, at 122; Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 L. Contemp. Probs. 229 (1998) (questioning the genuineness of judicial review of judges—drafters).

[102]Dickey, *supra* note 92, at 126.

[103]*See* Kaarlo Tuori, Ratio and Voluntas: The Tension Between Reason and Will in Law 3–33 (2011); *see also* R. C. van Caenegem, Judges, Legislators and Professors: Chapters in European Legal History (1992) (providing a historical perspective on power struggles between the three groups).

[104]Waldron, *supra* note 97, at 433.

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has the formalized procedure and legally bound process of decision-making, developing law through a process of experimentation and change in light of the experience gained through particular cases.[105] Academics detached from the practice are well placed to critically assess the work of the legislator and judges and articulate the theories and biases underpinning it, contributing to the law's coherence and providing an important source of limit and justification for the legal practice.[106] That is the strength of the law—no one controls it absolutely and many actors contribute to it from their own perspective and according to their own special institutional capacities. If one actor makes a mistake, others can point it out and effect change.

Superjudges monopolize this ideally multipolar process. By writing legislation they remove the tension between the legislative and judicial wills. By writing commentaries and lectures they sideline non-judicial academics. For sure, there may still be other academics involved in the legal system, but the doctrinal discussion in which judges are strongly represented is necessarily centered around the views of judges—for practically oriented lawyers and lower court judges are naturally interested in the view of those judges who will be deciding or reviewing their cases. If we add to this that Superjudges also influence the composition of courts and panels and that opposition to Superjudges' opinions within the judiciary is also unlikely,[107] what we get is an encapsulated monopoly where legal opinions are correct not because they are sound and well-reasoned, but because it is the Superjudges who hold them. What should be authoritative becomes authoritarian.[108] While the result may be uniform legal practice, the question is whether this is a healthy type of unity or a dangerous type of mental closure.[109] Moreover, there is also no guarantee that the law created by judges—even Superjudges—will be the best possible. By dominating the legal process at the expense of the legislature and academics, Superjudges may detach the law from the current thinking and development of society.

All in all, Superjudges bring both benefits and risks to the constitutional system. On the one hand, they may contribute to the informed, effective, and politically independent functioning of the judiciary. On the other hand, they bring with them the danger of eroding important divisions of powers: Between the first instance and appeal courts; between those writing the rules and those applying them; and between those delivering judicial decisions and those scrutinizing and making deeper sense of them. These erosions may negatively affect the judicial process, the authority of the courts, as well as the content of the law. The riddle of Superjudges lies in capitalizing upon the benefits they bring without jeopardizing the system's foundational principles.

Does the Czech Republic strike a correct balance? That is hard to say. As argued above, the overall assessment of the influence of Superjudges requires further empirical analysis. From what we know so far, however, we can say this: On the one hand, Czech Superjudges have strong formal and informal powers. On the other hand, there is no constitutional breakdown in Czechia. According to various independent observers, the state of democracy and the rule of law are assessed positively, especially when compared with those of other countries in the region.[110] Such a state of affairs, however, does not necessarily mean that all the constitutionally required separations are dutifully observed. Rather, that a legal system that includes such strong actors somehow works may be a haphazard consequence. The key condition in this regard seems to be that there are not one, two, or three Superjudges, but *several* of them, all being autonomous actors,

[105] *See* Timothy Endicott, *How Judges Make Law*, *in* THE FOUNDATIONS AND FUTURE OF PUBLIC LAW 127 (Elizabeth Fisher et al. eds., 2020).

[106] *See* Christian Atias, *Judges, Jurists, and Legal Knowledge*, 74 ARSP: ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 368, 387 (1988); *see also* TUORI, *supra* note 103, at 3–33.

[107] *See* Atias, *supra* note 106; TUORI, *supra* note 103, at 3–33; *see also* Bobek, *supra* note 50, at 109.

[108] *See* JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986).

[109] *See* Nález Ústavního soudu ze dne 18.06.2002 (US) [Decision of the Constitutional Court of June 18, 2002], sp.zn. I Pl. ÚS 7/02 (Czech) (arguing that the legitimacy of unity arises only from a conflict of different opinions).

[110] *See e.g.*, *WJP Rule of Law Index 2022 Report*, WORLD JUST. PROJECT (2022), https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2022.pdf (ranking Czechia as the 22nd of 140 countries).

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having their own interests, and watching and checking the activities of others. Superjudges check Superjudges. So, after all, there *is* a separation of powers. Only instead of being external and formalized, it is internal and purely informal. Only time will tell for how long such a setup can work. Hoping that the (judicial) stars will not align, however, might not be the smartest strategy.

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