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# Media as a second trial?

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Prohlašuji, že jsem esej na téma „Media as a second trial?“ zpracovala sama a uvedla jsem všechny použité prameny. Dávám souhlas s prvním zveřejněním své eseje vyhlášovateli soutěže nebo spolupracujícími institucemi v papírové či elektronické podobě.

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## Introduction

The nowadays media usually work on a daily basis or even on a 24/7 cycle. At the same time it also means that the media still need new information they can communicate, or even better for them, a wide flow of information from which they can choose the best fitting ones to use for their stories according to the agenda-setting criteria. This means the cooperation between media and legal system, too. In this essay, the focus is laid on particular cooperation or non-cooperation between media and judiciary: how do they cooperate? What can it mean for society and bring back to the judicial system? What is the typical behaviour of judges and media when they meet?

The essay is founded on the international literature and articles from the field of media, legal system and sociology. The supportive instrument is also the interview with the former judge of the European Court of Human Rights Egbert Myjer from the Netherlands. The essay is based on the information from the diploma thesis of the author.<sup>1</sup>

## 1. Media influence

### 1.1. Media as information influencer

Media cooperate with the regulatory system on everyday basis as they are systematically informing about the news from particular country which include changes and news from legal framework, too; even though some of the journalists do not necessarily feel in that way or they just do not notice the fact. That is why media have been labelled as in-between collectors informing public about the news from legal branch. This statement is supported even by court decisions when expressed *“if [applicant] told reporter this information, it is necessary to conclude that he [applicant] told the information to the public and he had to acknowledge they can be published.”*<sup>2</sup>

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<sup>1</sup> STACHOŇOVÁ, Monika. *Mass media and their role in the mechanism of legal regulation* [online]. 2014 [quot. 27<sup>th</sup> May 2015]. Diploma thesis. Masaryk University, Brno, Czech Republic. Faculty of Law. Supervisor Martin Škop. Available from: [http://is.muni.cz/th/348314/pravf\\_m/](http://is.muni.cz/th/348314/pravf_m/)

<sup>2</sup> Ruling of the Supreme Court of the Czech Republic from 25<sup>th</sup> April 2013, no. 30 Cdo 860/2013. Supreme Court [online]. Supreme Court of the Czech Republic 2010 [quot. 4<sup>th</sup> May 2015]. Available from: [http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/0BE0383FC3E65486C1257B740047E3AC?openDocument&Highlight=0,novin](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/0BE0383FC3E65486C1257B740047E3AC?openDocument&Highlight=0,novin)

On the other hand, media are also working vice versa as the voice and reflection of the public opinion for the lawmakers due to its nature: law is a vivid part of our social system and one of the main legislative purposes is to contribute to the actual living world and coordinate actual social problems. That is why it has to develop and change according to progress in society – which is being shown inter alia also by news in media. As the Council of Europe stresses, “[i]n order to survive in the present-day media landscape, PSM<sup>3</sup> must increasingly strive to move away from one-way communication to reinforced dialogue and afford the public access to varied information as well as a possibility to engage and participate in the democratic debate.”<sup>4</sup> This fact is valid not only for public service media but also for commercials as they follow the trends even quicker and usually are progressive in innovative forms of discussions with people.

Except for public service media, the others are not defined by legislative or ethical codices so precisely which means their role of ‘information influencer’ can differ. If we look at them through the optics of Jewkes criteria of news values for a new millennium, we can see they pick some of the values more than the others. While general news values according to Jewkes are threshold, predictability, simplification, individualism, risk, sex, celebrity or high-status persons, proximity, violence or conflict, visual spectacle or graphic imagery, children, conservative ideology and political diversion<sup>5</sup>; we can add more criteria for public service media. They should namely keep “[i]nforming the public in a truthful, objective and credible way about politics” and “contribute to the promotion of democratic participation of the individual members (...). On the other hand, PSM could fulfil a vital role in educating active and responsible citizens, providing not only quality content but also a forum for public debate, open to diverse ideas and convictions in society, and a platform for disseminating democratic values. One of PSM’s roles should be to foster citizens’ interest in public affairs and encourage them to play a more active part.”<sup>6</sup>

As we can see, one of the media’s main roles which is implicitly connected to them and expected from academic sphere as well as the general public, is also *informing about legal*

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<sup>3</sup> = public service media

<sup>4</sup> Group of Specialists on Public Service Media in the Information Society. *Strategies of public service media as regards promoting a wider democratic participation of individuals*. Strasbourg: Council of Europe, 2009. 47 p. Page 5.

<sup>5</sup> JEWKES, Yvonne. *Media and crime*. London : Sage, 2011. 317 p. ISBN 978-1-84860-702-6. Page 45.

<sup>6</sup> Group of Specialists on Public Service Media in the Information Society. *Strategies of public service media as regards promoting a wider democratic participation of individuals*. Strasbourg: Council of Europe, 2009. 47 p. Page 5.

topics. This means when media inform about particular case frequently enough, they can influence public opinion as it is expected of them to inform about it – which can have further consequences: “Citizens will not lose all their faith in legal authorities owing to one bad experience with a police officer or judge, nor would the feeling that legal authorities are not legitimate be overcome by a single favourable experience. What ultimately matters is the sum of one’s experiences.”<sup>7</sup> That is why some experts warn the media against conscious influencing and Postman shows connection with it through three basic commandments used in media. Postman applied these to television but according to my view they are similarly applicable to the other media forms, too:

- thou shalt have no prerequisites
- thou shalt induce no perplexity
- thou shalt avoid exposition like the ten plagues visited upon Egypt<sup>8</sup>

Since media usually in some varied form or another really apply these ‘commandments’, they can cause many misunderstanding and even damage. Let me explain it with a practical example. If we focus on second commandment – that media should not evoke uncertainty – we can see the media informing about legal topics with the tone of absolute truth, without any possible insecurity. However, that is wrong because law is not always one hundred per cent clear and absolute. Also, the media can never be really neutral and totally objective. As McChesney stresses, if we do not accept it, it is impossible to reveal the values taken into the game.<sup>9</sup> This is also emphasized by media analyst Milan Šmíd when pointed out that media are always subject which is determined by its character, experience, value system and the other factors. That is the reason why objectivity is impossible to achieve. He suggests talking more about impartiality and factual accuracy.<sup>10</sup> Moreover, it is necessary to realize that basic European media legislation does not even require absolute objectivity.<sup>11</sup> Objectivity itself can be taken only as an ideal to tend to.

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<sup>7</sup> TYLER, Tom R. *Why People Obey the Law*. New Jersey: Princetown University Press, 2006. 299 p. Page 76.

<sup>8</sup> POSTMAN, Neil. *Amusing Ourselves to Death: Public Discourse in the Age of Show Business*. London: Penguin Books, 2005. 184 p. Pages 147-148.

<sup>9</sup> MCCHESENEY, Robert Waterman. *The Political Economy of Media: Enduring Issues, Emerging Dilemmas*. New York: Monthly Review Press, 2008. 589 p.

<sup>10</sup> ŠMÍD, Milan in RŮŽIČKA, Vlastimil. *Politika a média v konzumní společnosti*. Praha: Grada Publishing, a.s. 2011, 1. vyd. ISBN 978-80-247-3667-9. Pages 94-96.

<sup>11</sup> e.g. Article 10 of ECHR: „...This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

Typically, when media inform about criminal cases they use terms as ‘perpetrator’ or “murderer” – for someone accused as if he was already sentenced, although the proceedings were still running or even in their beginning (as described below in case study of “bribery in a political party”). However the breach of presumption of innocent in criminal proceedings is just one of many examples. That is why on the one hand media as information influencer can cause good through keeping public updated, well-informed and educated, while on the other hand the badly mediated information can cause wrong and unintended consequences.

Another problem is connected with judges and law professionals as emphasized by Kirtley – that the official activities of the judiciary have a tremendous impact on public. *“And yet, when journalists set out to report on court cases, it may result in an adversarial relationship. Simply put, journalists frequently want to publicize information attorneys and the judge would prefer to keep secret.”*<sup>12</sup> Jewkes namely shows from which sources it raised: *„To what degree do media images bring about the negative effects in their viewers? The academic study of this phenomenon – ‘effect research’ as it has come to be known – developed from two main sources: mass society theory and behaviourism.”*<sup>13</sup>

One of the typical examples where media had negative influence could be the case of fourteen years old boy from small Czech town that allegedly stabbed his math teacher on her hand. Although there was no evidence and the investigation had just begun, the Czech mass media started to show his photo, school, friends and even his family’s house with words like ‘aggressor’ or ‘young attacker’ and similar titles. Even though his surname was never told publicly, because of all the other evidence published, everyone in his hometown knew which boy was meant by the news<sup>14</sup> as the town was rather small with approximately 16 thousand

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<sup>12</sup> KIRTLEY, Jane et al. *Media Law Handbook*. Bureau of International Information Programs [online]. 2010, 66 p. Page 26 [quot. 10<sup>th</sup> May 2015]. Available from: <http://iipdigital.usembassy.gov/st/english/publication/2011/04/20110428143515su0.4137776.html#axzz2j1sse9x8>

<sup>13</sup> JEWKES, Yvonne. *Media and crime*. London : Sage, 2011. 317 p. ISBN 978-1-84860-702-6. Page 10.

<sup>14</sup> Examples of the articles about the case in Czech yellow press:

- ČTK. *Tohle je učitelka, kterou pobodal její student: Po chodbě se procházel s rukama od krve*. Blesk.cz [online]. 30<sup>th</sup> Oct 2012. [quot. 18<sup>th</sup> May 2015]. Available from: <http://www.blesk.cz/clanek/zpravy-udalosti/184482/tohle-je-ucitelka-kerou-pobodal-jeji-student-po-chodbe-se-prochazel-s-rukama-od-krve.html>
- ČTK. *Pobodaná učitelka (61) promluvila o útoku: Odlákal mou pozornost a pak mě napadl*. Blesk.cz [online]. 15<sup>th</sup> Nov 2012. [quot. 10<sup>th</sup> May 2015]. Available from: <http://www.blesk.cz/clanek/zpravy-udalosti/185536/pobodana-ucitelka-61-promluvila-o-utoku-jakub-14-odlakal-mou-pozornost-a-pak-me-napadl.html>
- Veselý, Richard. *Zesměšnila školáka kvůli koktání? Pobodaná učitelka se chystá zpátky do školy*. Blesk.cz [online]. 8<sup>th</sup> Nov 2012. [quot. 25<sup>th</sup> May 2015]. Available from: <http://www.blesk.cz/clanek/zpravy-udalosti/185008/zesmesnila-skolaka-kvuli-koktani-pobodana-ucitelka-se-chysta-zpatky-do-skoly.html>

inhabitants. After one of the reportage during prime time on the most viewed Czech television (TV Nova) someone even wrote on the fence of his family's house sign saying 'killer'.

So, in this case, the negative effect of the media's influence apparently prevailed while trying to inform the public, though it had wrong consequences over respect to the presumption of innocent, right to privacy and protection of the minors. As pointed out by Kirtley, from the time a suspect is arrested or charged until sentencing, journalists should have the possibility to attend the proceedings but are limited in what they may report. This question remain still actual in the Czech Republic, where the praxis is highly fragmented: while during one politically exposed trial with well-known politician Vít Bárta (as in detail described further) the court opened his hearings to public and media without any restrictions, in another political process with former prime minister Petr Nečas and his mistress the court closed many hearings to secret. This can be understood by the media and public as very confusing, unclear or it can even undermine the trust of judiciary as a whole. On the other hand, in some countries, provisions in the civil or criminal code specify what types of information may or may not be reported, and ethical codes (practised and followed by media) helps in raising trust between media and judiciary. *"In some nations like Sweden, where the law is silent, the journalists' own code of conduct specifies that defendants should not be identified unless 'an obvious public interest requires it.'"*<sup>15</sup>

Despite that, as Jewkes stresses further, *"the influence of the media can be conceptualised both negatively and positively, depending on the perspective adopted."*<sup>16</sup> This means it is possible to come across such media who are responsible for much of the crimes, on contrary to the approach of other media who are educating public about the law, crime and prevention. According to Růžička, the empirical outcomes are not so important in comparison with the ability to quickly recognize the social impact of newly arising communication networks, and then to adopt an *individual sense of responsibility*, or even the responsibility for all the humanity – for the world that people inhabit together.<sup>17</sup>

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<sup>15</sup> KIRTLEY, Jane et al. *Media Law Handbook*. Bureau of International Information Programs [online]. 2010, 66 p. Page 27[quot. 11<sup>th</sup> May 2015]. Available from:

<http://iipdigital.usembassy.gov/st/english/publication/2011/04/20110428143515su0.4137776.html#axzz2j1sse9x8>

<sup>16</sup> JEWKES, Yvonne. *Media and crime*. London : Sage, 2011. 317 p. ISBN 978-1-84860-702-6. Page 40.

<sup>17</sup> RŮŽIČKA, Vlastimil. *Politika a média v konzumní společnosti*. Praha: Grada Publishing, a.s. 2011, 1. vyd. ISBN 978-80-247-3667-9. Page 17.

## 1.2. Agenda setting as key to the media

Since the media have mechanisms to convince the audience about the priorities of their content, not surprisingly they can therefore *regulate attention* on selected topics.<sup>18</sup> This so called agenda setting is one of the most powerful influences of the media – the ability to tell their readers which issues are important.

Agenda setting is usually defined as the creation of public awareness by the media and their focus on salient issues which are emphasized through media news.<sup>19</sup> Agenda setting theory was formally developed by Dr. Max McCombs and Dr. Donald Shaw during presidential election in 1968. By comparing the salience of issues in news content with the public's perceptions of the most important election issue, McCombs and Shaw were able to determine the degree to which the media determines public opinion.<sup>20</sup>

The obvious aim of agenda setting is therefore to intentionally influence public opinion – nowadays not necessarily only with a focus on politics but on wide range of topics in society. Two basic assumptions underlie most research on agenda-setting: firstly that the press and the media do not reflect reality but they rather filter and shape it (Niklas Luhmann goes even further with the idea of media making their own, second reality<sup>21</sup>); and secondly that media concentration on just a few issues or subjects leads the public to perceive those chosen issues as more important than the others. Moreover, agenda setting is usually accompanied by the certain time frame. But of course, different media have different agenda-setting potential. It is necessary to realize that the agenda setting is one of the aspects of media's pervasive role, typical for political communication systems.<sup>22</sup>

According to Berkowitz, the relationship of media and policymakers – who are the legislators at the same time – is symbiotic and controlled by shared culture of unofficial set of ground rules as journalists need access to official information and policymakers need media coverage. On the contrary, he also points out that often the needs of journalists and policymakers are

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<sup>18</sup> JIRÁK, Jan; KÖPPLOVÁ, Barbara. *Média a společnost*. Vyd. 2. Praha: Portál, 2007. Page 159.

<sup>19</sup> AGENDA SETTING THEORY. The University of Twente [online]. 2014[quot. 10<sup>th</sup> May 2015]. Available from: [http://www.utwente.nl/cw/theorieenoverzicht/Theory%20clusters/Mass%20Media/Agenda-Setting\\_Theory/](http://www.utwente.nl/cw/theorieenoverzicht/Theory%20clusters/Mass%20Media/Agenda-Setting_Theory/)

<sup>20</sup> MCCOMBS, M.E., SHAW, D.L. *The Agenda-Setting Function of Mass Media*. Public Opinion Quarterly, 1972, no. 36 (Summer), 176-187.

<sup>21</sup> LUHMANN, Niklas. *Realita masmédií*. Praha: Academia, 2014. 144 p.

<sup>22</sup> AGENDA SETTING THEORY. The University of Twente [online]. 2014 [quot. 24<sup>th</sup> May 2015]. Available from: [http://www.utwente.nl/cw/theorieenoverzicht/Theory%20clusters/Mass%20Media/Agenda-Setting\\_Theory/](http://www.utwente.nl/cw/theorieenoverzicht/Theory%20clusters/Mass%20Media/Agenda-Setting_Theory/)

incompatible or adversarial sometimes more of exchange.<sup>23</sup> Jewkes adds that this relationship as well as agenda-setting are influenced by the ownership and control of the mass media which is concentrated in the hands of very few individuals, and there is reliance among editors on a relatively limited pool of expert and available sources which can mean that culturally dominant groups impose patterns of belief and behaviour which conflict with ethnic, cultural and religious minorities.<sup>24</sup>

Media are **influence policymakers** – for instance government officials and politicians take the amount of media attention given to an issue as an indirect expression of public interest in the issue.<sup>25</sup> This was shown by Shoemaker, Wanta and Leggett who found that the percentage of the American public talking about drugs as the most important problem for America those days was correlated with the amount of media coverage to this particular topic few months before the survey. And what is even more important to demonstrate, is that the intense media coverage influences not only public opinion but also legal policy decisions. In that period of time, federal funding for antidrug law enforcement tripled and after media news campaign state added the other money.<sup>26</sup> This also functioned similarly in the Czech Republic in case of so called Crooks (Šmejdi) where there was a huge media pressure on politicians to change particular legislature.<sup>27</sup>

As we can see from abovementioned, media have tendencies to make some topics more visible at the expense of some others. We can realize particularly this fact for example through the experiment made by NewsWhip: they asked themselves the question ‘what if front pages were selected by newspapers’ readers instead of their editors and how those stories differ from the normal news stories editors put on the front pages of big newspapers.’ They found out that in most cases the stories picked by the readers were fundamentally different from

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<sup>23</sup> BERKOWITZ, D. “*Who sets the media agenda? The ability of policymakers to determine news decisions.*” In KENNAMER, J. D. *Public opinion, the press, and public policy.* Westport, CT: Praeger Publishers. Pages 81–102.

<sup>24</sup> JEWKES, Yvonne. *Media and crime.* London : Sage, 2011. 317 p. ISBN 978-1-84860-702-6. Pages 19-20.

<sup>25</sup> ROGERS, E. M., & DEARING, J. W. *Agenda-setting research: Where has it been? Where is it going?* In: Anderson, J.A. (Ed.). *Communication yearbook 11* (555-594), 1988. Newbury Park, CA: Sage.

<sup>26</sup> DEARING, J. W., & ROGERS, E. M. *Agenda-setting.* Thousand Oaks : Sage Publications, 1996. 139 p. Page 21.

<sup>27</sup> Case study is fully described in STACHOŇOVÁ, Monika. *Mass media and their role in the mechanism of legal regulation* [online]. 2014 [quot. 27<sup>th</sup> May 2015]. Diploma thesis. Masaryk University, Brno, Czech Republic. Faculty of Law. Supervisor Martin Škop. Available from: [http://is.muni.cz/th/348314/pravf\\_m/](http://is.muni.cz/th/348314/pravf_m/)

the chosen ones by the editors.<sup>28</sup> This case shows that media can set the agenda they want to be shown, instead of what their readers' choice would be.

Even though the news values, on the basis of which the news are picked into media by journalists, are subject to subtle changes over time and vary across different countries and cultures, Jewkes pointed twelve general ones (as abovementioned), while people who work in media and apply these criteria "*do have some degree of influence in terms of what potential stories they select and how they then organize them*"<sup>29</sup>. That is why we have to keep in mind that images made by the media are not reality. They are a *version* of reality that is culturally determined and dependent on related factors: on production processes of news organizations and also on agenda setting which prioritizes some stories over others.<sup>30</sup>

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<sup>28</sup> QUIGLEY, Paul. *Here's what happens when the readers choose the front page story* [online]. NewsWhip 2014 [quot. 12<sup>th</sup> May 2015]. Available from: <http://blog.newswhip.com/index.php/2014/03/people-powered-front-pages-rock>

<sup>29</sup> JEWKES, Yvonne. *Media and crime*. London : Sage, 2011. 317 p. ISBN 978-1-84860-702-6. Page 69.

<sup>30</sup> Ibid. Page 41.

## 2. Media influence on judicial decision making<sup>31</sup>

*“The pre-eminent role of the press in a democratic society is to impart ideas and opinions on political matters and on other matters of public interest.”*<sup>32</sup> The opinion of the ECHR means the media are a valuable source for judges themselves, as well as being filled by the news from the courts. This influential duality is reflected in their sometimes adversarial, sometimes complementary relationship. In my opinion, media and judiciary should be primarily cooperating with each other while respecting specifics of the other side. It is because on the one hand, media can bring valuable topic worthy of a change to the public eye or the idea to judiciary which was not considered or included; while on the contrary the judiciary fills the news content with the decisions and commentaries on legal topics.

Media effects according to social constructivists, involve a view of the media as those who tend to offer a ‘preferred’ view on social reality, which includes not only information providing but also their own interpretation – forming value judgements and opinions. Although as McQuail adds, it is up to the audience to decide whether or not to adopt the views offered, the fact is the media are often *the only source* available for forming opinions in a particular topic. Though there is no automatic line between the information offered and the necessity of audience acceptance. On the contrary, the media with their effects are not plain transmitters of movement messages and activities but the selectors, influenced by negotiations and conflicts in the news organizations.<sup>33</sup>

### 2.1. Media influence on judges

*“If the media have the role of public watchdog, then it is perfect. The criticism against judges works – that is necessary. But when the media take up the role of the judges themselves – that is different,”*<sup>34</sup> says judge Myjer and adds that for the future of the media the only thing that troubles him is the media influence on the public – then it is sometimes very difficult to give the real message to the public (as a judge) through the judgement; because the public already

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<sup>31</sup> When talking in this chapter or even in this thesis about ‘influence of the media’, it is meant synonymous to the term of media effects which are according to McQuail potential consequences, whether good or bad, intended or unintended. According to McQUAIL, Denis. *Mass Communication Theory*. 6<sup>th</sup> edition. London: SAGE Publications Ltd. 2010, 614 p. ISBN 978-1-84920-291-6. Page 341.

<sup>32</sup> Judgment of the ECHR from 01/07/2008, application no. 17343/04, the European Court of Human Rights [online]. 2012 [quot. 10<sup>th</sup> May 2015]. Available from: [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["17343/04"\],"itemid":\["001-87217"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)

<sup>33</sup> McQuail p. 459-460

<sup>34</sup> MYJER, Egbert. *Verbal expression*. Interviewed in Leiden [13<sup>th</sup> Dec 2013].

read conclusions in media<sup>35</sup> even before the final sentence was declared by the judge. Famous Czech journalist (focusing on legal topics) Tomáš Němeček confirms this hypothesis when says sometimes it is possible to see the 'media sentence' being released before a final decision comes in a particular case (e.g. in case of Czech former Prime Minister Petr Nečas<sup>36</sup>). Although in Němeček's opinion, it is more work of low-quality media as the others keep the principle of presumption of innocence, he admits he also sometimes used to comment not concluded case in the newspaper.<sup>37</sup>

As judge Myjer points out, another connected problem is "*you never know how the media caught the information from the file. Then the media are used as kind of secondary trial.*" This abuse is according to him very bad. The courts also have to deal with it – e.g. in cases of the *Sunday Times v. The United Kingdom (no. 2)* or the *Observer and Guardian v. The United Kingdom*.<sup>38</sup>

If following the most of the judiciary rulings, the role of the media as a public watchdog within the certain and clearly based limits is considered to be good. Despite that, they should keep information factual and within the limits of acceptable criticism.<sup>39</sup> As described by judge Myjer on practical example, the media can influence the judges *in a good manner*. He describes Dutch media in the past as 'not very critical' until the moment a journalist Jacques van Veen started to write a column with realistic and critical remarks when he thought the judges or prosecutors were not acting fair e.g. when they did not let the suspects speak, when they were behaving in a paternalistic way or were mumbling badly so nobody could hear them.

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<sup>35</sup> Ibid.

<sup>36</sup> See more at: ROZEHNAL, Aleš. *V kauze Nagyová selhala média* [online]. © 2014 HlídacíPes.org [quot. 30<sup>th</sup> May 2015]. Available from: <http://hlidacipes.org/ales-rozehnal-v-kauze-nagyova-selhala-media/>

<sup>37</sup> (Translated by the author of thesis from the original Czech language) NĚMEČEK, Tomáš In: SOMMEROVÁ, Klára. *Masová média a jejich role v mechanismu právní regulace* [online]. 2012 [quot. 15<sup>th</sup> Feb 2014]. Diploma thesis. Masaryk University, Brno, Czech Republic. Faculty of Law. Supervisor Martin Škop. Available from: [http://is.muni.cz/th/257566/pravf\\_m/](http://is.muni.cz/th/257566/pravf_m/)

<sup>38</sup> Judgment of the European Court of Human Rights from 26/11/1991, application no. 13585/88, the European Court of Human Rights [online]. 2012 [quot. 14<sup>nd</sup> March 2014]. Available from: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57705#{"itemid":\["001-57705"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57705#{)

<sup>39</sup> MYJER, Egbert. *Verbal expression*. Interviewed in Leiden [13<sup>th</sup> Dec 2013].

The influence of this reporter was enormous – because he did not take a role of a judge himself; he described critically the court process and the behaviour of persons. The point was that even when the judge read his article, he could consider if he really had acted in a proper manner or if he should improve something in his own behaviour – he was not advised on how to solve the case or criticised for his legal opinion in judgement.<sup>40</sup>

### 2.1.1. Isolation of judges from media as a solution?

It is impossible to prove the media influence on judges in factual decision-making as it cannot be verified or measured. This kind of influence is also strictly denied by judge Myjer when he explicitly said he had never been influenced by media on the judicial contents.<sup>41</sup> On the other hand, Postman objects that *“whatever the original and limited context of its use may have been, a medium has the power to fly far beyond that context into new and unexpected ones. Because of the way it directs us to organize our minds and integrate our experience of the world, it imposes itself on our consciousness,”*<sup>42</sup> and adds that these forms of definitions and regulations always implicitly influence our ideas of truth. Czech judge Zdeněk Kühn comments by stating that a judge of course does not live isolated in ‘a tower’ but he should be professionally trained to stay resistant against populist or majority opinions. His conclusion is the judge should perceive what is told by the media about the case but at the same time he should be good enough to decide according to the law and not according to journalistic conviction.<sup>43</sup>

As judge Myjer points out, firstly, when reading the newspaper, he would not take the contents automatically as a fact but secondly he adds the judge should always be upstanding within society, at least on one leg. Because if he does not read and does not use new technologies, then he can maybe attempt to be a good lawyer in terms of the ‘legal professional’, but to be a good judge, he should stand in the middle of the society. *“You should be aware what is going on in the society but that does not mean you should be affected by it*

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> POSTMAN, Neil. *Amusing Ourselves to Death: Public Discourse in the Age of Show Business*. London: Penguin Books, 2005. 184 p. Page 18.

<sup>43</sup> KÜHN, Zdeněk In: SOMMEROVÁ, Klára. *Masová média a jejich role v mechanismu právní regulace* [online]. 2012 [quot. 11<sup>th</sup> May 2015]. Diploma thesis. Masaryk University, Brno, Czech Republic. Faculty of Law. Supervisor Martin Škop. Available from: [http://is.muni.cz/th/257566/pravf\\_m/](http://is.muni.cz/th/257566/pravf_m/)

*and you should not be influenced by the fact of what the majority says. As a judge, you have your own responsibility – to do the justice.”*<sup>44</sup>

To sum up, the judges are never totally isolated from the media as the media are part of the society they live in. Concurrently, the judges do not let themselves be influenced by concrete articles or news in the particular cases they decide. This would be on the one hand contradictory to all the basic legal documents such as the article 10 of the Universal Declaration of Human Rights when stated the obligation of ‘independent and impartial tribunal’<sup>45</sup>, similarly in the Charter of Fundamental Rights of the European Union<sup>46</sup> or particular national legal documents by which the judges are bound.<sup>47</sup> On the other hand, they would be separated from the social environment and everyday reality of the other humans about which the judges decide. That is why they should perceive the news but always without emotional or informational influence on their own decision-making.

## **2.2. Media ethical problems while informing about the judiciary**

According to Hammarberg, ethical journalism is needed now even more – at a time when people are increasingly overwhelmed by a glut of impenetrable information which they generally cannot trust. That can be why some people struggle to identify what is truthful and trustworthy. They are exposed to torrents of information that can be trivial, unreliable and irresponsible.<sup>48</sup> In such a situation, the media should be aware of ethical and moral standards which should outweigh the desire to shock.<sup>49</sup> At the same time, “*reporters and editors are not*

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<sup>44</sup> MYJER, Egbert. *Verbal expression*. Interviewed in Leiden [13<sup>th</sup> Dec 2013].

<sup>45</sup> Article 10 of the Universal Declaration of Human Rights from 10 December 1948. In: Un.org [official website]. The United Nations [quot. 15<sup>th</sup> May 2015].

<sup>46</sup> Article 47 of the Charter of Fundamental Rights of the European Union from 30 March 2010. In: *EUR-Lex* [law information system]. Official Journal of the European Union [quot. 14<sup>th</sup> May 2015]. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>

<sup>47</sup> In the Czech Republic e.g.

- Law no. 1/1993 Sb., the Constitution of the Czech Republic. In: *ASPI* [law information system]. Wolters Kluwer ČR [quot. 10<sup>th</sup> May 2015].

- Law no. 6/2002 Sb., Courts and Judges Act. In: *ASPI* [law information system]. Wolters Kluwer ČR [quot. 5<sup>th</sup> March 2014].

<sup>48</sup> HAMMARBERG, Thomas et al. *Human rights and a changing media landscape*. Council of Europe [online]. 2011, 213 p. Page 53 [quot. 10<sup>th</sup> May 2015]. Available from: <http://www.coe.int/t/commissioner/Activities/themes/MediaFreedom/MediaLandscape2011.pdf>

<sup>49</sup> (Translated by the author of thesis from the original Czech language) NĚMEČEK, Tomáš In: SOMMEROVÁ, Klára. *Masová média a jejich role v mechanismu právní regulace* [online]. 2012 [quot. 13<sup>th</sup> May 2015]. Diploma thesis. Masaryk University, Brno, Czech Republic. Faculty of Law. Supervisor Martin Škop. Available from: [http://is.muni.cz/th/257566/pravf\\_m/](http://is.muni.cz/th/257566/pravf_m/)

*the mouthpiece of government, corporate power or even human rights defenders,*"<sup>50</sup> and good journalism raises awareness of what is acceptable or unacceptable, and can remind us of moral responsibilities. Moreover, it can reinforce our attachment to acceptable standards of behaviour and be an ally of everyone striving for democracy and human rights protection.<sup>51</sup> Media may be regarded as a potential site of ideological struggle, proponents of the competitive although some of the paradigms (e.g. pluralist) believe that all minority interests can be served by the plurality of channels of communication available while she marks it as nice but an 'unrealistic vision'.<sup>52</sup>

Because the media are part of the legal system as any other subjects, the collisions of their rights and obligations appear – and show us many ethical problems to deal with. This can be seen most visibly in the human rights collision as there are several rights standing against themselves and calling for answers. Although inevitably they have to stand next to each other as these rights are not absolute, to find the proper balance among them is sometimes so fragile and difficult that it is finally the task of the judicial decisions. The most often concerned basic rights in collision are: freedom of speech, freedom of expression, protection of the source, public interest, protection of the private life, protection of national security or confidential business information and protection of morals of the society<sup>53</sup> and their variations. To name a few examples, we can mention the famous case of protection of journalistic source versus proprietary business information held by the ECHR in *Goodwin v. United Kingdom* in 1996, or protection of journalistic source in connection with newsroom searches in cases of *Nagla vs. Latvia*<sup>54</sup>, *Roemen and Schmit v. Luxembourg*<sup>55</sup>, *Ernst and Others*

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<sup>50</sup> HAMMARBERG, Thomas et al. *Human rights and a changing media landscape*. Council of Europe [online]. 2011, 213 p. Page 50 [quot. 10<sup>th</sup> May 2015]. Available from:

<http://www.coe.int/t/commissioner/Activities/themes/MediaFreedom/MediaLandscape2011.pdf>

<sup>51</sup> Ibid.

<sup>52</sup> JEWKES, Yvonne. *Media and crime*. London : Sage, 2011. 317 p. ISBN 978-1-84860-702-6. Page 22.

<sup>53</sup> KIRTLEY, Jane et al. *Media Law Handbook*. Bureau of International Information Programs [online]. 2010, 66 p. [quot. 12<sup>th</sup> May 2015]. Available from:

<http://iipdigital.usembassy.gov/st/english/publication/2011/04/20110428143515su0.4137776.html#axzz2j1sse9x8>

<sup>54</sup> Judgment of the ECHR from 16/07/2013, application no. 73469/10, the European Court of Human Rights [online]. 2012 [quot. 16<sup>th</sup> May 2015]. Available from:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122374>

<sup>55</sup> Judgment of the ECHR from 25/02/2003, application no. 51772/99, the European Court of Human Rights [online]. 2012 [quot. 10<sup>th</sup> May 2015]. Available from:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60958>

v. Belgium<sup>56</sup> or *Ressiot and Others v. France*<sup>57</sup>. Although the ECHR held in all these cases that newsroom searches violate Article 10 of the European Convention on Human Rights, many European countries still permit them. Austria and Germany are two exceptions, with the German Constitutional Court ruling from February 2007<sup>58</sup> where stated that these searches violate constitutional freedom of speech protections, as well as Sweden where the expansive privileges are included in Freedom of the Press Act added to their Constitution.<sup>59</sup>

Other familiar and typical cases of the abovementioned basic rights in collision could be right to inform versus protection of the accused – criminal proceedings (presumption of innocence) or problems connected to protection of journalistic source versus national security where government authorities often argue that preserving public safety outweighs protecting editorial independence and to compel testimony from the journalist about his source for the news, the subpoenaing party must show that the evidence is of ‘direct and important value in determining a core issue in the case’ and that the evidence cannot reasonably be obtained elsewhere.<sup>60</sup>

The other ethical dilemma with all these abovementioned cases is that because they are connected to the media themselves (who are the ones picking the topics), the media can easily choose the judiciary as their target to be criticised. The media can then start informing about them more often than necessary or of course, even more negatively. All these factors can thereafter invoke in the public, the negative connotations with the judicial system – the more the case is in the news, the more powerful the opinion of the public on a particular (media) case. As pointed by several judges – they follow the news as well. So, if a case occurs in the media too often, they can feel like more pressure and responsibility is laid upon them. That is

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<sup>56</sup> Judgment of the ECHR from 15/07/2003, application no. 33400/96, the European Court of Human Rights [online]. 2012 [quot. 10<sup>th</sup> May 2015]. Available from:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61214>

<sup>57</sup> Judgment of the ECHR from 28/06/2012, application no. 15066/07, the European Court of Human Rights [online]. 2012 [quot. 16<sup>th</sup> May 2015]. Available from:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111671>

<sup>58</sup> Judgment of the Federal Constitutional Court from 27/02/2007, no. 538/06, BVerfG [online]. 2014 [quot. 14<sup>th</sup> May 2015]. Available from:

[http://www.bverfg.de/en/decisions/rs20070227\\_1bvr053806.html](http://www.bverfg.de/en/decisions/rs20070227_1bvr053806.html)

<sup>59</sup> KIRTLEY, Jane et al. *Media Law Handbook*. Bureau of International Information Programs [online]. 2010, 66 p. Page 19 [quot. 11<sup>th</sup> May 2015]. Available from:

<http://iipdigital.usembassy.gov/st/english/publication/2011/04/20110428143515su0.4137776.html#axzz2j1sse9x8>

<sup>60</sup> Ibid. Pages 20-21.

why the media should behave responsibly, in an ethical way, and do not abuse their position in the system but in contrary behave reasonably and choicely.

Moreover, when there is a significant media case, the parties of the dispute can rely on the fact of being constantly in the news which can also mean rise of prejudice or feeling of injustice in the public which cannot be marginalised. Afterwards, it can even cause 'social catharsis'<sup>61</sup> which means the public takes the opinions and information presented in media as a fact and truth about the case and even about the judicial system. This concurrently means that if the result of judicial proceedings is different than the public expected, the impression of malfunction of law rises in their minds. And what more, Sherwin thinks it influences also judges themselves: *"Even experienced courtroom lawyers may not as yet have tried to articulate (or adjust the way they practice law) to the fact that jurors are now more likely to have learned about law and lawyers from popular culture media than any other source."*<sup>62</sup> On the other hand, this 'deleterious effect' of law may, contrary to Sherwin's argument, be offset by the vigorous and healthy demystification of law.<sup>63</sup> Despite that, the public generally does not realise that the cases presented in the media are just a very small part of all legal disputes – but these cases (chosen by the media due to their system of agenda setting and due to fact they are the ones choosing the topic as described above) prevail and change the view on the actual *essence* of judicial system. As Sherwin adds: *"[W]hat people see about law from the means of information available to them is highly distorted. If you tune in to Court TV for example, they say this is 'justice without scripts.' They bill themselves as a window onto real law. But of course it's not, it's television."*<sup>64</sup>

### **2.2.1. Media instruments for ethical behaviour**

Because there are so many possibilities for journalism to get into collision with human rights or the ethical rules, there should be a system helping journalists to make it clearer. So then, when the journalist thinks about the next story he would have an easier decision to make about the possible ethical or legal collision. In an ideal situation, this could be solved by own

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<sup>61</sup> SHERWIN, Richard K. *When law goes pop: The vanishing line between law and popular culture*. 1<sup>st</sup> edition. Chicago : The University of Chicago Press, 2000. 332 p. Page 150.

<sup>62</sup> SHERWIN, Richard K. in: ELKINS, James R. A Law Culture Diagnostic. *Journal of Criminal Justice and Popular Culture*. 2001, vol. 8, no. 1, p. 48-57. ISSN 1070-8286.

<sup>63</sup> ELKINS, James R. A Law Culture Diagnostic. *Journal of Criminal Justice and Popular Culture*. 2001, vol. 8, no. 1, p. 48-57. ISSN 1070-8286.

<sup>64</sup> SCELFO, Julie. When Law Goes Pop: Interview with Richard Sherwin. *Stay Free*. 2001, vol. 18, Available online: <http://stayfreemagazine.org/archives/18/sherwin.html>

media **ethical practise and codes** (which they even often have but do not practise or the codes are too vague to solve any raised problems) and by their own **controlling body** (e.g. press council). The practical problem nowadays is the media do not respect the superior body and say they can control themselves. In other cases, they accept only the **judicial decision** to tell them to stop their wrong-doing which is a rather worrying thing for nowadays and the future, too.<sup>65</sup>

Moreover, to be able to make judgments morally and legally defensible, journalists must also be competent, well trained, informed and, above all, able to operate freely in conditions that encourage them to act ethically. However, none of this is easily achieved in the pressurised and turbulent world in which the media work.<sup>66</sup> Still though, it is in their own interest to try it as the high public profile makes the study of law and ethics important for journalists on at least three counts: public responsibility, self-protection and professionalism.<sup>67</sup>

### 2.3. When judiciary does not communicate to media

Should the judges or courts communicate to media? What and when should they talk to each other? The trend of past decades in democratic countries is to be more open towards the media and give them the information they need, but keep the distance necessary for good and high-quality work from the judges according to the current law. As former ECHR judge Egbert Myjer advises as a judge you should “*never talk to the press in which you yourself are involved since you speak in your judgement might give another interpretation. The judge always talks through his judgements.*”<sup>68</sup> That is why there should always be some intermediate, e.g. press judge or press prosecutor who gives the information. These should be available in terms of valid legislation and give all the details which can be provided, but always ‘within the limits’.<sup>69</sup>

In the Netherlands, when the media became more critical against the judges, especially as far as the judges’ behaviour was concerned – that was the turning point for the change. “*A lot of*

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<sup>65</sup> MYJER, Egbert. *Verbal expression*. Interviewed in Leiden [13<sup>th</sup> Dec 2013].

<sup>66</sup> HAMMARBERG, Thomas et al. *Human rights and a changing media landscape*. Council of Europe [online]. 2011, 213 p. Page 51 [quot. 10<sup>th</sup> May 2015]. Available from: <http://www.coe.int/t/commissioner/Activities/themes/MediaFreedom/MediaLandscape2011.pdf>

<sup>67</sup> PEARSON, Mark. *The Journalist's Guide to Media Law: Dealing With Legal and Ethical Issues*. Sydney: Allen and Unwin, 2007. 3rd edition. 470 p. Pages 4-5.

<sup>68</sup> MYJER, Egbert. *Verbal expression*. Interviewed in Leiden [13<sup>th</sup> Dec 2013].

<sup>69</sup> Ibid.

*judges realized what were they doing and became more aware of the importance of having open public hearings, publicity and so on. All these critical remarks also helped at setting up training centres for judiciary to take care that press was taken seriously, that judges are trained the way they acted.”* As the journalist and lawyer Němeček thinks, by the cooperation of judges with the media, the judges can avoid misunderstanding their decisions. In addition, through media the judges can say their own legal opinion quickly and effectively to a large audience. At the same time, with the laid journalistic questions, the judge can realize he did not explain the case in his decision clearly or intelligibly enough but through the media he has another ‘chance’ to correct himself while the media interview him about the case.<sup>70</sup>

While in some countries openness of judges to the media is still something unexpected, according to a judge of the Czech Constitutional Court Vojtěch Šimíček, a judge has to not ‘only decide’ but he has to be able to explain his decisions publicly as court decisions also have the informative and preventive functions for use to the public.<sup>71</sup>

#### **2.4. Case study: Political bribery**

The case of Czech politician Vít Bárta started with a criminal charge from his colleagues Jaroslav Škárka and Kristýna Kočí who accused Bárta of bribing them when he gave them 170 000 and 500 000 Czech crowns<sup>72</sup>. The prosecution claimed that Bárta gave the money to these politicians because he wanted to buy their loyalty in a political way. Bárta denied all this information by saying that this money was only an interest-free loan for those persons as his friends.

Even though the (potential) bribery cases usually catch some media attention, what was surprising in this case, were the tonality and the high frequency with which the media informed about the proceedings. Some of them named it clearly as a ‘case of bribery in VV’<sup>73</sup>

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<sup>70</sup> NĚMEČEK, Tomáš In: SOMMEROVÁ, Klára. *Masová média a jejich role v mechanismu právní regulace* [online]. 2012 [quot. 10<sup>th</sup> May 2015]. Diploma thesis. Masaryk University, Brno, Czech Republic. Faculty of Law. Supervisor Martin Škop. Available from: [http://is.muni.cz/th/257566/pravf\\_m/](http://is.muni.cz/th/257566/pravf_m/)

<sup>71</sup> ŠIMÍČEK, Vojtěch. *Mlé soudče!*. Jiné právo [online]. Jinepravo.blogpot.cz 2013 [quot. 10<sup>th</sup> May 2015]. Available from: <http://jinepravo.blogspot.cz/2007/05/ml-soude.html>

<sup>72</sup> Approx. 6 300 and 18 500 euros

<sup>73</sup> VV is a shortcut for the name of the political party Věci veřejné, in which the politicians participated.

Example of the headline ‘case of bribery in VV’:

KOZELKA, Petr. *Definitivní konec kauzy úplatků VV: Bárta a Škárku soud osvobodil*. Novinky.cz [online]. © 2003–2014 Borgis, a.s. [quot. 10<sup>th</sup> May 2015]. Available from: <http://www.novinky.cz/domaci/325497-definitivni-konec-kauzy-uplatku-vv-bartu-a-skarku-soud-osvobodil.html>

despite the fact bribery was not proven, which means in my opinion, a flagrant breach of presumption of innocence and also unethical and unprofessional approach of these media.

Most of the Czech mass media started to cover the topic from the very beginning when there was no verified information – a typical example illustrating an increasingly competitive media marketplace and the pressure to be the first with an intense story.<sup>74</sup> Then they continued intensive informing all throughout the time of the investigation and the judicial proceedings. During the first year of the case, the main Czech mass media published nearly 2 000 news stories about the case.<sup>75</sup> That is why I think there was very high pressure put on judge Jan Šott who was the one to release the first court ruling in this case.

The public meaning and 'media judgement' before the first released decision were generally clear: politician Vít Bárta bribed the others and he should be harshly punished to show him that even when he is a politician he cannot do whatever he wants, especially what is illegal for others according to the law. The decision of judge Šott completely fulfilled these predictions: he decided Bárta really bribed the others. Despite the impossibility to objectively prove he was influenced also by the media, in this case, there could be seen exemplary 'educational' effort of judge Šott to punish a 'bad person' as perceived by the public and to convey that message through the media to the general public.

To make it truly perfect, Šott even allowed the cameras into the court room during the public delivering of the judgement. As he told, he wanted to offer the widest possible access to the public in those proceedings.<sup>76</sup> Controversially to that, former Czech president Václav Klaus labelled this practice as an 'absurd reality show'<sup>77</sup> and Postman would possibly highly agree to that claim due to his famous approach of perceiving everything as show business, more described in this chapter above. So, on the one hand, there was the principle of the public hearing which is in my opinion absolutely welcomed and needed (even though there was a critique from the former Czech president or the another criticism that the judge just wants to

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<sup>74</sup> KIRTLEY, Jane et al. *Media Law Handbook*. Bureau of International Information Programs [online]. 2010, 66 p. Page 10 [quot. 15<sup>th</sup> May 2015]. Available from: <http://iipdigital.usembassy.gov/st/english/publication/2011/04/20110428143515su0.4137776.html#axzz2j1sse9x8>

<sup>75</sup> According to Media Monitoring provider in Central & Eastern Europe NEWTON Media which monitors Czech mass media (radio, press, television, online), available from: <http://www.newtonmedia.eu/>

<sup>76</sup> ŠÍDLOVÁ, Tereza. *Odsoudil dva poslance. Kdo je soudce "věček" Šott*. Aktuálně.cz [online]. 1999 – 2014 © centrum holdings [quot. 10<sup>th</sup> May 2015]. Available from: <http://zpravy.aktualne.cz/domaci/odsoudil-dva-poslance-kdo-je-soudce-vecek-sott/r~i:article:736579/>

<sup>77</sup> Ibid.

make himself more famous) while on the other hand, there were shocking news titles whose primary aim was to make fun of it and to show the proceedings as one big drama.

This approach is definitely connected to the ethics of journalists who are reporting about the case and as described above, because without well-trained and educated reporters no matter how good the final judgement is, without proper and correct media the public will not receive the end result. The media stand in the middle of this process of connecting the law with people. It is also their responsibility to behave in an ethical way, following the legal standards in contrary to their desire to constantly shock.

### **3. Conclusions**

Media are, in my essay, understood as an intermediary between legal system and public. Agenda setting is one of the media most powerful tools – the media ability to tell their readers which issues are important makes them to be strong opinion makers. Public can easily adopt media views and opinions – that is why judiciary needs media, too.

Media are still perceived as valuable, trustworthy source of news and opinions; only very few people of the general public would study legal basis of some case from the legal acts rather than just read it briefly from the media. That is why media can cause much higher public awareness than for example judges themselves; and put pressure on the judiciary, too.

Media hold a key role of “public watchdog” and the public majority as well as judges agree it is necessary for the society. This responsibility but bring also duties – the media should not take up the role of the judges themselves, they should respect legal frame, inform truthfully, follow the ethical code, respect their own controlling bodies, know about their public responsibility.

Journalists should be competent, well trained, informed and able to operate freely in conditions that encourage them to act ethically. On the other hand, judges should not close the eyes against media, they should communicate reasonably and try to understand media processes and their complex, very specific and turbulent, system.