

MEDIA AND CRITICISM OF JUDGES: ROAD TO PERDITION OR GENUINE CHECK UPON THE JUDICIARY?

By

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1 Introduction¹

It is generally accepted that the role of media vis-à-vis political figures was both scrutinised by scholars and media itself and subject to intensive adjudication. In contrast, surprisingly little has been said on the issue of criticism of judges which can be rephrased as balancing of freedom of expression² on the one hand, and the reputation of judges and broader administration of justice concerns on the other.³ Only with the rapid growth of scholarship by political scientists on the role of courts in the society,⁴ has this issue come gradually to the fore.

This shortage of attention to the criticism of judges no doubt reflects certain “enigma” surrounding the judiciary and official line about the judicial process that denies the existence of discretion in judicial decision-making and instead emphasise “how rule bound [law] is”.⁵ In the Czech Republic, additional factors such as lack of tradition of free speech, stifling free debate on public issues during communist regime and limited education of the public in legal matters provide further explanation for reluctance to scrutinise the work of judges.

Yet, times are changing and growing power of courts goes hand in hand with efforts to influence and sometimes even intimidate judges in order to achieve expected results. Both

¹ This paper is freely inspired from my LLM thesis submitted at the CEU in 2007. I am grateful to Aharon Barak (my supervisor), Lucas Lixinski, András Sajó, and participants of both the ‘Theory of Principles’ workshop in Krakow and ESIL Research Forum in Budapest for extremely helpful comments and discussions. However, all opinions expressed in this paper are personal to the author and any mistake, of course, remains his own.

² For purposes of this essay, I will treat “freedom of expression”, “freedom of speech” and “freedom of the press,” as synonymous.

³ Eric Barendt, "Michael K. Addo (Ed.): Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards (Book Review)," *European Public Law*, Vol. 7, no. 4 (2001): 702.

⁴ See e.g. Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000); or Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004).

⁵ Richard Posner, *How Judges Think* (Cambridge: Harvard University Press, 2008): 2.

politicians and general public realised that judges often act as “occasional legislators”.⁶ In fact, politicians in the Czech Republic themselves contributed to this situation by delegating important decision upon courts – and particularly upon the Constitutional Court (hereinafter only “CC”). It is thus not much surprising that intemperate attacks upon the judiciary reach its historic flow here.

To name few examples, President Václav Klaus warns against “judgeocracy”,⁷ a respected journalist once suggested that Pavel Rychetský “suffers from censorial stroke”, “his brain’s blood circulation was stalled”, “does not follow precedents of his own institutions” and “should resign since he desecrated [the CC]”,⁸ former Chief Prosecutor Marie Benešová labeled several senior judges and prosecutors as “judicial mafia” toeing to political line,⁹ Public Defender of Rights referred to the Vice-President of the Supreme Court as a “shame of the judiciary”,¹⁰ and Senator Josef Novotný accused the judges of Regional Court in Brno of manipulation with bankruptcy proceedings and referred to them as “new Berdych’s gang”.¹¹ These claims, not to mention even more vitriolic attacks in the blogosphere,¹² are harsh accusations that often reach the level of intimidation of individual judges.

The aim of this essay is to address these cases. The main issue is thus to what extent can media criticize judiciary? This issue divides into two fundamental subquestions. First, are the interests of a democratic society better served by encouraging free debate about judicial matters, or by protecting the judiciary and its activities from criticism?¹³ Second, to what

⁶ I borrowed this term from Richard Posner, in: *ibid*: 78-92.

⁷ See Marek Loužek (ed.): *Soudcokracie v ČR: fikce nebo realita?* Praha: CEP, 2006.

⁸ Erik Tabery, *Mráz přichází z Kremle*, Respekt No. 6/2006.

⁹ This accusation was initially broadcasted by Český rozhlas on December 20, 2007, and subsequently reproduced by virtually all media.

¹⁰ See e.g. Martin Pavlíček: Aktéři kauzy Čunek: co je s nimi dnes? *Týden.cz*, 1.4.2008 (available at http://www.tyden.cz/rubriky/domaci/politika/akteri-kauzy-cunek-co-je-s-nimi-dnes_51830.html)

¹¹ Soud chce senátorovu omluvu, *Lidové noviny* (21.3.2008): 2.

¹² See e.g. harsh criticism of several decisions of the CC by the commentators at blogs such as *Jiné právo* or *LEBLOG*; or online journals such as *Politikon.cz*.

¹³ These questions are to a significant degree inspired by Elizabeth Handlsey; in: Elizabeth Handlsey, "Contempt and Free Expression: Multilingual Lessons (Book Review)," *Media & Arts Law Review* 7, no. 2 (2002).

extent should discussion of judicial processes be treated as an exception to general principles of freedom of expression and if so, why?

From a broader perspective, this essay supports the assertion that much can be learned about the role of the judge in contemporary society¹⁴ and that a particular balance between freedom of debate and the need for judicial independence “also shows how much respect each system gives to its judiciary”.¹⁵ This essay, however, must also inevitably leave out several important issues. More specifically, it does not address reporting on pending trials, questions raised by Internet speech, and repercussions of freedom of speech on fair trial aspects such as the impartiality of the judges and presumption of innocence.¹⁶

The structure of this essay is as follows. Part 2 is devoted to a discussion of pros and cons of criticism of judges. The purpose of this chapter is to “set the stage nicely” and place the problem into a broader perspective. In order to address the issues raised in the second chapter, Part 3 first briefly skims through the relevant jurisprudence of the European Court of Human Rights (hereinafter the “ECtHR”) and identifies trends therein. Building upon these trends it then identifies myths of criticism of the judiciary and suggests solutions how to overcome these myths. Part 4 draws conclusions from preceding chapters.

2 Contextualization of the topic

The whole topic of criticism of judges is permeated by a clear tension. Controlling the amount of criticism the judiciary faces is among other things a legitimate concern aimed at preserving the impartiality and independence of the judiciary, which are important constitutional values. These constitutional values might be seriously jeopardized if judges were to be constantly exposed to ill-founded and widespread criticism. On the other hand,

¹⁴ See E. M. Barendt, *Freedom of Speech*, 2nd ed. (New York: Oxford University Press, 2005): 322.

¹⁵ Mark C. Miller, "Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards (Book Review)," *Law & Politics Book Review* 11, no. 11 (2001): 525.

¹⁶ For an in-depth analysis of these issues, see Ian Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Oxford: Hart, 2002).

criticism of the judiciary not only allows wider public to enter arena of public debate on legal matters, but also represents one of few available checks upon the judicial branch. This chapter will briefly address the main legal issues inextricably linked to the topic of this essay and discuss pros and cons of wider limits of permissible criticism of the judiciary.

But first of all, there are two additional aspects worthy of mention that are not central to the enquiry of this essay, but will be often touched upon. Firstly, any research on criticism of judges would be incomplete without addressing the principle of separation of powers. Experience teaches us that potentially the most dangerous criticism of the judiciary stems from politicians (both from the executive and legislative branches). However, the relationship between the judiciary and the other two branches is very complex¹⁷ and this is not to say that *any* criticism of the judiciary by other branches is harmful. It is just a reminder that constant “judge bashing”¹⁸ by politicians can undermine public confidence in the judiciary and its independence most seriously. This effect is even strengthened when the politicians create an “unholy alliance”¹⁹ with the media and launch a joint campaign against the judiciary and when the conflict reaches its peak, the ultimate move of political branches is a change of the “rules of the game”, usually by “court packing”.²⁰

The second underlying aspect is which theory of free speech supports or opposes wider limits of acceptable criticism of judges.²¹ While Michael Addo stresses the

¹⁷ See e.g. Aharon Barak, *The Judge in a Democracy* (Princeton, N.J. ; Woodstock: Princeton University Press, 2006): 213-259; or András Sajó, *Limiting Government: An Introduction to Constitutionalism*, English ed. (Budapest: Central European University Press, 1999): 225-244.

¹⁸ This term was coined by Stephen Sedley in Foreword to Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards* (Aldershot: Dartmouth, 2000).

¹⁹ This phrase is used by Eric Barendt (in: Barendt, "Michael K. Addo (Ed.): Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards (Book Review)," n. 3 above, 704). Marek Safjan, retired Chief Justice of the Polish Constitutional Court, refers to this phenomenon as “political mobbing”, in: Politics and Constitutional Courts a Judge's Personal Perspective, *EUI Working Papers LAW*, No. 2008/10: 1-4.

²⁰ See Frank Delano Roosevelt's ‘court packing plan’ in U.S. in 1930's; or the tension between parliament and the Appellate Division of South Africa on the apartheid issue in 1950's (described in C. F. Forsyth, *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80* (Cape Town: Juta & Co, 1985)) or recent efforts of brothers Kaczyńskis in Poland.

²¹ See generally, Larry Alexander, *Is There a Right to Freedom of Expression?*, Cambridge Studies in Philosophy and Law (Cambridge; New York: Cambridge University Press, 2005): 127-146; Barendt, *Freedom of*

accountability of judges and the “democratic theory of free speech” argument,²² Eric Barendt prefers an argument based on the “self-fulfilment theory,”²³ and Ian Cram advocates the “distrust of government” rationale of free speech.²⁴ However, even the remaining theories of free speech such as the truth-related arguments, Dworkin’s constitutive basis of free speech,²⁵ and arguably also the so-called “counter-attack theory” of free speech,²⁶ are not without any bearing on the topic. It is thus highly advisable to have these theories in mind when reading the following lines.

2.1 Arguments against (wider) criticism of judges

There are six basic arguments in favour of broader protection of the judiciary against their criticism. Firstly, it is argued that abusive criticism undermines public confidence in the legal system and administration of justice. Secondly, shielding judges from criticism serves an important public interest of protection of judicial independence. Thirdly, society needs to be compelled to respect the authority and impartiality of the judiciary. Fourthly and more practically, protective standards ensure a smooth administration of justice. Fifthly, certain authors argue that other, mainly internal, checks on the proper functioning of the judiciary are sufficient. Finally, it is generally presumed that judges by the nature of their work cannot defend themselves since they are barred from replying to their criticism. In other words, "judges can't fight back".²⁷

Speech, n. 14 above, 6-22; Cram, *A Virtue Less Cloistered*, n. 16 above, 6-21; András Sajó, *Freedom of Expression*, English ed. (Warsaw: The Institute of Public Affairs, 2004): 17-25.

²² Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 11-16.

²³ Barendt, "Michael K. Addo (Ed.): *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards* (Book Review)," n. 3 above, 704.

²⁴ Cram, *A Virtue Less Cloistered: Courts*, n. 16 above, 19-21.

²⁵ Dworkin, Ronald. *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996): 200.

²⁶ See *Schmid-Spiegel*, 12 BverfGE 113 (1961). See also *Art Critic*, 54 BverfGE 129 (1980); *Credit Shark*, 60 BverfGE 234 (1982); or Kommers, Donald. *The constitutional jurisprudence of the Federal Republic of Germany*, 2nd ed. (Duke University Press, Durham/London, 1997): 369-372.

²⁷ Kathleen Sullivan, panelist’s comment at the conference on "Fair and Independent Courts: A Conference on the State of the Judiciary", Georgetown University Law Centre, Washington D.C., 28 September 2006.

Most of these rationales have been invoked in countries such as Austria or Belgium that enacted laws against criticism of the judiciary and decided to enforce them vigorously.²⁸ However, several commentators have recently questioned most of the abovementioned arguments. For example, it is argued that internal checks on the judiciary (such as appeals, dissenting opinions and disciplinary proceedings) not only have proved to be insufficient²⁹ but are often slow and unacceptable from the democratic point of view.³⁰ Furthermore, internal quality control suffers from institutional bias which supports the thesis that structural deficiencies are best reviewed externally.

Similarly, it is more and more difficult to endorse the view that judges and their institutions are as vulnerable as often portrayed in legal doctrine and whose authority can be easily undermined. In fact, the opposite thesis that “constitutional maturity has now secured judges’ place in the society [and] [a]ccording special protection to judges is viewed as patronizing to a highly professional and well trained group of public officials” is presented.³¹ While the Czech Republic might be still considered a country in transition and thus allegedly still immature to accept broad criticism of judges, one may invoke another rebuttal, namely a “precommitment strategy”³² against the stifling the debate on public and judicial matters lasting from the communist era or necessity to “deal with the past” of the judiciary.³³

Likewise, in order to rebut the traditional presumption that judges cannot respond to criticism, Michael Addo developed a two-fold argument. First, judicial reticence “may be imposed to strengthen the enigma surrounding the judiciary and to forestall any criticism of

²⁸ Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 12.

²⁹ Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," in *Political Rights under Stress in 21st Century Europe*, ed. Wojciech Sadurski (Oxford; New York: Oxford University Press, 2006): 116.

³⁰ Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 12.

³¹ Id.

³² This term was coined by Cass Sunstein in: Cass R. Sunstein, "Constitutionalism and Secession," *University of Chicago Law Review* 58 (1991): 636-642.

³³ The latter seems to be (at least implicit) position of the CC in Decision No. Pl. ÚS 23/05 *Pichova*.

any shortcomings in its work”.³⁴ Addo quotes a former UK Lord Chancellor, Lord Kilmuir, who claimed that “so long as a judge keeps silent his reputation for wisdom and impartiality remains unassailable”³⁵ as an example of proponent of judicial restraint but rightly contests Lord Kilmuir’s view on the ground that judges’ wisdom and impartiality can be equally appreciated through the discussion and scrutiny of their work. Second, judicial reticence in responding to criticism lacks an objective character since it is selective. Addo supports this assertion by the observation that judges in fact often respond to criticism via press releases and that they often bring civil proceedings or have recourse to the ordinary law of torts.³⁶

The remaining rationales can also be questioned. It is by no means clear that shielding judges from criticism serves public confidence in the judiciary better than encouraging free debate about judicial matters.³⁷ As to judicial independence, it may be argued that it is undermined anyway since the criticism which is potentially the most harmful – the one from the other branches of the Government – is in most countries protected by parliamentary privilege. And finally, although a smooth administration of justice is clearly an asset, it is not such important public interest that would by itself outweigh the competing values – accountability of the judiciary and protection of the right to freedom of expression.

³⁴ Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 179 (referring to Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982)).

³⁵ *Ibid.*: 7.

³⁶ *Id.*

³⁷ Cram, *A Virtue Less Cloistered*, n. 16 above, 179; See also Dissenting Opinion of Judge Martens in *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, § 3, footnote no. 8; and more generally, Van Niekerk, *The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World* (New York: Praeger, 1987).

2.2 Arguments in favour of (wider) criticism of judges

Apart from undermining traditional arguments for shielding the judiciary from criticism, there are several additional, and perhaps even stronger, arguments for shifting the scales in favour of freedom of speech. The first line of argumentation in favour of free speech suggests that judges must be accountable in some way and since they are not politically accountable and often granted lifetime tenure, criticism is the only way how to scrutinise their conduct or eventually induce resignation of a particular judge.³⁸

Similarly, Comella argues that in order to ensure that the system of democratic accountability functions, citizens “must be entitled to object the result they see in real cases and bring pressure on the system to introduce the necessary reforms”.³⁹ But the crucial question is to *what extent* the judges should be held accountable. While Addo seems to assert that judges are accountable in the same way as politicians,⁴⁰ Barendt disagrees with this view and suggests three other arguments which he finds more convincing, namely the right of individuals to speak on whatever matters their choose, the lack of clear line between political and judicial matters, and finally the institutional bias of the judiciary.⁴¹

The right of individuals to speak and write about matters of their own choosing is based upon the self-fulfilment theory of free speech. This argument is supported also by Addo who opines that “all individuals but especially legal journalists, lawyers and other officials of legal establishment, contribute to the architecture of judicial policy through the expression of

³⁸ Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 11-16; Accord Barendt, *Freedom of Speech*, n. 14 above, 319. Contra Barak, *The Judge in a Democracy*, n. 17 above, 94-96 and 108, who claims that “judges’ non-accountability is their most precious asset” (at 108).

³⁹ Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," n. 29 above, 119.

⁴⁰ Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 12-14.

⁴¹ Eric Barendt, "Michael K. Addo (Ed.): *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards* (Book Review)," n. 3 above, 704.

their opinions”⁴² and “freedom of expression in this context can also prove to be an instrument of individual and professional self-fulfilment”.⁴³

Furthermore, by way of expressing ourselves, we do not simply convey our messages to the rest of the world, but also to a great deal shape the content of these messages. Therefore, freedom of expression is two-prong; it is not simply the freedom to communicate one’s voice to others, but also the freedom to develop distinctive voice of one’s own.⁴⁴ In the context of court reporting, it means that by limiting critical free speech vis-à-vis the judiciary we significantly hamper development of citizens’ thoughts on judicial matters. Shielding the courts from criticism thus limits education of the wider public in legal matters.⁴⁵

The second of Barendt’s arguments pinpoints the fact that the inherent difficulty to draw the clear line between political matters (on which individuals are free to express their view) and judicial matters (on which they are less free to express their view) renders this distinction useless.⁴⁶ This view seems to be supported both by commentators and judges themselves who claim that judges increasingly enter the sphere of law-making. For instance, Beverley McLachlin, Chief Justice of the Supreme Court of Canada, has confirmed that “the lawmaking power of the judge ... has dramatically expanded ... [and] [j]udicial lawmaking ... is [increasingly] invading the domain of social policy, formerly the exclusive right of Parliament and the legislature.”⁴⁷ Although one may argue that the situation in the common law countries is different from the civil law jurisdictions,⁴⁸ pioneering works of Alec Stone-

⁴² Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 16.

⁴³ Id.

⁴⁴ On this often neglected aspect of free speech, see Timothy Macklem, *Independence of Mind* (Oxford: Oxford University Press, 2006): 1-32.

⁴⁵ See Cram, *A Virtue Less Cloistered*, n. 16 above, 2.

⁴⁶ See also another Barendt’s piece: Barendt, *Freedom of Speech*, n. 14 above, 319, and cases cited therein.

⁴⁷ Beverley McLachlin, “The Role of Judges in Modern Commonwealth Society”, *Law Quarterly Review*, 110 (1994): 263.

⁴⁸ Another aspect of distinction between common law and civil law judges is addressed in Barendt, *Freedom of Speech*, n. 14 above, 319.

Sweet⁴⁹ and Ran Hirschl⁵⁰ on entanglement between the judging and politics in general decisively rebut this argument.⁵¹

Thirdly, Barendt invokes also a “professional freemasonry” argument.⁵² He suggests that “judges are naturally inclined to be unsympathetic to criticism of their colleagues [and thus] it is better to outlaw such proceedings altogether or at least confine them to narrow sets of circumstances”.⁵³ This argument seems to be supported by virtually any author writing on the topic of criticism of the judiciary. Lemmens talks about “*esprit corporatiste*”⁵⁴ and “*verité judiciaire*”.⁵⁵ Addo asserts that “judges are called upon to perform an impossible task of upholding the democratic process by, ironically, being *judges of their own cause*”.⁵⁶ Similarly, Judge Gölcüklü in his dissenting opinion in *Barfod v. Denmark* endorsed that “justice must not only be done but must also be seen to be done”⁵⁷ and Cram concludes that “the institutional bias which government (understood broadly) brings to its regulation of political speech ought to make us distrustful of such regulation”.⁵⁸

From the sociological point of view, the “professional freemasonry” concern is buttressed by the so-called Thomas Theorem.⁵⁹ If we apply the Thomas Theorem⁶⁰ in the context of the criticism of judges, we may conclude that if men define situations – here lack

⁴⁹ See Stone Sweet, *Governing with Judges*, n. 4 above; or more recently Alec Stone Sweet, “The Politics of Constitutional Review in France and Europe,” *International Journal of Constitutional Law* 5, no. 1 (2007).

⁵⁰ Hirschl, *Towards Juristocracy*, n. 4 above.

⁵¹ Accord Comella, “Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights,” n. 29 above, 116.

⁵² This term was coined by Colin Warbrick in: “The European Convention on Human Rights,” 9 *Y.E.L.* 439 (1989): 445.

⁵³ Eric Barendt, “Michael K. Addo (Ed.): Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards (Book Review),” n. 3 above, 704. In his book on free speech, Barendt adds another French example which he refers to as ‘justice de classe’ (Barendt, *Freedom of Speech*, n. 14 above, 319).

⁵⁴ Lemmens, *La Presse Et La Protection Juridique De L'individu: Attention Aux Chiens De Garde* (Bruxelles: Larcier, 2004): 301.

⁵⁵ Id., (quoting *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, § 34)

⁵⁶ Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 22 (emphasis added).

⁵⁷ Dissenting Opinion of Judge Gölcüklü in *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149, § 3. Accord Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 22.

⁵⁸ Cram, *A Virtue Less Cloistered*, n. 16 above, 21.

⁵⁹ “If men define situations as real, they are real in their consequences.”, in: William Isaac Thomas and Dorothy Swaine Thomas, *The Child in America; Behavior Problems and Programs* (New York,: Johnson Reprint Corp., 1970): 571-572.

⁶⁰ This theorem was employed by the CC in Decision No. Pl. 11/04 *US Security Clearance Committee*, § V.A.

of impartiality of judges judging their colleagues – as real, they are real in their consequences – general confidence that the decision is the decision of an impartial tribunal is undermined. Put differently, appearances matter. It is not easy to rebut the “professional freemasonry” argument. One may only argue that the current situation is non-ideal but still the best available one since it does not make sense to create a fourth branch of government that would guard the judiciary⁶¹ and that other branches of government are also in certain situations “judges of their own cause”, for instance the Parliament in setting the salaries of its MPs.

The last important argument against broad protection of judges from criticism builds upon truth-related theories of free speech, and more specifically the so-called “infallibility trap”.⁶² This argument starts from the proposition that judges are not infallible and they can err in their judgments as easily as any other individuals.⁶³ Experience teaches us that in order to combat the “infallibility trap” vis-à-vis the judiciary, three principles must be kept in mind: all people (including judge) are prone to make serious mistakes; all people (including judges) are hesitant to admit their mistakes; and most people (excluding judges) are delighted to point out the mistakes of their rivals.⁶⁴

Judges are not delighted to pinpoint the mistakes of fellow judges mainly due to collegiality and dissent aversion.⁶⁵ Moreover, many European countries do not allow casting dissenting opinions. In these legal cultures, the “infallibility trap” reaches its peak. But both examples, total absence of or limited amount of dissenting opinions, are troubling since lack of dissent may lead to “groupthink”, “group polarization” and the “hidden profiles phenomenon”.⁶⁶ Since we need sufficient amount of dissent, lack of rivalry among judges

⁶¹ Barak, *The Judge in a Democracy*, n. 17 above, 44.

⁶² I borrowed this concept from Stephen Holmes, *The Matador's Cape : America's Reckless Response to Terror* (New York: Cambridge University Press, 2007): 287-302. See also Cram, *A Virtue Less Cloistered*, n. 16 above, 7-10.

⁶³ Accord Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 16.

⁶⁴ Holmes, *The Matador's Cape : America's Reckless Response to Terror*: 287.

⁶⁵ Richard Posner, *How Judges Think*, n. 5 above, 32-33.

⁶⁶ Cass R. Sunstein, *Why Societies Need Dissent* (Cambridge, MA: Harvard University Press, 2003): 118-120 and 140-144 (with further references).

(internal dissent) justifies heightened protection of criticism of judges from external actors (external dissent). In other words, the scarcer the internal dissent, the more valuable external dissent becomes and the more we should protect it. Put bluntly, there must always be someone able and willing to say “The Emperor is naked”.

The remaining arguments in favour of a broader level of permissible criticism of judges to a significant degree overlap with those previously stated or do not seem to be so strong. These are the “right-to-receive-information” argument (that there is not only the right to *impart* information at stake but also the right to *receive* them), danger of “chilling effect” phenomenon leading to self-censorship, and need of dismantling a bar against involvement of citizenry without legal background in judicial matters.

Finally, it is often asserted that “criticism of the judiciary ... [is] a form of *political speech* and therefore enjoy[s] the highest degree of legal protection”.⁶⁷ However, the “political speech” argument is not equally accepted in all jurisdictions since perceptions of the role and importance of courts varies from one country to another. Barendt correctly observes that “it is easier for a society which fully accepts the political role of the judiciary to tolerate abusive criticism of it”.⁶⁸ Furthermore, it is equally plausible that people perceives only certain court(s) as political (usually the constitutional courts) and thus tolerate harsher criticism of the constitutional courts than of the ordinary courts.⁶⁹

⁶⁷ Barendt, *Freedom of Speech*, n. 14 above, 322 (emphasis added). See also Comella, “Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights,” n. 29 above, 116; and *Kobenter and Standard Verlags Gmbh v. Austria*, no. 60899/00, 2 November 2006, § 29 (iv).

⁶⁸ Barendt, *Freedom of Speech*, n. 14 above, 322.

⁶⁹ Unfortunately, the politicization of the constitutional courts often plagues also into the ordinary judiciary.

2.3 Summary of Part 2

It might seem that the arguments for greater criticism of judges by far outnumber the ones that counsel for maintaining strong protection of the judiciary. But it does not mean that they are necessarily more convincing. In other words, mere summation of arguments does not shift in itself the balance in favour of free speech. Yet it is perhaps correct to say that the arguments for shielding the judiciary from criticism are rather traditional and long-established assumptions whereas the arguments to the contrary represent progressive development of law. The process of re-reconciling freedom of speech and independence of the judiciary is thus already “on the road”.

Finally, it must also be borne in mind that not only legal norms in the strict sense and jurisprudence based thereon “signal” the level of permissible criticism of the judiciary taken in different countries. There are many other factors that influence the outcome of the core question, where does a particular country lie on the continuum of permissible free speech of the judiciary. These factors include among others selection and method of appointment of the judiciary, legal and political culture and level of maturity of a given democracy.

3 Overcoming myths of criticism of judges

The main focus of this chapter is to provide an answer to the core question – when does legitimate criticism of judges deteriorate into illegitimate, independence-threatening intimidation and how to manage it? To this end, this chapter proceeds as follows. Part 3.1 will briefly pinpoint the approach adopted by the ECtHR and ongoing shift in its jurisprudence. Part 3.2 will be devoted to identifying myths about criticism of the judiciary. Part 3.3 will propose how to overcome these myths, and building upon policy recommendations identified by Task Force of Citizens for Independent Courts it will suggest how to effectively respond to intimidating and misleading criticism of judges.

3.1 Recent trends in the jurisprudence of the ECtHR

Due to the limited scope of this essay, this subchapter does not have ambition to become an exhaustive account of the ECtHR's jurisprudence on criticism of judges. Instead, it will only briefly summarize its basic principles and outline their underlying rationale. But before doing so, I must explain why I chose the ECtHR as the starting point of my analysis.

Sure, the ECtHR is an international court that operates under the guise of the principle of subsidiarity, it employs techniques different from national courts and even though it aspires to become the "European Constitutional Court",⁷⁰ this position is still rather wishful thinking. However, these shortcomings are rebutted by the fact that the ECtHR accumulated sufficient number of cases that allows conducting a meaningful analysis,⁷¹ the ECtHR's case law "summarizes" the European approach to the problem, and that many cases from national courts have ended up there.⁷²

I will discuss the ECtHR jurisprudence in a non-routine way by answering the four Wh-questions: (1) WHO is criticized?; (2) WHO is criticizing?; (3) WHERE does criticism take place?; and (4) WHAT is said? The aim of applying this 4-Wh question analysis is to rebut the assumption that the place of the target of critical remarks (in this case of the judges) is a sole decisive criterion for the outcome of a free speech case before the ECtHR.

As to "WHO is criticized" question, the ECtHR developed a complex hierarchy of public figures that operates on a continuum, and placed the judiciary closer to the bottom of the ladder. The main rationale of the ECtHR for the protective approach to the judiciary was

⁷⁰ See Luzius Wildhaber, "A Constitutional Future for the European Convention of Human Rights?," (2002) 23 *Human Rights Law Journal* 161.

⁷¹ This is a main reason why I rejected the study into the Czech case-law. Due to the very limited jurisprudence it would be rather obscure and fail to address all the nuances of this complex topic.

⁷² But it must be reminded that the ECtHR sets only minimum standards of human rights protection and the signatory states to the ECHR50 are entirely free to adopt higher standards.

its inability⁷³ (or inappropriateness⁷⁴) of replying to their criticism. But more recently, the ECtHR has begun to invoke a “political speech” argument and to perceive criticism of judges as a part of political debate with wider limits for legitimate criticism.⁷⁵ Yet, the ECtHR is still willing to adopt more protective standard when the judges are attacked individually⁷⁶ (in contrast to criticising of the court as a whole or the judiciary within certain region). Furthermore, the ECtHR tends to distinguish between the various judicial officers *within* the judiciary itself. For instance, judges of the constitutional courts (and especially those that exercise abstract review of constitutionality⁷⁷) must withstand harsher criticism.

The second WHO-question focusing on speakers is even trickier. The ECtHR treats different speakers differently. Broadly speaking, ECtHR implicitly refused symmetry of speakers and has identified one “underprivileged” and three “overprivileged” groups of speakers. Therefore, it does matter who is speaking. The “overprivileged” groups include politicians, “elected representatives” in the broad sense,⁷⁸ and more arguably journalists. The sole “underprivileged” group is lawyers. In between are “ordinary citizens”.

Strong protection of free speech rights of politicians and “elected representatives” in the broad sense is essential since they are usually spokespersons of a broader group of persons, either formally (i.e. elected) or informally, and they also often represent a voice of opposition. Put differently, their position *ipso facto* arguably makes their criticism more valuable since it forms a direct part of the democratic process.⁷⁹ The press deserves heightened protection in order to be able to play its vital role of “public watchdog”. In

⁷³ *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 17, § 34.

⁷⁴ See e.g. *Buscemi v. Italy*, judgment of 16 September 1999, no. 29569/95, § 67.

⁷⁵ *Kobenter and Standard Verlags GmbH v. Austria*, no. 60899/00, 2 November 2006, § 29 (iv). Cf. *Ormanni v. Italy*, judgment of 17 July 2007, § 74.

⁷⁶ *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, § 37.

⁷⁷ See *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III; and Victor Ferreres Comella, “Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights,” n. 29 above, 118, footnote 99.

⁷⁸ This category includes representatives of professional or other bodies such as vice-chair of the parents’ organization in the context of education debate, chairman of the national Bar, elected representatives of police associations, or speakers in forums comparable to Parliament such as municipal councils.

⁷⁹ Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 12.

contrast, lawyers must accept wider self-censorship vis-à-vis the judiciary,⁸⁰ since “the special nature of the legal profession has a certain impact on their conduct in public, which must be discreet, honest and dignified”.⁸¹

Under the WHAT-question, the ECtHR heavily relies on the “criticism of reasoning”/ “personal attack” dichotomy and attempts to define the line between comments related to professional competency and the personal characteristics of judges.⁸² Similarly, it takes the *form* of criticism seriously. Therefore, insults of the judiciary are not protected by freedom of expression (even if they are not intimidating or misleading).⁸³ But distinction between criticism and insult is not clear-cut and assessment of a crucial issue – what level of criticism amounts to insult – has changed in time in favour of free speech.⁸⁴

Finally, as to the place of criticism, the ECtHR roughly distinguishes three places of criticism under the WHERE-question: (1) the courtroom; (2) “non-public communication” via private letters, complaints to superior officer, statements to the police, appeals and other submissions to the court; and (3) the media. Putting it briefly, the first two categories operate as a mitigating factor, whereas speaking one’s voice in media is considered an aggravating factor.

On the one hand, a strong protection of lawyer’s speech in the courtroom is required since it serves not only to the lawyer himself but primarily to the protection of the rightful interests of her clients,⁸⁵ and criticism in “non-public communication” works in favour of the speaker since the harm to the target of criticism is significantly reduced. On the other hand,

⁸⁰ See *Kyprianou* [GC], § 173; *Accord Schöpfer v. Switzerland*, judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1052-53, §§ 29-30; *Nikula*, § 45-46; *Steur v. the Netherlands*, no. 39657/98, § 36; ECHR 2003-XI.

⁸¹ *Veraart v. the Netherlands*, no. 10807/04, 30 November 2006, § 51 (referring to *Steur v. the Netherlands*, no. 39657/98, § 38; ECHR 2003-XI).

⁸² *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149, § 35; *Nikula*, § 51, Kobenter, § 30.

⁸³ See e.g. *W.R. v. Austria*, no. 26602/95, Commission decision of 30 June 1997 (unreported); *Wingarter v. Germany* (dec.), no. 43718/98, 21 March 2002; and *Skalka v. Poland*, no. 43425/98, 27 May 2003, § 34.

⁸⁴ See Dissenting opinion of Judges Caflich and Pastor Ridruejo in *Nikula* (§ 6) who point at the fact “[t]he applicant's attacks [in *Nikula*] seem *far more extreme* than they were in *Schöpfer* ... where the Court found no violation” (emphasis added).

⁸⁵ *Accord Meister v. Germany*, no. 30549/96, Commission decisions of 10 April 1997 (unreported).

the ECtHR seems to take the voicing criticism in the media (or leakage of “non-public communication” to media) as an aggravating circumstance for the speaker due to larger audience resulting in a bigger harm to the reputation of the judge and/or the authority of the judiciary as a whole.⁸⁶

In conclusion, a brief survey of the ECtHR’s jurisprudence generally supports the proposition of Michael Addo that the balance between protection of the judiciary and tolerance of freedom of expression has shifted in favour of the latter.⁸⁷ This is good news from Strasbourg for media and individual commentators. But there is also bad news. First, Strasbourg case-law is far from being predictable and consistent. Second, it suffers from several substantive deficiencies.

Most notably, asymmetry of speakers serves the most informed and most powerful individuals in the society, namely politicians, whereas the aggravated circumstance of voicing criticism in media places heavy burden on journalists (both full-time and occasional), and particularly on outspoken lawyers. These issues will be addressed in the following subchapter.

For now, it is sufficient to observe that according to the ECtHR’s case-law journalists must be still on guard. They should try to avoid naming the specific judges; they should carefully select their words (i.e. avoid “contested words”⁸⁸); they should be careful to question personal life or professional competence of judges and rather base their criticism strictly on the text of the judgment.⁸⁹ All in all, they should construe their criticism narrowly. As a result, lawyers and journalists are deterred from entering public discourse on the administration of justice, and their speech becomes diluted.

⁸⁶ *Schöpfer v. Switzerland*, judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1054, § 34; *Accord Lešník v. Slovakia*, no. 35640/97, ECHR 2003-IV, § 61; and *Nikula*, § 52.

⁸⁷ Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 239. *Accord Lemmens, La Presse Et La Protection Juridique De L'individu: Attention Aux Chiens De Garde*, n. 54 above, 300, § 407-408.

⁸⁸ Under ‘contested words’ I understand words that can be considered as insults.

⁸⁹ Reducing the criticism strictly to the reasoning of the judgment is naturally welcomed by judges since this the domain they excel at and thus can dismiss any criticism very easily.

3.2 Myths of criticism of judges

Drawing on the conclusions in previous chapters, this part will identify the myths of criticism of judges and put forth the argument that many of the arguments in favour of broader protection of the judiciary mentioned in Part 2.1 no longer have a place in the 21st century.

Starting from the reverse order, the first myth is that judges *cannot* respond to their criticism. This assertion is no longer substantiated, at least not in such categorical terms. It might be still plausibly argued that judges *should* not fight back or cannot *fully* respond to their criticism, but in fact, counterspeech is alive. Judges often appear on TV and explain their decisions, they respond to criticism via press releases and misleading accusations against the judges have been ultimately exposed in counterreports.⁹⁰ Richard Posner, himself a senior appellate judge, asserts that judges can easily dismiss both academic and journalistic criticism as being “product of politics and ignorance”.⁹¹ He further concedes that most judges are unaware of criticism of their work and thus not responsive.⁹² What is more, as this essay demonstrated, European judges including the Czech ones, are not hesitant to bring defamation proceedings or recourse to the law of torts.

The second myth is that internal checks on the proper functioning of the judiciary are sufficient. Apart from its slowness and apparent incompatibility with the argument from democracy, they have empirically proved to be insufficient. In the Czech Republic, the disciplinary proceedings against judges (judge Nagy’s case being the last example) proved to be a disaster⁹³ and this system is rightly under revision. However, the most important concerns stem from the institutional bias of judges deciding on criticism of their colleagues,

⁹⁰ See also Citizens for Independent Courts, *Uncertain Justice: Politics and America’s Courts* (New York: The Century Foundation Press, 2000): 144.

⁹¹ Richard Posner, *How Judges Think*, n. 5 above, 39.

⁹² Id.

⁹³ Michal Bobek, "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries," *European Public Law* 14, no. 1 (2008): 114.

sometimes even sitting on the very same court. This practice clearly violates the long-standing principle that “the justice not only must be done, it must also be seen to be done”. However, this does not mean that internal checks are useless. In fact, the following chapter will argue that after relatively minor modifications they might become very fruitful.

The third myth of smooth administration of justice has been exhaustively addressed in Part 2.1. The fourth myth is that society needs to be compelled to respect the authority and impartiality of the judiciary. The core question is whether society can be *compelled* to respect to behave accordingly at all. The response of the U.S. courts is telling. In *Bridges*, the USSC observed that

“The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion.... an enforced silence, however limited, solely in the name of preserving the dignity of the bench, *would probably engender resentment, suspicion, and contempt much more than it would enhance respect.*”⁹⁴

More recently, lower courts affirmed this reasoning when lawyers are speaking as well: “Limiting an attorney’s extrajudicial criticism of a branch of government in the name of preserving the judiciary’s integrity is likely to have an *unintended, deleterious effect upon the public’s perception*, since attorneys are often best suited to assess the performance of judges.”⁹⁵

The U.S. approach seems to be correct especially when politicians are speaking (or when others’ assertions are shared by politicians). If the courts try to silence its critics-politicians, it inevitably leads to another response via means which are usually more harmful than the original criticism. These means vary from threats of impeachment via court-packing plans to non-appointment of new judges and limiting the budget for the judiciary. Indeed, this is the strongest pragmatic argument for broad protection of speech critical to judicial officers. If we suppress criticism, it will “bubble-through” anyway. Most probably, it will also be more

⁹⁴ *Bridges v. California*, 314 U.S. 252, 270-271 (1941) (emphasis added).

⁹⁵ *Fieger, et al. v. Michigan Supreme Court, et al.*, _ F.Supp. 2d _ (E.D. Mich. Sept. 4, 2007) (emphasis added).

dangerous to the public interests of protection of judicial independence and administration of justice, since the suppressed actors will often overact.

The fifth argument of protection of judicial independence is definitely not a myth,⁹⁶ but requires further clarification. While I fully agree that protection of judicial independence is an important public interest, it must not be overestimated.⁹⁷ In fact, it was numerously reported that in Europe the notion of “judicial independence” was exaggerated or even abused for various claims, often very distantly related to any genuine threats to judicial impartiality.⁹⁸ Even in the U.S., where the threats of impeachment are common, John Yoo persuasively argues that no federal judge has ever been impeached and other institutional safeguards were not abolished.⁹⁹

Furthermore, judicial independence is just a proxy to judicial impartiality and fair justice. As a result, it must be coupled with accountability.¹⁰⁰ As Barendt correctly observes, “criticism of the judiciary is valuable, not only because it allows individual members of the society to participate in public discussion, but also because it contributes to the accountability of judges”.¹⁰¹ The independence of the judiciary and accountability are two sides of the same coin. It is thus entirely correct to state that “[a]ccountability, in turn, often begins with

⁹⁶ See footnote no. 20.

⁹⁷ See e.g. Citizens for Independent Courts, *Uncertain Justice*, n. 90 above, 147; and Bobek, “The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries,” n. 93 above.

⁹⁸ See *ibid.*; and Emmert F. The Independence of Judges – A Concept Often Misunderstood in Central and Eastern Europe, 3 *European Journal of Law Reform* 405 (2002).

⁹⁹ John C. Yoo, Criticizing Judges, 1 *Green Bag* 2d 277, 277 (1998).

¹⁰⁰ See *ibid.*; and also Barendt, “Michael K. Addo (Ed.): Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards (Book Review),” n. 3 above, 702; Comella, “Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights,” n. 29 above, 119; Addo, *Freedom of Expression and the Criticism of Judges*, n. 18 above, 12-14; and Blankenburg, E. Independence and Accountability of the Judiciary – Two Sides of a Coin: Some Observations on the Rule of Law in Central Europe. In: Sajó, A. (ed.), *Sajó, A. (ed.) Judicial Integrity*. Leiden: Koninklijke Brill NV, 2004: 207-224. *Contra* Barak, *The Judge in a Democracy*, n. 17 above, 94-96 and 108, who claims that “judges’ non-accountability is their most precious asset” (at 108).

¹⁰¹ Barendt, “Michael K. Addo (Ed.): Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards (Book Review),” n. 3 above, 702.

criticism” and “[s]uch criticism provides judges with an opportunity to rethink their views and to correct their errors”.¹⁰²

It is the sixth argument in favour of shielding the judiciary from criticism, which is the most powerful. This argument asserts that abusive criticism should not be protected since it undermines public confidence in the legal system and administration of justice. But the question stands: Will the fair administration of justice and public confidence in their authority be necessarily shaken by hostile comment? The answer in the U.S. is “no”. As Barendt rightly observes, “[i]t is truth of the comment, not the mere fact that it is made, which might in some circumstances undermine such confidence. If the remarks are true, the public should certainly be allowed to digest them.”¹⁰³

The ECtHR’s position is different. It repeatedly held that it is necessary to protect public confidence of the judiciary “against destructive attacks that are essentially *unfounded*”.¹⁰⁴ The immediate response is why should we ban unfounded criticism if it is unfounded? If it is really unfounded it cannot cause (much) harm. However, the problem is not black-and-white. Even if we assume that unfounded criticism does not affect judges’ independence, “the public perception may be to the contrary, thereby undermining public confidence in the courts”.¹⁰⁵ This is of course a serious problem.

The answer to this objection is not perfect but I am still persuaded that the competing values prevail. If we accept that criticism of judges serves three goals – it is instrumental to good government,¹⁰⁶ it is every citizen’s constitutional right, and it facilitates education of the public in legal matters – these goals suffice to outweigh the possible detrimental effect on public confidence in the courts. Furthermore, as I argued above, the question before us is not

¹⁰² Citizens for Independent Courts, *Uncertain Justice*, n. 90 above, 147. John Yoo goes further and asserts that “[j]udges should welcome all criticism (much like academics) in order to help them improve the quality of their work” (in: John C. Yoo, *Criticizing Judges*, n. 99 above, 281).

¹⁰³ Barendt, *Freedom of Speech*, n. 14 above, 321.

¹⁰⁴ *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 17, § 34.

¹⁰⁵ Citizens for Independent Courts, *Uncertain Justice*, n. 90 above, 149. See also Marek Safjan, *Politics and Constitutional Courts a Judge's Personal Perspective*, n. 19 above.

¹⁰⁶ Since it enhances accountability of the judiciary and pinpoints the errors in the functioning of justice.

“to allow *or* to stifle criticism”. Criticism of judges can never be eradicated. Instead, if we (attempt to) suppress it, it will come back through the backdoor anyway, and will be less transparent and often more dangerous.

The final argument against criticism of judges, not elaborated in Part 2.1, is protection of “the dignity of the judicial process”¹⁰⁷ or “the dignity of judges”.¹⁰⁸ If we leave aside the U.S. response mentioned above,¹⁰⁹ the best rebuttal is provided by Lord Denning, who referred to an article¹¹⁰ which strongly criticised a judgment of the Court of Appeal and which was allegedly a contempt of court, as follows:

“That article is certainly critical of this court. In so far as it referred to the Court of Appeal, it is admittedly erroneous ... Let me say at once that we will never use this jurisdiction [of contempt of court] as a means to uphold *our own dignity*. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not.”¹¹¹

Hence, the argument from “the dignity of judges” is unacceptable from the democratic point of view.

¹⁰⁷ Dissenting opinion of Judges Cafilisch and Pastor Ridruejo in *Nikula*, § 6.

¹⁰⁸ Dissenting opinion of Judge Pavlovschi in *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III.

¹⁰⁹ See *Bridges v. California*, 314 U.S. 252, 270-271 (1941); *New York Times v. Sullivan*, 376 U.S. 254, 272-73 (1964); and *Fieger, et al. v. Michigan Supreme Court, et al.*, _ F.Supp. 2d _ (E.D. Mich. Sept. 4, 2007).

¹¹⁰ The article included the following: “The recent judgment of the Court of Appeal is a strange example of the blindness which sometimes descends on the best of judges. The legislation of 1960 and thereafter has been rendered virtually unworkable by the unrealistic, contradictory and, in the leading case, erroneous, decisions of the courts, including the Court of Appeal. So what do they do? Apologise for the expense and trouble they have put the police to? Not a bit of it.”

¹¹¹ *R. v. Metropolitan Police Commissioner, ex parte Blackburn (no.2)* [1968] 2 All England Law Reports 320 (emphasis added). The whole passage of Lord Denning’s opinion was quoted by Judge Loucaides in his Partly concurring and partly dissenting opinion in *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III.

3.3 Overcoming myths

The previous chapter identified not only the myths of criticism of judges, but also serious concerns that criticism of judges poses. The aim of this subchapter is to overcome these myths and suggest recommendations that would integrate criticism of judges into the public confidence in justice. To this end, it suggest modifications in the ECtHR's approach, identifies the most dangerous forms of criticism of the judiciary and building upon policy recommendations identified by Task Force of Citizens for Independent Courts¹¹² (hereinafter only "CIC") it will suggest how to effectively respond to intimidating and misleading criticism of judges.

As mentioned above, this subchapter builds heavily upon the work of the CIC. This is not to put forth the U.S. standard of free speech. For instance, this essay does not call for the adoption of "actual malice" standard¹¹³ in defamation of public officials.¹¹⁴ It uses the CIC's analysis rather as an inspiration from the country with the longest and richest experience with criticism of judges. European countries can learn a lot from this experience, which may eventually help them to avoid many mistakes and prevent unnecessary ambushes upon the judiciary. It is this reason why the American response to criticism of judges is particularly valuable.

The first proposal to overcome the myths mentioned in the previous chapter is to abolish the discrimination of speakers. In Europe, the situation can be described as follows. On the one hand, journalists and lay persons are discriminated against since "they don't know enough". As a result, their attacks are (often) unfounded and punished. Conversely, lawyers are discriminated against since "they know too much" and, for that reason, their attacks are

¹¹² Citizens for Independent Courts, *Uncertain Justice*, n. 90 above.

¹¹³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

¹¹⁴ In fact, this standard was rejected also in other common law countries. *Reynolds v. Times Newspapers Limited*, [2001] 2 AC 127, 4 All E.R. 609 (UK); *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130; 126 DLR (4th) 129 (Canada); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (Australia); and *Lange v Atkinson* [2000] 3 NZLR 385 (New Zealand).

well-founded and again punished. In stark contrast is the treatment of politicians (and more arguably of judges themselves¹¹⁵). Politicians are prioritized since “they’re too powerful” and judges since “they are our colleagues”, and their comments are thus left unpunished.

The outcome is that on the one hand, ECtHR silences the public (lay persons) to whom the justice is originally supposed to serve, those who should serve as their watchdogs (press) and the *most informed* part of the public (lawyers) who can best pinpoint the deficiencies and misconducts of the judiciary, while, on the other hand, it leaves the *most harmful* criticism (by politicians) untouched. This approach is clearly incompatible with the argument from democracy. As I argued above, the centre of a court’s inquiry should be on the speech itself, not on the speaker. Among these three underprivileged groups, the most discriminated group is lawyers. This approach is particularly problematic since lawyers are “uniquely well-situated to inform the public of possible problems with the judicial system”¹¹⁶ and therefore deserve the same protection of their free speech rights. Furthermore, lawyers often act as whistleblowers in case of malfunctioning of justice.

The second proposal is to leave the judgment whether a particular criticism of the judiciary is unfounded up to the public. I fully agree with Comella that we should rely on social norms: “the audience should apply the relevant social standards and judge by themselves whether a particular speaker unduly insulted another person. A speaker undermines the persuasive effect of his own speech if he uses words that are regarded by the public to be insulting”.¹¹⁷ By adopting this position, the European courts (including the ECtHR) would solve three-fold problem. It would eradicate uncertainty whether a particular expression amounts to insult, limit the unnecessary chilling effect on freedom of speech, and

¹¹⁵ There has not been such a case (judge criticizing a judge) before the ECtHR so far.

¹¹⁶ Citizens for Independent Courts, *Uncertain Justice*, n. 90 above, 147.

¹¹⁷ Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," n. 29 above, 109. The Supreme Court of the Czech Republic employed the similar logic in a recent case of abusive criticism of local politician (Decision No. 30 Cdo 5018/2007).

avoid imposition of charitable interpretation of the utterance – an interpretation that would erode the radical quality of the message that is being conveyed.¹¹⁸

However, it does not mean that unfounded criticism should be left without *any* response. There are two types of criticism (which form a subset of unfounded criticism) that I find the most detrimental to the judiciary: (1) misleading; and (2) intimidating criticism. If we aim at preserving the public confidence in judiciary and fair administration of justice, it is important to react to this criticism effectively. But before we proceed to policy recommendations, we must define the goals they are supposed to meet.

The starting point for any response is that it is successful only if it persuades the target audience.¹¹⁹ Therefore, the correction should not be left solely up to the criticized judge. The risk is that a response by a judge to a criticism of her actions may be perceived by the community as “self-serving” and/or as a “defensive” position which fails for lack of credibility.¹²⁰ The same is true in the case of bar-generated responses or response by the Chief Justice. The CIC thus recommends that legal educators, civic organizations, community leaders, and other concerned citizens be involved in response efforts.¹²¹

Put differently, response to the criticism of judges should be “four-fold” and should involve Bench, Bar, Academia and Public (i.e. non-lawyers and interest groups).¹²² The crucial point is to involve non-lawyers since it buttresses the credibility of the response. Furthermore, this is not the only positive effect of involving non-lawyers as it also serves another long-term goal – education of the public on the role of courts.¹²³

But involvement of non-lawyers does not suffice in itself. Any response must meet four conditions: (1) it must be prompt, accurate, and take the appropriate form in order reach

¹¹⁸ See Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," n. 29 above, 109-111.

¹¹⁹ Citizens for Independent Courts, *Uncertain Justice*, n. 90 above, 156.

¹²⁰ *Ibid.*: 195.

¹²¹ *Ibid.*: 127.

¹²² *Ibid.*: 154.

¹²³ *Ibid.*: 156.

the target audience; (2) it must be used only when it is necessary; (3) it must recognize that the goal is not to protect judges, but to protect the rights of the people; and (4) it must not be perceived as a “shield” for the judges it defends.¹²⁴

The first condition is clear and rather technical.¹²⁵ It is the remaining three conditions that are critical. In fact, these three conditions are interrelated and interdependent. As to the second condition, the responses to criticism must be used carefully. While it should provide for a prompt response to misleading or potentially intimidating criticism, it must not seek to defend judges for the sake of defending them when they are subjected to non-intimidating, non-misleading criticism (however harsh).

The third condition flows from the second. On the one hand, it acknowledges that counterspeech can be effectively employed to neutralize judicial intimidation, but at the same time it makes clear that “when judges make erroneous decisions at the expense of our constitutional rights and responsibilities, they deserve criticism”.¹²⁶ The CIC correctly observes, that “[t]o attempt to protect judges from legitimate criticism also disserves the individual rights that we seek to protect and preserve”.¹²⁷ Finally, the fourth condition calls for independent assessment whether the response is necessary and appropriate. The Bar should not respond simply because a judge has requested the Bar to intervene on her behalf.¹²⁸

The final recommendation relates to judicial discipline. As I mentioned above, the internal checks on the functioning of the judiciary have proven to be insufficient. But the disciplinary proceedings should not be rejected as such. Judicial discipline is critically important to preserving an independent judiciary.¹²⁹ But the public must be aware of its existence and must be allowed to participate in it.

¹²⁴ Ibid.: 155-156.

¹²⁵ For details, see *ibid.*: 201-203.

¹²⁶ Ibid.: 156.

¹²⁷ Ibid.: 156.

¹²⁸ Ibid.: 156.

¹²⁹ Ibid.: 151.

In fact, judicial discipline can be easily improved by involving other legal professions, and preferably also non-lawyers, in the composition of the disciplining organs.¹³⁰ It might be argued that this step would politicize the appointments into this organ and may ultimately undermine the judicial independence. But these threats can be eradicated by appropriate models of appointment (e.g. by a lot from the list of attorneys registered at the Bar¹³¹) and composition of the organs. The judges may retain majority in the disciplining authority and the main goals – breaking the false collegiality and enhancing public confidence in the disciplinary proceedings – would be still met. It is not necessary to add that these improvements are not to the detriment but in the interest of the judges themselves.

4 Conclusion

This essay demonstrates that criticism of judges is alive. It even suggests that the general trend both in Europe is that criticizing judges has become fashionable. But it is by no means new. At least in U.S., criticism of the judiciary has regularly oscillated between historical ebb and flow. The European experience (especially in the post-communist Europe) is different but situation on both sides of the Atlantic seems to have converged recently. Nevertheless, the one thing is clear. It seems highly unlikely that this criticism will diminish in the near future as it is an inevitable “by-product” of the growing power of the courts.

Judges are no longer mouthpieces of the legislature nor do they live in Montesquieu’s world. Even if we do not ascribe to claims of “juristocracy” or “judgeocracy”, we cannot deny that the judicial decision-making frequently enters into areas where people feel very strongly for religious, political, or philosophical reasons. In Europe, this phenomenon is exacerbated by the existence of the abstract review of legislation. As a result, European constitutional

¹³⁰ It is thus praiseworthy that the Czech Republic attempts to accommodate the lay factor (albeit not non-lawyers) in the new system of judicial disciplinary procedure.

¹³¹ That would be similar to assigning attorneys *ex officio*.

courts are even more powerful. It is thus only natural that criticism of judges has increased and intensified.

A recent ambush upon the CC prior to and following rulings on tax, health insurance and social security reform serves as a clear example of this phenomenon. In fact, what we experience in the Czech Republic now is politicians' fight back and attempt to regain control of what has been devolved to judges shortly after the Velvet Revolution. To accomplish this end, politicians adopted two effective techniques, delegitimisation of the judiciary, and delegation of responsibility upon the judiciary.¹³²

When responding to these practices it is important to bear in mind that the judiciary can never win over more political branches in direct clash. However, this is not to say that judges should become indifferent and inactive (or hide behind the notion of "judicial independence"). Instead, judges should tackle delegitimisation and delegation by mixture of verified and creative techniques; for instance by applying consistent methodology, strong adherence to precedent, adopting (at least initially) more deferential position towards governmental policy, acquiring reputation for fairness and intellectual rigour, and, more arguably, by quoting to foreign jurisdictions.¹³³ Their ultimate goal is to gain popular support.¹³⁴ Unfortunately, Czech courts have a poor record in this area.¹³⁵

More specifically to the criticism of judges, unfounded criticism can be easily rebutted for instance by publishing all decisions of *all* the Czech courts on Internet and (simultaneously) by avoiding legal jargon, so that every citizen can verify whether the

¹³² These two techniques are not mutually exclusive (delegation often precedes delegitimisation).

¹³³ The last technique must be exercised with caution and rather sporadically since it is extremely time-consuming and since it can be easily misused or even abused. Here I partially disagree with Marek Safjan (see n. 19 above). On pitfalls of constitutional borrowing, see Goldsworthy, J.: Questioning the migration of constitutional ideas: rights, constitutionalism and the limits of convergence. In: Choudhry, S.: *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2007):115-141

¹³⁴ This in ideal situation means reaching the stage, when the costs of unfounded criticism of the judiciary (such as 'political mobbing') or change of rules of the game (see footnote no. 20) become intolerable electorally.

¹³⁵ As a result, attacks on the judiciary seem to have 'sex-appeal' both for politicians and voters.

criticism is unfounded or not. But it is correct to acknowledge that not every criticism can be fought effectively this way.

For this reason, my essay suggests recommendations that provide an effective response to intimidating and misleading criticism and which ultimately should minimize its harmful consequences. However, we must not forget that both criticism of judges and stifling the criticism described in this essay represents only the top of the ice-berg as there are various types of *informal* restrictions and *indirect* sanctions on criticism of judges, which never come before courts.¹³⁶ It would be very peculiar to claim that these informal restraints disappeared in time or took place only in common law jurisdictions.

The main message of this essay is that criticism of judges is one of the few checks on their work. It provides response, however partial, to the question how to guard the guardians. Contrary to the prevailing view, criticism of judges is neither necessarily in tension with the judicial independence nor does it necessarily undermine the public confidence in courts. In fact, non-intimidating, non-misleading criticism (however excessive) is a *proxy* to judicial independence and not a threat. It enhances judges' accountability and prevents disproportionate attacks from the more political (and more powerful) branches, and at the same time it buttresses public confidence in judicial system and improves it.

It is thus only the intimidating and misleading criticism that is capable of eroding public's confidence in courts. Therefore, there should be a presumption in favour of free speech and the few limitations should serve only the citizens who deserve an impartial decision on their claim, and not the judges themselves. Only then the perception of the judiciary as a "cloistered virtue" will cease to exist.

¹³⁶ Van Niekerk, *The Cloistered Virtue*, n. 37 above, 149-208. On the other hand, internal criticism of the judiciary, unknown to general public, also occurs.