



FREEDOM OF SPEECH AND PERMISSIBLE DEGREE OF CRITICISM OF JUDGES

In the Jurisprudence of the European Court of Human Rights and the U.S. courts

By

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Executive Summary

This thesis deals with question how much one can criticize the judiciary. It acknowledges that the whole topic of criticism of judges is permeated by a clear tension since criticism of the judiciary may endanger the impartiality and independence of the judiciary on the one hand, but, on the other hand, it is one of the few means (if not the only one) how to hold judges accountable and how the people can participate in the public discussion on judicial matters. It can also be rephrased as balancing of freedom of expression with the reputation of judges and broader administration of justice concerns. In order to address this tension, this paper analyzes the jurisprudence of the European Court of Human Rights (ECtHR) and the U.S. courts as examples of allegedly opposite views on the subject. The case law in both jurisdictions is rich and diverse, but shares some important common features, such as discrimination between speakers, and in particular discrimination of lawyers. This paper argues that this practice is problematic since it excludes the most informed part of the citizenry from the discussion on judicial matters and thus effectively prevents remedying the problems in the functioning of justice. The ECtHR's decision-making practice is further criticized for employing too many variables, which results in substantial uncertainty and inconsistency. Similarly, while this paper acknowledges that the balance between protection of the judiciary and tolerance of freedom of expression in the ECtHR's jurisprudence has shifted decisively in favour of the latter, the ECtHR is criticized for its reluctance to accept that criticizing judges is "political speech". As a result of this reluctance, the ECtHR has failed to send a clear message that the judiciary must accept wider criticism than other public servants. And finally, this paper puts forth the argument that the ECtHR's should refrain from deciding whether a particular expression amounts to insult and instead rely on the social norms in a particular society since the ECtHR's 'overprotection' of the judiciary from "insults" has a serious chilling effect. This

paper is organized as follows. First, it places the problem into a broader perspective and discusses pros and cons of criticism of judges. Afterwards, it provides an in-depth analysis of the approaches to criticism of judges adopted by the U.S. courts and the ECtHR. Subsequently, it draws on the comparison and evaluation of the two alternatives and identifies myths of criticism of the judiciary. Finally, Part 5.3 suggests solutions how to overcome these myths and how effectively respond to ill-founded criticism of judges.

1 Introduction

It is generally accepted that a lot has been written on the defamation of political figures. In contrast, as Eric Barendt rightly points out, there seems to be relatively little said on the issue of criticism of judges which can be rephrased as balancing of freedom of expression¹ on the one hand, and the reputation of judges and broader administration of justice concerns on the other.² Since the pioneering work of Barend van Niekerk,³ only two more books on the topic have been published.⁴ Only with the rapid growth of scholarship by political scientists on the role of the judge in the society,⁵ has this issue come gradually to the fore. This shortage of scholarly works on criticism of judges is further coupled with a significant development on both sides of the Atlantic, and particularly in the case law of the European Court of Human Rights (hereinafter only the “ECtHR”).

The aim of this paper is to address these issues. To this end, this paper not only builds upon the scholarship of Barend Van Niekerk, Michael Addo and Ian Cram,⁶ but also takes into account recent developments particularly in the case law of the ECtHR and in the United States. More specifically, the aims of this paper are first to place judges into the hierarchy of public figures and focus on the careful balancing of the competing interests, and second, to

¹ For purposes of this thesis, I will treat “freedom of expression” as in Art. 10 of the ECHR50, “freedom of communication” as in the May 28, 2003, Declaration on Freedom of Communication on the Internet by the Committee of Ministers of the Council of Europe, and “freedom of speech” and “freedom of the press,” as in the First Amendment to the U.S. Constitution, as synonymous, although there are instances in which variations in formulation reflect different substantive understandings and may even make a genuine difference in practice.

² 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* 7, no. 4 (2001): 702.

³ Barend Van Niekerk, *The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World* (New York: Praeger, 1987).

⁴ Michael K. Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards* (Aldershot: Dartmouth, 2000); and Ian Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Oxford; Portland, Or.: Hart, 2002).

⁵ 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).

⁶ See footnotes nos. 2 and 3.

search whether and to what extent the approach to the criticism of judges adopted in Europe differs from the one taken in the United States.

The main research question is thus to what extent one can criticize judiciary? This question 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?⁷ Second, to what extent should discussion of judicial processes be treated as an exception to general principles of freedom of expression and if so, why? In order to address these issues, this paper departs from three hypotheses. Firstly, judges are not as accountable as politicians but must accept wider criticism than other public servants. Secondly, Addo's proposition that the balance between the protection of the judiciary on the one hand, and tolerance of freedom of expression on the other, in the recent case law of the ECtHR has shifted decisively in favour of the latter.⁸ And finally, the jurisprudence of the U.S. courts is more speech protective than the ECtHR's case law.

The core of this paper is to explore both the extent to which there are criminal and/or civil sanctions for the publication of criticism of the judiciary and the extent to which, conversely, it is protected by constitutional or other legal provisions recognizing freedom of speech. This paper focuses on the jurisprudence of the U.S. courts and the ECtHR with a limited use of case law and materials from other jurisdictions. From a broader perspective, this paper supports the assertion that much can be learned about the 'role of the judge' in contemporary society⁹ 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".¹⁰

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

⁸ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*. 239. Accord Lemmens, *La Presse Et La Protection Juridique De L'individu: Attention Aux Chiens De Garde*, 300.

⁹ See E. M. Barendt, *Freedom of Speech*, 2nd ed. (New York: Oxford University Press, 2005), 322.

¹⁰ 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): p. 525, p. 525.

This thesis, however, must also inevitably leave out several related issues. It does not address reporting on proceedings pending before the courts, and specific issues such as influencing juries in criminal trials,¹¹ trials involving children or juveniles,¹² questions raised by Internet speech,¹³ and also, to the large extent, repercussions of freedom of speech on fair trial aspects such as the impartiality of the judges and presumption of innocence. Put it differently, this thesis does not intend to cover all issues covered by the notion ‘contempt of the court’. Instead, its scope is limited only to what a common law lawyers refer to as ‘scandalising the court’ and to a lesser extent also ‘contempt in the face of the court’.¹⁴

In order to address the questions raised in the previous paragraphs, this paper employs a comparative method on the subject. Its primary purpose is to shed light on the current operation and/or shortcomings of both jurisdictions under scrutiny. In fact, it is generally assumed that it sometimes happens that other legal systems treat a problem more effectively than others and, as one reviewer of Addo’s book endorsed, “the very best that comparative study [like this] can offer [is] a new paradigm against which to compare our own system, not necessarily to point up its shortcomings but certainly to broaden our outlook and deepen our understanding”.¹⁵

The Strasbourg organs (i.e. of the ECtHR and the former European Commission of Human Rights) and the U.S. courts were intentionally chosen as examples of allegedly opposite views on the subject. Although inclusion of the ECtHR might be considered as

¹¹ See Ian Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Oxford; Portland, Or.: Hart, 2002), 77-122.

¹² See *ibid.*, 123-60.

¹³ See *ibid.*, 209-21.

¹⁴ The other two types of conduct which at common law would be thought to constitute contempt are infringement of the *sub judice* principle and non-compliance with a court order. See e.g. M. Chesterman, "Contempt: In the Common Law, but Not the Civil Law," *The International and Comparative Law Quarterly* 46, no. 3 (1997).

¹⁵ Elizabeth Handsley, "Contempt and Free Expression: Multilingual Lessons (Book Review)," *Media & Arts Law Review* 7, no. 2 (2002): 150.

problematic from the methodological point of view,¹⁶ since the ECtHR is a supranational body that employs different techniques from national courts, this shortcoming is rebutted by the fact that the ECtHR case law ‘summarizes’ the European approach to the problem and that many cases from national courts have ended up before this judicial body.

The main findings of this paper are as follows. First, analysis of the ECtHR’s jurisprudence allows for concurring to Addo’s proposition that the balance between protection of the judiciary and tolerance of freedom of expression has shifted decisively in favour of the latter, albeit with certain qualifications. Second, the jurisprudence of the U.S. courts is more speech protective than the ECtHR’s case law. Therefore, the second and third hypotheses of this paper have been generally correct. It is the first hypothesis that calls for further clarification. While both jurisdictions acknowledge that judges are not as accountable as politicians, the ECtHR case-law does not support the second part of this hypothesis that the judiciary must accept wider criticism than other public servants.

The main problem this paper identifies is the discrimination between speakers, and in particular discrimination of lawyers. Surprisingly, lawyers form an ‘underprivileged’ group both in the ECtHR’s and the U.S. courts’ jurisprudence. The ECtHR’s approach suffers from further deficiencies. It takes into account too many variables which leads to a high degree of uncertainty of the outcome of its judgments. Furthermore, its case-law is also inconsistent and often lacks sufficient policy justification. And finally, (lack of) the ECtHR’s definition of “insult” might have a serious chilling effect on excessive but otherwise lawful criticism of judges.

The structure of the thesis is as follows. Chapter 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

¹⁶ But comparison of the jurisprudence of these two judicial bodies on free speech is far from being unique; see e.g. Colin Warbrick, "'Federalism' and Free Speech: Accommodating Community Standards - the American Constitution and the European Convention on Human Rights." In *Importing the First Amendment: Freedom of Expression in American, English and European Law*, edited by Ian Loveland (Oxford: Hart, 1998).

place the problem into a broader perspective. In order to address the issues raised in the second chapter, Chapters 3 and 4 will deal with approaches to criticism of judges in two jurisdictions, the U.S. and the ECtHR. Chapter 5 is divided into three parts. Part 5.1 will be dedicated to the comparison and evaluation of the two alternatives whereas Part 5.2 of this chapter will identify myths of criticism of the judiciary. Finally, Part 5.3 suggests solutions to overcome these myths. Chapter 6 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 is submitted to 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, “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”.¹⁷ This chapter will briefly address the main legal issues inextricably linked to the topic of this paper and discuss pros and cons of wider limits of permissible criticism of the judiciary.

But first of all, there are two other aspects worthy of mention that are not central to the enquiry of this paper, but will be often touched upon. Firstly, any research on criticism of judges would be incomplete without addressing the separation of powers aspect. 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 complex¹⁸ 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’¹⁹ by politicians can undermine public confidence in the judiciary and its independence most seriously. This effect is even strengthened when the politicians create an

¹⁷ Barendt, "Michael K. Addo (Ed.): Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards (Book Review)," 702.

¹⁸ 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.

¹⁹ 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*.

‘unholy alliance’²⁰ with the media and launch a joint campaign against the judiciary and when the conflict reaches its peak, the ultimate move by other branches is a change of the ‘rules of the game’, usually by ‘court packing’.²¹

The second underlying aspect is which theory of free speech supports or opposes wider limits of acceptable criticism of judges.²² While Michael Addo stresses the accountability of judges and the “democratic theory of free speech” argument,²³ Eric Barendt prefers an argument based on the “self-fulfilment theory,”²⁴ and Ian Cram advocates the “distrust of government” rationale of free speech.²⁵ However, even the remaining theories of free speech such as the truth-related arguments, Dworkin’s constitutive basis of free speech,²⁶ and arguably also the so-called “counter-attack theory” of free speech,²⁷ are not without any bearing on the topic. It is thus highly advisable to read the following lines having in mind all of these theories.

²⁰ 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)," 704) referring to Michael Bohlander, "Criticizing Judges in Germany," in: *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, ed. Michael K. Addo (Aldershot: Dartmouth, 2000), 72-73. See also Barendt, *Freedom of Speech*, 319.

²¹ See Frank Delano Roosevelt’s ‘court packing plan’ (to increase the size of the Supreme Court of the United States and then bring in several new justices who would change the balance of opinion on the Court) in 1930’s; or the tension between parliament and the Appellate Division of South Africa on 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.

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

²³ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 11-16.

²⁴ Barendt, "Michael K. Addo (Ed.): Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards (Book Review)," 704.

²⁵ Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 19-21.

²⁶ Dworkin, Ronald. *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge, Mass.: Harvard University Press, 1996, p. 200.

²⁷ See *Schmid-Spiegel*, 12 BverfGE 113 (1961). See also *Art Critic*, 54 BverfGE 129 (1980); *Credit Shark*, 60 BverfGE 234 (1982); or KOMMERS, D.: *The constitutional jurisprudence of the Federal Republic of Germany*, 2nd ed., Duke University Press, Durham/London, 1997, p. 369-372.

2.1 Arguments against (greater) 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".²⁸

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.²⁹ However, several commentators have recently questioned the plausibility of some of these six 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 insufficient³⁰ but are often slow and unacceptable from the democratic point of view.³¹ 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

²⁸ 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 (quoted in Alexandra Abboud and Michelle Austein, *Judges Must Be Undeterred by Criticism*, Justice's Gonzales Says, *Washington File*, 29 September 2006, available at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=September&x=20060929164709hmnietsua0.9044763>).

²⁹ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 12.

³⁰ Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," 116.

³¹ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 12.

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.³²

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 any shortcomings in its work”.³³ 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”³⁴ 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 indeed often respond to criticism via press releases and that they often bring civil proceedings or have recourse to the ordinary law of torts.³⁵

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.³⁶ 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

³² Ibid., 7.

³³ Ibid., 179 (referring to Frederick Schauer, *Free Speech : A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982)).

³⁴ Ibid., 7.

³⁵ Id.

³⁶ Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 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*.

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.

2.2 Arguments in favour of (greater) criticism of judges

Apart from criticism of 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.³⁷ 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”.³⁸ 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,³⁹ 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 they choose, the lack of clear line between political and judicial matters, and finally the institutional bias of the judiciary.⁴⁰

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 by Addo who opines that “all individuals but especially legal journalists, lawyers and other officials of legal

³⁷ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 11-16; Accord Barendt, *Freedom of Speech*, 319. Contra Barak, *The Judge in a Democracy*, 94-96 and 108, who claims that “judges’ non-accountability is their most precious asset” (at 108).

³⁸ Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," 119.

³⁹ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 12-14.

⁴⁰ 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* 7, no. 4 (2001): 704.

establishment, contribute to the architecture of judicial policy through the expression of their opinions”⁴¹ and “freedom of expression in this context can also prove to be an instrument of individual and professional self-fulfilment”.⁴² 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.⁴³ 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.⁴⁴

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.⁴⁵ 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.”⁴⁶ Although one may argue that the situation in the common law countries is different from the civil law jurisdictions,⁴⁷ pioneering works of Alec Stone-

⁴¹ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 16.

⁴² *Id.*

⁴³ On this often neglected aspect of free speech, see Timothy Macklem, *Independence of Mind* (Oxford: Oxford University Press, 2006), 1-32.

⁴⁴ See Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*. p. 2.

⁴⁵ See also another Barendt’s piece: Barendt, *Freedom of Speech*, 319 and cases cited therein.

⁴⁶ Beverley McLachlin, “The Role of Judges in Modern Commonwealth Society”, *Law Quarterly Review*, 110 (1994): 263.

⁴⁷ Another aspect of distinction between common law and civil law judges is addressed in Barendt, *Freedom of Speech*, 319.

Sweet⁴⁸ and Ran Hirschl⁴⁹ on entanglement between the judging and politics in general decisively rebut this argument.⁵⁰

Thirdly, Barendt invokes also a ‘professional freemasonry’ argument.⁵¹ 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”.⁵² This argument seems to be supported by virtually any author writing on the topic of criticism of the judiciary. Lemmens talks about “*esprit corporatiste*”⁵³ and “*verité judiciaire*”.⁵⁴ 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*”.⁵⁵ 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”⁵⁶ and Cram (building upon Schauer and Scanlon) concludes that “the institutional bias which government (understood broadly) brings to its regulation of political speech ought to make us distrustful of such regulation”.⁵⁷

⁴⁸ See Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*; or more recently Alec Stone Sweet, “The Politics of Constitutional Review in France and Europe,” *International Journal of Constitutional Law* 5, no. 1 (2007).

⁴⁹ Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*.

⁵⁰ Accord Comella, “Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights,” 116.

⁵¹ This term was coined by Colin Warbrick in: “The European Convention on Human Rights,” (1989) 9 *Y.E.L.* 439, p. 445.

⁵² 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* 7, no. 4 (2001): 704. In his book on free speech, Barendt adds another French example which he refers to as ‘justice de classe’ (Barendt, *Freedom of Speech*, 319).

⁵³ Koen Lemmens, *La Presse Et La Protection Juridique De L'individu: Attention Aux Chiens De Garde*, Collection De Thèses (Bruxelles: Larcier, 2004).301.

⁵⁴ *Ibid.*, (quoting *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, § 34)

⁵⁵ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 22 (emphasis added).

⁵⁶ 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: A Comparative Study of European Legal Standards*, 22.

⁵⁷ Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*. p. 21.

From the sociological point of view, the ‘professional freemasonry’ concern is buttressed by the so-called Thomas Theorem.⁵⁸ If we apply the Thomas Theorem in the context of the criticism of judges, we may conclude that if men define situations – here lack 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 not the ideal one but still the best available one since it does not make sense to create a fourth branch of government that would guard the judiciary⁵⁹ and that other branches of government are also in certain situations ‘judges of their own cause’, for instance the legislator 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’.⁶⁰ The judges are not infallible and they can err in their judgments as easily as any other individuals.⁶¹ 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 judges are prone to make serious mistakes; all people including judges are hesitant to admit their mistakes; and most people are delighted to point out the mistakes of their rivals.⁶² Having these three principles in mind, the ‘infallibility trap’ reaches its peak in legal cultures that lack dissenting opinions. Lack of dissent, both internal (by means of dissenting opinions) and external (by other branches and the electorate), may lead to ‘groupthink’, ‘group polarization’ and the ‘hidden

⁵⁸ "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.

⁵⁹ Barak, *The Judge in a Democracy*.: 44.

⁶⁰ 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: Courts, Speech and Constitutions*. 7-10.

⁶¹ Accord Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 16.

⁶² Holmes, *The Matador's Cape : America's Reckless Response to Terror*, 287.

profiles phenomenon' with its negative symptoms.⁶³ History is the best judge on this issue. 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 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".⁶⁴ 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".⁶⁵

2.3 Concluding remarks on Chapter 1

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.

⁶³ Cass R. Sunstein, *Why Societies Need Dissent* (Cambridge, MA: Harvard University Press, 2003), 118-120 and 140-144 (with further references).

⁶⁴ Barendt, *Freedom of Speech*, 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," 116; and *Kobenter and Standard Verlags GmbH v. Austria*, no. 60899/00, 2 November 2006, § 29 (iv).

⁶⁵ Barendt, *Freedom of Speech*, 322.

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 method of appointment and selection of the judiciary, legal and political culture and level of maturity of a given democracy.

3 European Court of Human Rights

Free speech plays no doubt a central role among the rights enshrined in the ECHR⁵⁰. As early as in 1979, the ECtHR held in *Handyside v. the United Kingdom*⁶⁶ for the first time what would become a mantra⁶⁷:

“Freedom of expression constitutes one of the essential foundations of ... [democratic] society, one of the basic conditions for its progress and for the development of every man ... [and] is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”⁶⁸

Since then the ECtHR progressively marshalled the protection of ‘political speech’⁶⁹ and stressed that “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention”.⁷⁰ However, it took an entire decade since *Handyside* judgment before the first case on the criticism of judges⁷¹ was decided on the merits by the ECtHR,⁷² and further cases followed only slowly.⁷³ It was only after the turn of the century when the ECtHR has faced a more numerous challenges against

⁶⁶ Judgment of 7 December 1976, Series A no. 24.

⁶⁷ For a recent criticism within the ECtHR itself that this mantra “should not become an incantatory or ritual phrase but should be taken seriously”, see Joint dissenting opinion of judges Costa, Cabral Barreto and Jungwiert in *I. A. v. Turkey*, no. 42571/98, ECHR 2005-..., § 1.

⁶⁸ *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49.

⁶⁹ See e.g. leading cases such as *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103; *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236; or *Oberschlick v. Austria (no. 2)*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV; and more recently *Lopes Gomes da Silva v. Portugal*, no. 37698/97, ECHR 2000-X; *Unabhängige Initiative Informationsvielfalt v. Austria*, no. 28525/95, ECHR 2002-I; *Brasilier v. France*, no. 71343/01, 11 April 2006; or *Falter Zeitschriften GmbH v. Austria*, no. 26606/04, 22 February 2007. See also cases cited below in Part 2.2.

⁷⁰ *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, § 42.

⁷¹ Under ‘criticism of judges’ I understand only what a common law scholar would refer to as ‘scandalising the court’ and presumably also a portion of ‘contempt in the face of the court’ but not the other prongs of the ‘contempt of court’ such as prejudice or impeding the proceedings by e.g. commenting upon pending or juvenile trials. See e.g. C. J. Miller, *Contempt of Court*, 3rd ed. (Oxford ; New York: Oxford University Press, 2000).

⁷² *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149.

⁷³ *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313; *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I.

alleged overprotection of the judiciary from criticism⁷⁴ so that we can finally talk about *case law* instead of individual *cases*.⁷⁵

Before this chapter proceeds to the analysis of the jurisprudence of the ECtHR, it will briefly outline basic structure and general themes of Art. 10 relevant for the criticism of judges. These themes include methodological model for free speech cases applied by the ECtHR, discussing the legitimate aims particularly relevant for criticism of the judiciary and identification of four different conflicts inherent in criticism of judges. Following these general themes, this paper will turn its attention to the analysis of the case law of the ECtHR. This analysis will be conducted in the form of answers to the four basic 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 the four-prong analysis (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 before the ECtHR.

This chapter will be structured as follows. Part 2.1 will address the general themes of ECtHR's free speech jurisprudence, namely a standard 5-step test, as applied in Art. 10 ECHR50, relevant legitimate aims of restriction of freedom of expression in Art. 10 (2) ECHR50 and typology of conflicts in 'criticism-of-judges' cases. Parts 2.2 - 2.5 are devoted to the 4Wh questions described above. Part 2.6 discusses the WHEN-question and other residual factors that might (have) influence(d) the reasoning of the ECtHR, namely largeness of the territory, density of population and a specific argument of 'transition to democracy'. And finally, Part 2.7 identifies trends in the ECtHR's jurisprudence and concurs to the proposition of Michael Addo that the balance between protection of the judiciary and tolerance of freedom of expression has shifted decisively in favour of the latter.

⁷⁴ See e.g. *Nikula v. Finland*, no. 31611/96, ECHR 2002-II; *Perna v. Italy* [GC], no. 48898/99, 6 May 2003; *Skalka v. Poland*, no. 43425/98, 27 May 2003; *Kobenter and Standard Verlags Gmbh v. Austria*, Application no. 60899/00, 2 November 2006; and *Leempoel & S.A. ED. Ciné Revue v. Belgium*, Application no. 64772/01, 9 November 2006.

⁷⁵ Albeit, as I will argue below, this case law is far from being consistent and settled.

3.1 General Themes and Basic Structure of Art. 10

It is high time to remind the actual wording of Art. 10 whose relevant parts read as follows:

- “1. Everyone has the right to freedom of expression. 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....
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ... or for *maintaining the authority and impartiality of the judiciary.*” (emphasis added)

As to the structure of Art. 10, it on the first sight reveals its two-tier character which stands in stark contrast to the seemingly absolutist wording of the First Amendment.⁷⁶ The first paragraph of Art. 10 defines the scope of freedom of expression, whereas the second paragraph contains a limitation clause. As a result of the two-tier structure of Art. 10 the ECtHR has taken different approach from the USSC and defined both the scope of freedom of expression and its limitations broadly.⁷⁷ On the other hand, the ECtHR has imposed limits on the limitations stipulated in Art. 10 (2) and developed what might be called a 5-step-test for justifying limitations of free speech.⁷⁸

A standard 5-step-test can be expressed in the following shortcut: (1) scope, (2) interference, (3) ‘prescribed by law’, (4) legitimate aim, (5) ‘necessary in a democratic

⁷⁶ Ian Cram, "Criminal Contempt, Article 10 and the First Amendment - a Case for Importing Aspects of Us Free Speech Jurisprudence?," *Maastricht Journal of European and Comparative Law* 7, no. 3 (2000): 244.

⁷⁷ On the theoretical aspects of these two different approaches to the rights adjudication, see Mattias Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice (Review Essay)," *International Journal of Constitutional Law* 2, no. 3 (2004): 583-84; Mattias Kumm, "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement," in *Law, Rights, Discourse: Themes of the Work of Robert Alexy*, ed. G. Pavlakos Paulsen (Oxford: Hart, 2007); or Frederick Schauer, "The Exceptional First Amendment," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, N.J.: Princeton University Press, 2005).

⁷⁸ Indeed, the 5-step test is common to Arts. 8-11 ECHR50 since the structure and wording of these four articles is very similar. See Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 1997), or more recently Clare Ovey, Robin C. A. White, and Francis Geoffrey Jacobs, *Jacobs and White: The European Convention on Human Rights*, 4th ed. (Oxford: Oxford University Press, 2006), 220-223 and 226-31, and particularly a helpful table at p. 221.

society’.⁷⁹ Since the first three steps do not pose any important problems, I will immediately focus on the legitimate aims relevant to the issue of criticism of judges. It is clear that the drafters of the ECHR50 were aware of special status of judges and explicitly included ‘maintaining the authority and impartiality of the judiciary’ in the list of permitted restrictions of free speech in Art. 10 (2).⁸⁰ Interestingly, although the wording of Art. 10 itself provides an articulate textual guidance, the aim of ‘maintaining the authority and impartiality of the judiciary’ has been invoked very scarcely both by the parties and the ECtHR itself.⁸¹ In fact, governments often formally rely rather on more general aim of ‘protection of the reputation or rights of others’ and then invoke a special status of the judiciary only in the final stage of 5-step-test, the stage of ‘necessity in democratic society’.⁸²

However, the scarce use of the aim of ‘maintaining the authority and impartiality of the judiciary’ does not seem to be such a ‘big deal’ since in practice the intensity of review of legitimate aims by the ECtHR is very relaxed and the governments do not have significant problems to subsume the interference under one of the aims legitimate listed in Art. 10 (2). Not surprisingly, majority of cases on merits are thus decided only in the last stage – test of ‘necessity in a democratic society’. An in-depth analysis of the factors that determine the outcome of the test of ‘necessity in a democratic society’ in the cases dealing with criticism of judges will be addressed in the following subchapters and thus I will now focus on a different aspect of criticism-of-judges cases.

As I stressed earlier, the issue of criticism of judges entails a conflict of values. In terms of the ECHR50, we may speak of two different types of conflicts: clash of freedom of

⁷⁹ Several commentators and the ECtHR itself often talk about threefold or fourfold test but I prefer to include the first two stages as well since it is theoretically more elegant and crucial for comparison with the approach to limitations of free speech under the First Amendment. See also works cited in footnote no. 78.

⁸⁰ Interestingly, this ground for restriction of free speech is missing both in Art. 19 ICCPR66 and in Art. 13 of ACHR78.

⁸¹ See Ovey, White, and Jacobs, *Jacobs and White: The European Convention on Human Rights*, 231.

⁸² E.g. in *Kobenter and Standard Verlags GmbH v. Austria* the Government invoked only the aim of ‘protection of the reputation or rights of others’ (§ 26), but in the balancing stage they put on weighs ‘interest of the judge concerned in protecting his reputation and the standing of the judiciary in general’ (§ 27).

expression with public interest and a clash freedom of expression with another human right. If we go further and distinguish two separate public interests – authority of the judiciary *and* impartiality of the judiciary, and two separate sets of human rights – the right to reputation *and* ‘rights of others’, we may define four different conflicts: (1) freedom of expression vs. public interest in ‘maintaining the authority of the judiciary’; (2) freedom of expression vs. public interest in ‘maintaining the impartiality of the judiciary’; (3) freedom of expression vs. the right to reputation;⁸³ and (4) freedom of expression vs. rights of others.⁸⁴

In order to fully address the implications of the four conflicts mentioned above, we must first define the notion ‘rights of others’. There are three options how to interpret this notion: (1) that it encompasses only other ‘conventional rights’ (rights explicitly enshrined in the ECHR50 and its Protocols); (2) that it covers only rights of others other than those guaranteed by the ECHR50 and its Protocols (‘non-conventional rights’); or (3) that it includes both ‘conventional rights’ and ‘non-conventional rights’. If we employ classic maxim of avoiding situation where certain words become mere surplusage, we may plausibly argue that the notion of ‘rights of others’ covers only ‘conventional rights’.⁸⁵ However, the ECtHR has been so far reluctant to address the precise contours of this notion and tended to interpret it broadly. Therefore, for the purpose of this paper I will understand under the ‘rights of others’ both ‘conventional rights’ and ‘non-conventional rights’.

But even if we accept a broad interpretation of ‘rights of others’, which includes both ‘conventional’ and ‘non-conventional’ rights, the conventional/non-conventional dichotomy should have a bearing on the balancing between competing rights. One may expect that when a ‘conventional right’ conflicts with a ‘non-conventional’ right, the former should *ordinarily*

⁸³ This conflict can be translated as a conflict between a right that *is* guaranteed by the ECHR50 (freedom of expression) and a right that *is not* guaranteed by the ECHR50 (the right to reputation).

⁸⁴ This conflict can be translated as a conflict between competing freedoms that are *both* guaranteed by the ECHR50 (between freedom of expression and the right to private life).

⁸⁵ By expressly mentioning the ‘non-conventional right’ - the right to reputation - among legitimate aims limiting free speech in Art. 10(2), the drafters deliberately discarded the view that the notion of ‘rights of others’ includes both ‘conventional rights’ *and* ‘non-conventional rights’ since such an interpretation would render the legitimate aim of ‘protection of the reputation’ superfluous.

prevail.⁸⁶ It means that a ‘conventional right’ should be accorded a higher abstract weight. However, it does not necessarily mean that a ‘conventional right’ *always* prevails over a ‘non-conventional right’ since a higher abstract weight of a ‘conventional right’ still may be rebutted in the concrete weighing if the degree of non-satisfaction of a ‘non-conventional right’ (or in other words the level of intensity of its intrusion) is sufficiently high. The aim of this paper is not to develop a generally applicable theory of conflicts of fundamental rights under the ECHR⁸⁷ but the differences between the abovementioned four conflicts inevitably emerge from the following chapters.

3.2 WHO is criticized?

Since *Lingens* the ECtHR made clear that the degree of permissible criticism varies according to the target of the speech. More specifically, it held that “[t]he limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual.”⁸⁸ The ECtHR based this distinction on the following rationale: “Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.”⁸⁹ Six years later, it went even further and stipulated that with regard to the Government, “the limits of permissible criticism are [even] wider than in relation to ... a politician.”⁹⁰ Until now, the ECtHR took a stance (albeit often less overtly than in *Lingens*

⁸⁶ Accord Lemmens, *La Presse Et La Protection Juridique De L'individu: Attention Aux Chiens De Garde*, 304.

⁸⁷ See e.g. Brems, "Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms.", Tulkens, "Freedom of Expression and Information in a Democratic Society and the Right to Privacy under the European Convention on Human Rights: A Comparative Look at Articles 8 and 10 of the Convention in the Case-Law of the European Court of Human Rights," § II.B, Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford University Press, 2007). Leading cases are *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports* 1996-IV; *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI; and *Öllinger v. Austria*, no. 76900/01, ECHR 2006-...

⁸⁸ *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, § 42.

⁸⁹ *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, § 42.

⁹⁰ *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 46.

and *Castells*) on a long list of ‘public figures’ including police officers,⁹¹ journalists,⁹² celebrities such as members of the Royal family⁹³ or famous sportsmen,⁹⁴ those who entered into the public arena by their conduct,⁹⁵ and judges.⁹⁶

However, the ECtHR has never explicitly established a hierarchy of ‘public figures’ and one must thus reconstruct scattered fragments of the mosaic in order to get a broader picture. So far we can reasonably infer that the list of ‘public figures’ can be considered along a continuum. On the one end, there are politicians including local representatives⁹⁷ and candidates standing for elections⁹⁸ which must bear harsher criticism. On the other end, we can see ‘ordinary’ private individuals who deserve stronger protection. In between the two tails lies a ‘grey zone’ where the categorization may shift to the one end or another depending on the circumstances of a particular case. This ‘grey zone’ includes celebrities, journalists, ad hoc ‘public figures’(usually by their conduct) and different categories of public servants.

The core question of this subchapter is where to place judges on the continuum. This question is framed by clear tension. On the one hand, the clear textual guidance in Art. 10 (2) pleads for restrictive interpretation of freedom of speech vis-à-vis the judiciary. On the other hand, there are strong arguments suggesting that criticism of the judiciary should be treated as a form of ‘political speech’ and thus enjoy the highest degree of protection.⁹⁹ The former interpretation was also an early position of the ECtHR. For instance, in *Barfod*¹⁰⁰ the ECtHR

⁹¹ *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 80, ECHR 2004-XI, and cases cited therein.

⁹² *Urbino Rodrigues v. Portugal*, no. 75088/01, § 30, 29 November 2005.

⁹³ *Von Hannover v. Germany*, no. 59320/00, § 62, ECHR 2004-VI.

⁹⁴ *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03, § 26, 22 February 2007.

⁹⁵ *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria (no. 3)*, nos. 66298/01 and 15653/02, § 44, 13 December 2005.

⁹⁶ See cases cited in footnotes nos. 72-75.

⁹⁷ *Kwiecień v. Poland*, no. 51744/99, § 52, 9 January 2007; *Krasulya v. Russia*, no. 12365/03, § 37, 22 February 2007; *Zakharov v. Russia*, no. 14881/03, § 25, 5 October 2006.

⁹⁸ *Kwiecień v. Poland*, no. 51744/99, § 52, 9 January 2007; and *Krasulya v. Russia*, no. 12365/03, § 37, 22 February 2007.

⁹⁹ Barendt, *Freedom of Speech*, 322. Accord Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," 116 and 119; and Raimo Pekkanen, "Criticism of the Judiciary by the Media," in *Protecting Human Rights: The European Dimension: Studies in Memory of Rolv Ryssdal*, ed. Paul Mahoney, et al. (Koln: Carl Heymanns Verlag KG, 2000), 1084.

¹⁰⁰ *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149.

rejected the applicant's argument that his accusations that the two lay judges 'did their duty'¹⁰¹ should be seen as a part of political debate with wider limits for legitimate criticism.¹⁰²

However, the majority in *Barfod* did not address the question why the *Lingens* standard does not also apply to the judiciary.¹⁰³ It was only in *Prager and Oberschlick* when the ECtHR provided a clear answer:

“Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.”¹⁰⁴

The main rationale of the ECtHR for the protective approach to the judiciary was thus its inability (or inappropriateness¹⁰⁵) of replying to their criticism. But more recently, the ECtHR has begun to invoke a 'political speech' argument and seems to have gradually shifted to the latter position.¹⁰⁶

First of all, we must define the notion 'judiciary'. As to the scope of this term, it means 'judicial machinery in the broader sense of this term' comprising also "public prosecutors [who] are civil servants whose task it is to contribute to the proper administration

¹⁰¹ Which according to the ECtHR in the circumstances of the case could only mean that they cast their votes as employees of the Local Government (which was a party of the dispute to be decided by the two lay judges) rather than as independent and impartial judges (*Barfod*, § 30).

¹⁰² *Barfod*, § 35.

¹⁰³ It was only the dissenting judge Gölcüklü who rightly pointed out that "it is not possible to extract an a contrario argument from the *Lingens* case in which the Court held that 'politicians' must be ready to accept more criticism than non-politicians" (§ 3) and persuasively argued for broader understanding of the notion 'political matters' and opined that "those who, although not politicians in the strict sense, nevertheless take part in public affairs should [not] be excluded from the arena of free discussion and democratic debate" (*ibid.*).

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

¹⁰⁵ See e.g. *Buscemi v. Italy*, judgment of 16 September 1999, no. 29569/95, § 67; where the ECtHR stressed that "[T]he judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty".

¹⁰⁶ *Kobenter*, § 29 (iv). Cf. *Ormanni v. Italy*, judgment of 17 July 2007, § 74.

of justice”,¹⁰⁷ clerks to the Justices¹⁰⁸ and arguably also other judicial officials.¹⁰⁹ The *Sunday Times* judgment added further confusion by adding that “[t]he term ‘judiciary’ (*pouvoir judiciaire*) comprises the machinery of justice or the judicial branch of government *as well as* the judges in their official capacity”.¹¹⁰ It is thus the ECtHR’s view that it is possible to distinguish the criticism of the judiciary in general and criticism of a particular judge.

In order to cast more light onto this puzzle, it might be helpful to distinguish the criticized judicial officers along two criteria – ‘quantitative’ and ‘qualitative’. Under ‘quantitative’ criterion, we can distinguish criticism of (1) an individual judge; (2) a particular court or the judiciary within a certain region; (3) the judiciary as a whole – as a branch of government; or (4) the ‘functioning of the system of justice’. Under ‘qualitative’ criterion I understand the role of a particular judicial officer in the machinery of justice. To this end, we can differentiate between (1) lay judges, (2) professional judges,¹¹¹ (3) judges of the constitutional or supreme courts as a distinct category, and (4) prosecutors.

As to the ‘quantitative’ criterion, it is possible to conclude that the criticism of the ‘functioning of the system of justice’¹¹² and the judiciary as a branch of the government falls clearly within ‘political speech’. This was not disputed by the ECtHR even in *Barfod*.¹¹³ It is reasonable to infer that also criticism of a particular court is mostly protected speech.¹¹⁴ But in *Skalka*,¹¹⁵ the ECtHR upheld the sentence for insulting the court as an institution,¹¹⁶ and in

¹⁰⁷ *Lešník v. Slovakia*, no. 35640/97, § 54, ECHR 2003-IV.

¹⁰⁸ *Prince v. the United Kingdom*, no. 11456/85, Commission decision of 13 March 1986, Decisions and Reports 46, p. 222.

¹⁰⁹ But the ECtHR later on rejected interpretation of the term ‘judiciary’ encompassing all persons who are employed by the State as overbroad (*Zakharov v. Russia*, no. 14881/03, § 25, 5 October 2006).

¹¹⁰ *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, § 55 (emphasis added).

¹¹¹ Clerks to Justices best fit within this bracket. See *Prince v. the United Kingdom*, no. 11456/85, Commission decision of 13 March 1986, Decisions and Reports 46, p. 222.

¹¹² Cf. Dissenting opinion of Judge Morenilla in *De Haes and Gijssels*, § 11.

¹¹³ *Barfod*, §§ 31 and 34. See also lucid reasoning of the Spanish Tribunal Constitucional in STC 107/1988 (*Objetor Navazo*), and the description of this case in Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 199.

¹¹⁴ *Barfod*, § 33.

¹¹⁵ *Skalka v. Poland*, no. 43425/98, § 41, 27 May 2003. *Accord Prager and Oberschlick v. Austria*, § 37. This view seems to be supported also by *Nikula*, § 50, last sentence (reproduced below).

Wingarter, it went even further and considered “the fact that the statement made by the applicant was an attack on the reputation of three local professional groups *as a whole*” as aggravating circumstance for the lawyer criticizing all Mannheim judges, public prosecutors and lawyers as incompetent to handle a criminal case.¹¹⁷ These two rulings are worrisome, since it should be only under extreme circumstances of ‘judge-bashing’¹¹⁸ of a particular court or of judicial officials in a particular region, sufficiently serious by its nature and repetition so as to undermine the authority of the judiciary, and not an individual comment of an individual lawyer, when the restriction of free speech might be justified.

But even criticism of individual judges, irrespective of identification of their names,¹¹⁹ does not in itself shift the balance in favour of judges and concerns of administration of justice. This view is supported by *Prager and Oberschlick*, where the ECtHR stressed that

“the evidence shows that the relevant decisions were not directed against the applicant's use as such of his freedom of expression in relation to the system of justice or *even the fact that he had criticised certain judges whom he had identified by name*, but rather the excessive breadth of the accusations, which, in the absence of a sufficient factual basis, appeared unnecessarily prejudicial.”¹²⁰

Therefore, the crux of the problem lies rather in breadth of criticism and in distinction between criticism of a particular judge and criticism of the reasoning of the decision.¹²¹ These issues will be discussed under the WHAT question.

The ‘qualitative criterion’ can also be best described along a continuum. On the one side of the continuum are lay-judges, who deserve the strongest protection since they are

¹¹⁶ But the ECtHR found eight months' imprisonment (sic!) of the applicant disproportionate.

¹¹⁷ *Wingarter v. Germany* (dec.), no. 43718/98, 21 March 2002. The ECtHR thus implicitly accepted the argumentation of the German government that “[e]ven the obvious legal errors committed in the criminal proceedings against [the client of the applicant] could not justify disparaging *whole* groups of professionals” (emphasis added). But see also *Ormanni v. Italy*, judgment of 17 July 2007, § 74.

¹¹⁸ See supra footnote no. 19.

¹¹⁹ Criticizing unnamed but identifiable judge does not seem to be a mitigating circumstance. See *Skalka v. Poland*, no. 43425/98, § 41, 27 May 2003.

¹²⁰ *Prager and Oberschlick v. Austria*, § 37.

¹²¹ *Kobenter*, § 30.

rather ‘ordinary private persons’ without professional training and robust resilience against criticism and, furthermore, often did not choose to sit on the bench but were prescribed to do so.¹²² On the other side are prosecutors. The ECtHR explicitly noted in *Nikula* the fundamental difference between the roles of the prosecutor, being the opponent of the accused, and the judge in all of surveyed contracting states¹²³ and went on to say that “this difference should provide increased protection for statements whereby an accused criticises a prosecutor, as opposed to verbally attacking the judge or the court as a whole”.¹²⁴

In between jurors and prosecutors are professional judges. However, their position within the broader hierarchy of ‘public figures’ has not yet settled. If we adhere to the dictum of *Nikula*, it would suggest that judges are below public servants such as prosecutors or police officers. This position is clearly unacceptable at least for the one specific category of judges – justices of the constitutional courts – and therefore I singled-out this category from the rest of the judiciary. Even if we do not accept argument ‘à la Stone-Sweet’ that *all* courts perform political and not only judicial functions,¹²⁵ we must agree that at least the ‘constitutional courts’¹²⁶ often decide morally sensitive and highly political cases.¹²⁷ Therefore, the constitutional justices must accept harsher criticism that is very close to the level accepted with regards to politicians.¹²⁸

¹²² See *Zarb Adami v. Malta*, no. 17209/02, ECHR 2006-....

¹²³ *Nikula*, §§ 25 and 50.

¹²⁴ *Nikula*, § 50.

¹²⁵ However, it is necessary to admit that Stone-Sweet’s argument is mostly limited to the constitutional courts.

¹²⁶ Under ‘constitutional courts’ I understand the highest judicial bodies in the contracting states including bodies such as House of Lords, *Conseil Constitutionnel* or supreme courts that are not strictly speaking ‘constitutional courts’. What might be a distinguishing feature of these bodies is a power to exercise the abstract review of legislation (see below).

¹²⁷ Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," 118.

¹²⁸ *Accord* *Ibid.*, 118, footnote 99. I would add that this equation with politicians should be accompanied with the exception of intrusions into the private life of judges which are less justifiable than in case of politicians.

This conclusion is even truer in case of constitutional courts that are empowered to exercise abstract review of legislation¹²⁹ or in case of French *Conseil Constitutionnel* where the very status of being considered as the ‘court’ is disputed.¹³⁰ The former seems to be acknowledged by the ECtHR. Comella rightly points out that in *Amihalachioaie v. Moldova*¹³¹ the ECtHR seemed to be considerably protective of speech criticizing the judgment of the constitutional court in the abstract review procedure and, in contrast to other cases, its scrutiny was less searching.¹³²

Alternatively, instead of a strict distinction of the constitutional justices and ordinary judges we may apply a gradual approach. This might be expressed in the following formula: “the higher the court, the better and more robust the judges and the larger the social impact of the decision, and thus the broader criticism they must withstand”.¹³³ Therefore, low-ranking members of the judiciary should be arguably more shielded from the criticism than their senior colleagues.

Nevertheless, there seems to be one obstacle against elevating judges on the continuum of public figures closer to politicians – the *Nikula* judgment. But there is an alternative reading of *Nikula* which focuses on the fact that the comment against the prosecutor took place in the courtroom. Therefore it may be plausibly argued that *only* in that procedural context the prosecutors must tolerate more considerable criticism than judges.¹³⁴ In other contexts such as criticism voiced in media, judges should bear harsher criticism than prosecutors.

¹²⁹ This power is particularly broad e.g. in the post-communist countries in the CEE region. See e.g. Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht, Netherlands; Norwell, MA: Springer, 2005).

¹³⁰ See, most recently, articles of Cheryl Saunders, Burt Neuborne, Dominique Rousseau and Alec Stone-Sweet dedicated to the memory of Louis Favoreu; in I-CON, Vol. 5, No. 1, 2007.

¹³¹ *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III.

¹³² Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," 118, footnote 99.

¹³³ *Contra* Dissenting opinion of Judge Pavlovski in *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III.

¹³⁴ *Nikula*, § 51. This view is supported by *Ormanni v. Italy* (judgment of 17 July 2007, § 74), where the prosecutors were not distinguished from the rest of judicial functionaries when the criticism did not take place in the courtroom.

This reading would dismantle another barrier from the proposition that the criticism of judges is a form of ‘political speech’ triggering the highest protection of freedom of expression. It is indeed generally accepted that the impact of the decisions of judges are larger than those of prosecutors and the prestige of judges in the society is generally higher. Furthermore, in contrast to prosecutors, the judiciary is itself a branch of government, and although arguably the ‘least dangerous branch’,¹³⁵ it is still *dangerous* and still *a branch*. In conclusion, the place of the judiciary in the hierarchy of public figures should be definitely above all public servants including public prosecutors, and according to the level of the court very close to politicians.

3.3 WHO is criticizing?

In contrast to categorization of targets of criticism, much less seems to be written on the categorization of speakers in the ECtHR jurisprudence on free speech and almost nothing in relation to the judiciary. The immediate question is: Does it matter who speaks? This subchapter argues that at least in the ECtHR jurisprudence it does and not only in widely acknowledged case of parliamentary privilege. Therefore, this subchapter first identifies the ‘overprivileged’ and ‘underprivileged’ groups and focusing on the speech vis-à-vis judges concludes that the categorization of speakers is highly problematic and sometimes leads even to paradoxical results.

Apart from politicians, there are at least three other groups that are arguably ‘overprivileged’, namely journalists, then what I call ‘elected representatives’ in the broad sense, and judges themselves. As to the politicians, the ECtHR upheld their parliamentary

¹³⁵ Hamilton, A. The Federalist no 78 (The Judiciary Department). See also famous book of Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962).

privilege¹³⁶ even against Art. 6 (the right to the fair trial) and applying the argument *a maiori ad minus*, we can infer that if the ECtHR upheld the parliamentary privilege against another and *unqualified* human right guaranteed by the ECHR50 (for instance the right to the fair trial), it will do the same against the *qualified* human right (such as the right to privacy or the right to reputation)¹³⁷ and against a public interest. The ECtHR's line of jurisprudence seems to support this thesis,¹³⁸ albeit as Comella rightly observed, it does so without developing a convincing rationale in favour of the parliamentary immunity.¹³⁹ The protection of free speech might be arguably even stronger in case of the opposition leader.¹⁴⁰

The second privileged group is arguably journalists. The protective approach of the ECtHR vis-à-vis the press is well-known. To name a few essential principles: "a constant thread running through the Court's case-law is the insistence on the essential role of a free press in ensuring the proper functioning of a democratic society",¹⁴¹ the duty of the press "is ... to impart ... information and ideas on all matters of public interest, including those relating to the administration of justice",¹⁴² "[n]ot only does the press have the task of imparting such information and ideas; the public has also a right to receive them [since] otherwise, the press would be unable to play its vital role of 'public watchdog'",¹⁴³ "[j]ournalistic freedom also

¹³⁶ This distinction between the criticism within and outside Parliament is beyond this paper. See e.g. Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," 114-15.

¹³⁷ I will leave aside for now a claim made above that the right to reputation is nowhere mentioned in the ECHR50, and therefore allegedly deserves lower protection than e.g. the right to private life (see footnote no. 83).

¹³⁸ See *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 42; *Jerusalem v. Austria* (no. 26958/95, §§ 36 and 40, ECHR 2001-II; *A. v. the United Kingdom*, no. 35373/97, § 79, ECHR 2002-X.

¹³⁹ See Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," 113, footnote 83. The ECtHR endorses aims of protecting freedom of speech in Parliament and maintaining separation of powers between the legislature and the judiciary.

¹⁴⁰ See *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 42.

¹⁴¹ E.g. *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 71, ECHR 2004-XI.

¹⁴² E.g. *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-34, § 37.

¹⁴³ E.g. *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 27, § 63; or *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III.

covers possible recourse to a degree of exaggeration, or even provocation”,¹⁴⁴ and finally “news is a perishable commodity and to delay its publication ... may well deprive it of all its value and interest”.¹⁴⁵ Yet, in balancing the rights of the press and the authority of the judiciary, the former often gave way to the latter,¹⁴⁶ and thus the ‘journalistic privilege’ does not seem to be of much an asset in this particular context.¹⁴⁷

The third category of protected speakers is comprised of ‘elected representatives’ in the broad sense. This category includes representatives of professional or other bodies in different contexts such as vice-chair of the parents’ organization in the context of education debate,¹⁴⁸ elected representatives of police associations,¹⁴⁹ or speakers in forums comparable to Parliament such as municipal councils.¹⁵⁰ What is common to the speakers of third category is their representative character in two senses. Firstly, they are usually spokespersons of a broader group of persons, either formally as elected representatives or rather informally, and secondly they also often represent a voice of opposition. Put it differently, their position *ipso facto* arguably makes their criticism more valuable since it forms a direct part of the democratic process.¹⁵¹ However, the position of this category vis-à-vis the judiciary remains unclear since the ECtHR has not had the opportunity to take a stance on this issue.

¹⁴⁴ E.g. *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38; *Thoma v. Luxembourg*, no. 38432/97, §§ 45 and 46, ECHR 2001-III; and *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V.

¹⁴⁵ *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII.

¹⁴⁶ See e.g. *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313; *Perna v. Italy* [GC], no. 48898/99, ECHR 2003-V; and *Leempoel & S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, 9 November 2006.

¹⁴⁷ But see a recent case, where the ECtHR correctly stipulated that it is not possible to impose on a journalist a duty to describe in the punctual manner the technical details of judicial proceedings which he refers to (*Ormanni v. Italy*, judgment of 17 July 2007, § 69).

¹⁴⁸ *Ferihumer v. Austria*, no. 30547/03, § 27, 1 February 2007.

¹⁴⁹ *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 44, ECHR 1999-VIII.

¹⁵⁰ *Jerusalem v. Austria*, no. 26958/95, § 40, ECHR 2001-II; *Accord Roseiro Bento v. Portugal*, no. 29288/02, § 44, 18 April 2006. According to Comella, by introducing category of ‘forums comparable to Parliament’ the ECtHR tries to reduce asymmetry between representative assemblies that technically enjoy immunity and those that do not; see Comella, “Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights,” 115, footnote 89.

¹⁵¹ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 12.

And finally, we should not forget judges themselves. Even though the level of criticism of judges *within* the judiciary varies from one signatory state of the ECHR⁵⁰ to another pursuant to prevailing judicial culture in a given state, judges often criticize their colleagues on a professional level. This phenomenon is apparently stronger in countries where judges may append dissenting opinions to the majority findings.¹⁵² Yet, this criticism rarely reaches the level typical for American legal culture¹⁵³ and, not surprisingly, none of this type of case has arrived before the ECtHR.¹⁵⁴

On the other end of the spectrum is the ‘underprivileged’ group, namely lawyers. The former group seems to be deeply embedded in the case law of ECtHR. The ECtHR attributed the special status to lawyers for the first time in *Casado Coca*,¹⁵⁵ but in relation to criticism of judges the last word for now has been said in *Kyprianou*:

“The special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein.”¹⁵⁶

This special position explains the usual restrictions on the conduct of members of the Bar and also the monitoring and supervisory powers vested in the various Bar councils.¹⁵⁷ In *Veraart*, the ECtHR stressed that “the special nature of the legal profession has a certain impact on their conduct in public, which must be discreet, honest and dignified”.¹⁵⁸ Therefore,

¹⁵² *Ibid.*, 11.

¹⁵³ But see cases cited by Addo in *Ibid.*, 12, footnote 14.

¹⁵⁴ This is of course fortunate since such an application would put the judiciary in a given state in a very bad picture. Yet we should not exclude this possibility, particularly with regards to clashes in the CEE region between the old-fashioned communist-educated judges on the one hand, and the ‘new-generation’ judges on the other.

¹⁵⁵ *Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, p. 21, § 54.

¹⁵⁶ *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; *Steur v. the Netherlands*, no. 39657/98, § 36; ECHR 2003-XI; and *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III, § 27. See also *Campbell v. the United Kingdom*, judgment of 25 March 1992, Series A no. 233, § 42.

¹⁵⁷ See *Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, p. 21, § 54; and *Nikula v. Finland*, no. 31611/96, § 45, ECHR 2002-II.

¹⁵⁸ *Veraart v. the Netherlands*, no. 10807/04, § 51, 30 November 2006 (referring to *Steur v. the Netherlands*, no. 39657/98, § 38; ECHR 2003-XI).

lawyers seem to be limited by ‘dignity of their profession’¹⁵⁹ and thus must accept wider ‘self-censorship’ vis-à-vis the judiciary.¹⁶⁰ This self-censorship reaches its peak when a lawyer exercises his freedom of speech in the media and is at its lowest ebb in the courtroom.¹⁶¹

Interestingly, a position of a lawyer might coincide with being an ‘elected representative’ in the broad sense. This happened in *Amihalachioaie v. Moldova*,¹⁶² where the applicant, a lawyer, was simultaneously a chairman of the Moldovan Bar Council. Furthermore, his harsh comments were related to the very heart of interests of his professional organization, a ruling of the Constitutional Court of Moldova abolishing a compulsory membership in the Moldovan Bar Council. This ruling effectively brought to an end the system whereby lawyers were organised within a single structure, the Moldovan Bar Council, which was an association chaired by the applicant. The ECtHR had not been very explicit but it seemed to have interpreted the chairman position as a mitigating factor for the applicant.¹⁶³

In conclusion, there are two major findings as to the categorization of speakers. First, unlike in case of targets of criticism, the speakers do not seem to operate on the continuum but rather on categorical underprivileged/normal/overprivileged trichotomy. In any case, ‘criticism of judges’ cases deviate from what Comella has called a ‘principle of symmetry’ among speakers in ECtHR’s free speech cases.¹⁶⁴ Second, the categorization of speakers is highly problematic and often leads to paradoxical results. As I argued earlier in Part 1, it is the criticism by politicians (especially when coupled with media pressure) which is the most harmful form of speech against the judiciary.¹⁶⁵ Eric Barendt rightly observes that “politicians may relatively easily undermine the authority of a court or of a particular judge through a

¹⁵⁹ *Nikula*, § 46.

¹⁶⁰ But see *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III, which suggests that in abstract review procedure the degree of permissible criticism by (not only but also) lawyers is higher.

¹⁶¹ But see *Veraart v. the Netherlands*, no. 10807/04, § 53, 30 November 2006.

¹⁶² *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III.

¹⁶³ See *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III, § 35.

¹⁶⁴ Victor Ferreres 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), 111-12.

¹⁶⁵ See supra footnote nos. 19 and 20.

campaign intended to discredit the quality of his decisions, while some of them can even secure dismissal [and] [t]he press, let alone private individuals, does not have the same capacity”.¹⁶⁶

But it is precisely this group of speakers that is most protected. Interestingly, there has not been a single case of ‘judge-bashing’ by politicians before the ECtHR. In contrast, it was always journalists,¹⁶⁷ lawyers,¹⁶⁸ or private individuals¹⁶⁹ who were ‘punished’ for the exercise of their freedom of speech vis-à-vis the judiciary. Put differently, with the exception of lawyers, the strict standards for ‘criticism of judges’ limits the ability to participate in the work of the judiciary only to those who are the legally most informed ones or have a sufficient secretariat at their disposal, such as judges and politicians.¹⁷⁰ These two groups enjoy the safe harbour of their privileges whereas the journalists and private individuals must fear of the consequences of their speech. As to the lawyers, the restrictive approach is highly problematic from the international ‘soft law’ documents such as the Basic Principles on the Role of Lawyers¹⁷¹ or Recommendation (2000) 21 the Committee of Ministers of the Council of Europe.¹⁷²

¹⁶⁶ Barendt, "Michael K. Addo (Ed.): Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards (Book Review)," 703.

¹⁶⁷ See cases cited in footnote 146.

¹⁶⁸ *Schöpfer v. Switzerland*, judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III; *Wingerter v. Germany* (dec.), no. 43718/98, 21 March 2002.

¹⁶⁹ *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149 (applicant was a precious-stone cutter).

¹⁷⁰ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 21.

¹⁷¹ Adopted in 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders; according to § 20 lawyers should enjoy “civil and penal immunity for relevant statements made in good faith in written or oral pleadings in their professional appearances before a court, tribunal or other legal or administrative authority”.

¹⁷² For instance, “lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards”. Lawyers should, however, “respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards” (principles I:4 and III:4). Both international documents were cited in *Nikula*, §§ 27-28; and *Kyprianou* [GC], §§ 58-59.

This ‘discrimination’ of speakers runs contrary to the principle of “ensuring public participation in, and scrutiny of, judges’ work”.¹⁷³ The ECtHR seems to have acknowledged this problematic aspect in part and held that “[t]he press is one of the means by which politicians and public opinion *can verify* that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them.”¹⁷⁴ This position is welcomed since it ensures not only that the citizenry must have access to the discourse on judicial matters but also that they must be allowed to participate in this discourse.

3.4 WHAT is criticized?

The third WH-question focuses on the object of criticism. In this context, the distinction between the criticism against the judge and criticism against the reasoning of the court’s decision comes to the fore. Although it is often difficult to draw a clear line between the attack solely against the reasoning of the court and attack solely against the judge, this criterion plays a significant role in the jurisprudence of the ECtHR.

As early as in the *Barfod* case, the ECtHR heavily relied on the reasoning/personal attack dichotomy and held that “[t]he impugned statement was not a *criticism of the reasoning* ..., but rather, ..., a defamatory *accusation against the lay judges personally*, which was likely to lower them in public esteem and was put forward without any supporting evidence.”¹⁷⁵ Later on, this dichotomy was taken as a basis for both majority and minority opinions in the ECtHR’s cases on the criticism of judges.

¹⁷³ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 23.

¹⁷⁴ *Kobenter*, § 29 (ii) (emphasis added).

¹⁷⁵ *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149, § 35 (emphasis added). Cf. Partly concurring and partly dissenting opinion of Judge Thomassen in *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III.

In *Nikula*, a slightly different context of criticising the actions of public prosecutor, majority opined that

“[i]t is true that the applicant accused prosecutor T. of unlawful conduct, but this criticism was directed at the prosecution strategy purportedly chosen by T., that is to say, the *two specific decisions* which he had taken prior to the trial and which, in the applicant's view, constituted ‘role manipulation ... breaching his official duties’”.¹⁷⁶

Similarly, majority in *Kobenter* reaffirmed the same principle in different terms holding that “the statement ‘the judgment delivered by the private prosecutor would only differ somewhat from the traditions of medieval witch trials’ made sufficiently clear that the criticism concerned *the judgment* and not, as the domestic courts and the Government found, alleged *deficiencies by the judge* in conducting the proceedings”.¹⁷⁷

However, as I stressed above, the same line of argumentation has also been used in separate opinions to the detriment of free speech. For instance, Judge Pavlovschi in his dissent in *Amihalachioaie* thought that “the impugned statement of the applicant was not a *criticism of the reasoning* contained in the decision of the Constitutional Court, but rather *defamatory accusations against the judges* of that court, as well as the court itself, the highest judicial authority of the State”.¹⁷⁸ It is thus important to define the phrase ‘reasoning of the judgment’. This phrase may have two meanings: (1) solely the judicial reasoning; (2) a generic term covering both the actual reasoning as well as judicial process. The former might be called ‘reasoning of the judgment’ in the strict sense whereas the latter ‘reasoning of the judgment’ in the broad sense. Different perception of the term phrase ‘reasoning of the judgment’, never explicitly defined by the Strasbourg court, might be an underlying cause of disagreement between its judges.¹⁷⁹ Finally, it must be reminded that the fact that criticism is not attacking

¹⁷⁶ *Nikula*, § 51 (emphasis added).

¹⁷⁷ *Kobenter*, § 30 (emphasis added).

¹⁷⁸ Dissenting opinion of Judge Pavlovschi in *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III. See also Dissenting opinion of Judge Morenilla in *De Haes and Gijssels*, § 10.

¹⁷⁹ See also Dissenting opinion of Judges Caflisch and Pastor Ridruejo in *Nikula* (§ 6) who call for greater protection of “the dignity of the *judicial process*” (emphasis added).

solely ‘reasoning of the judgment’ (even in the broad senses) does not in itself justify the speech restriction.

Yet another problem in practice, addressed above, is an overlap of attack against the reasoning of the court and attacks against the judge. This problem might be mitigated by drawing the line between comments related to professional competency and personal characteristic of the judges. While the former should clearly belong to the public arena, the latter should enjoy greater protection. Unfortunately, even this distinction does not completely eradicate the abovementioned overlap.¹⁸⁰ Furthermore, this rule requires two qualifications. First, by ‘greater protection’ against attacks on personal characteristic of a judge, I do understand only greater protection than in case of attacks on professional competency and *not* greater protection than granted to the ordinary citizenry in the ‘attack-on-personal-characteristic’ cases. As Barendt rightly points out, “the object [of the offence of ‘contempt of court’] is not to protect the judges personally, so comment on the *character of a judge unrelated to his performance* on the bench falls outside the scope of the offence”.¹⁸¹

Second, there are still few instances where a judge’s personal life may be the subject of criticism.¹⁸² This separation of private and public life of a judge might prove to be very difficult particularly in countries in the process of transition to democracy where the citizenry has undeniable right to know about private life of a particular judge under previous regime. Furthermore, Addo has raised another persuasive objection, that to limit permissible criticism to the professional sphere of a judge “will limit the ability to participate in the work of the

¹⁸⁰ See Cram, pp. 199-200; Addo, p. 17, 21 and 238.

¹⁸¹ Barendt, *Freedom of Speech*, 317. Accord R. Ergec, “La Liberté D’expression, L’Autorité Et L’Impartialité Du Pouvoir Judiciaire,” *Revue trimestrielle des droits de l’homme* (1993): 177. For an absolutely wrong understanding of the official/personal dichotomy, see argument of Romanian Government in *Cumpănă and Mazăre v. Romania* [GC], Application No. 33348/96, 17 December 2004, § 81.

¹⁸² Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 17.

judiciary to the legally well informed alone”¹⁸³ because of “the public’s unfamiliarity with the technical aspects of the law”.¹⁸⁴

A related issue to the issue of *object* of criticism is a *form* of this criticism. We may place the *form* of criticism on three-tier continuum of Michael Addo – disagreement/disapproval/disrespect of the judiciary.¹⁸⁵ It is the third category, and in particular personal insults, that has been constantly found by the Strasbourg institutions not deserving the protection of Art. 10 ECHR50. The European Commission of Human Rights has dismissed cases, in which counsel had described the opinion of a judge as “ridiculous”,¹⁸⁶ where counsel had referred to judges as “highly irritable idiots” and their decisions as “biased idle talk” and “shameless deception”,¹⁸⁷ where counsel had stated at the trial that the prosecutor had drafted the bill of indictment “in a state of complete intoxication”,¹⁸⁸ and where counsel raised in the written pleadings the question “whether or not the lack of Judge R.’s moral strength was more or less flagrant as compared to his obvious incompetence to act as a judge” and stated that “District Court Judge [R.], as a result of his ignorance of the law and of the relevant case-law, had become the accomplice of the accused”.¹⁸⁹

Similarly, the ECtHR had rejected as manifestly ill-founded the complaint of a lawyer reprimanded for a statement in written appeal submissions collectively dismissing judges, public prosecutors and lawyers in a particular locality as “incompetent”,¹⁹⁰ and held that sentencing a prisoner referring to the officials in the Penitentiary Division of the Regional Court as “irresponsible clowns” would not in itself amount to a violation of Art. 10

¹⁸³ *Ibid.*, 21.

¹⁸⁴ *Id.*

¹⁸⁵ *Ibid.*, 11.

¹⁸⁶ *W.R. v. Austria*, no. 26602/95, Commission decision of 30 June 1997 (unreported).

¹⁸⁷ *Meister v. Germany*, no. 25197/95 and no. 30549/96, Commission decisions of 18 October 1995 and 10 April 1997, respectively, unreported.

¹⁸⁸ *Mahler v. Germany*, no. 29045/95, Commission decision of 14 January 1998, unreported.

¹⁸⁹ *Bossi v. Germany*, no. 30339/96, Commission decision of 15 January 1997, unreported.

¹⁹⁰ *Wingert v. Germany* (dec.), no. 43718/98, 21 March 2002.

ECHR50.¹⁹¹ In the latter case, *Skalka v. Poland*, it made the distinction between criticism and insult clear: “[a] clear distinction must ... be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate punishment would not, in principle, constitute a violation of Article 10 § 2 of the Convention”.¹⁹² But it seems that the assessment of a crucial issue – what level of criticism already amounts to insult – has changed in time.¹⁹³

Finally, it is important to justify one omission from the analysis in the WHAT question – distinction between value judgments and statements of facts. This paper to a large extent put this distinction aside for two reasons. First, in this aspect the ECtHR jurisprudence on criticism of judges does not differ much from the rest of the defamation cases.¹⁹⁴ Second, I am rather sceptical about determinacy of this dichotomy since it does not provide clear guidance in hard cases.¹⁹⁵ More precisely, insults are not protected even though they are a particular form of value judgment, and even those utterances that do not amount to insult might not be protected unless justified by sufficient evidence.¹⁹⁶

3.5 WHERE does criticism take place?

The other criterion present in the jurisprudence of the ECtHR is the place or means of criticism. Although there has not been enough cases solely of ‘criticism of judges’, with

¹⁹¹ The applicant went even further and referred to one judicial official as “small-time cretin”, “some fool”, “a limited individual”, and “outstanding cretin”.

¹⁹² *Skalka v. Poland*, no. 43425/98, 27 May 2003, § 34. Cf. *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III, § 36.

¹⁹³ See Dissenting opinion of Judges Caflisch 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).

¹⁹⁴ *Contra* M. K. Addo, “Are Judges Beyond Criticism under Article 10 of the European Convention on Human Rights?,” *The International and Comparative Law Quarterly* 47, no. 2 (1998): 438. The other issues left out include a good faith requirement, impact according the media employed, standard of proof, problem of partial truths, previous conduct of parties to the original dispute etc.

¹⁹⁵ Cf. Comella, “Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights,” 104-08, and cases cited therein. More recently, see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, 22 October 2007, § 57.

¹⁹⁶ On insults, see e.g. Comella, “Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights,” 108-111.

support of other cases on criticism of public figures, we can distinguish four places of criticism under the WHERE-question: (1) in the courtroom also referred to as ‘contempt in the face of the court’; (2) in ‘non-public communication’ via private letters, complaints to superior officer, statements to the police, appeals and other submissions to the court, or during telephone conference etc.; (3) in the media; and finally (4) on Internet.¹⁹⁷

Firstly, the criticism might be strictly confined to the courtroom. In this case, perhaps due to the limited audience and specific context of the ongoing controversy, a person representing the client enjoys higher protection of her free speech. This view is supported by *Nikula*, where the ECtHR took the fact that “applicant's submissions were confined to the courtroom, as opposed to criticism against a judge or a prosecutor voiced in, for instance, the media”¹⁹⁸ as a mitigating circumstance for the applicant.¹⁹⁹ The expanded protection seems to apply both for criminal²⁰⁰ and civil²⁰¹ proceedings.

But the ECtHR also stressed that “lawyer’s freedom of expression *in the courtroom* is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right.”²⁰² However, the ECtHR added immediately that “it is only in exceptional circumstances that restriction – even by way of a lenient criminal penalty – of defence counsel’s freedom of expression can be accepted as necessary in a democratic society.”²⁰³ A strong protection of lawyer’s speech in the courtroom is welcomed since it serves not only to the lawyer himself but primarily to the protection of the rightful interests of

¹⁹⁷ Issues such as picketing before the court building are left out since they belong rather to the right of assembly.

¹⁹⁸ *Nikula*, § 52 (references omitted). *Accord Steur v. the Netherlands*, no. 39657/98, § 41; ECHR 2003-XI.

¹⁹⁹ But we must keep in mind that in case of criticism of judges in the courtroom there are also several arguments that counsel against wider protection of free speech: (1) it is usually lawyer who represents the party of the proceedings and lawyers fall to the ‘underprivileged’ groups of speakers (see Part 3.3; note that in *Nikula*, the applicant was not a member of the Bar); (2) verbal attacks against the judge or the court as a whole trigger decreased protection of criticism as opposed to criticism of other party of the proceedings (see Part 3.2), and in *Nikula* it was the prosecutor (and not the judge) who was criticized.

²⁰⁰ *Nikula*, § 50.

²⁰¹ *Steur v. the Netherlands*, no. 39657/98, § 39; ECHR 2003-XI.

²⁰² *Kyprianou [GC]*, § 174 (emphasis added).

²⁰³ *Kyprianou [GC]*, § 174, citing *Nikula v. Finland*, §§ 54-55.

her clients.²⁰⁴ This of course does not mean that every disparaging statement will be covered by this protection.²⁰⁵

The second forum of criticism is a communication with the court other than via media and Internet or during the course of proceedings. The very fact that this form of criticism is accessible to a limited audience and is often expressed in a formal procedure such as complaint or appeal, should counsel for higher protection. This view is supported by *Zakharov*, where the ECtHR not only accepted the fact that the applicant's grievances against the head of the town council were set out exclusively in private correspondence and were not made public as a mitigating circumstance,²⁰⁶ but also stressed the applicant's right to report irregularities in the conduct of State officials to a body competent to deal with such complaints as an essential component of the rule of law.²⁰⁷

But private letter to a hierarchical superior does not in itself always save the speaker. For instance, in the *Lešník* case²⁰⁸ where the applicant was held criminally responsible for setting out allegations against a prosecutor public in a letter to his hierarchical superior the ECtHR found no violation of Art. 10. However, *Zakharov* was rightly distinguished by the ECtHR *inter alia*²⁰⁹ on the ground that “Mr Lešník's aspersions on the prosecutor were leaked to a newspaper – whether intentionally or otherwise – [whereas in *Zakharov*] the applicant's grievances remained a matter strictly between him and the deputy regional governor, the hierarchical superior of the town council head”.²¹⁰ Therefore, the *Lešník* case does not run

²⁰⁴ *Accord Meister v. Germany*, no. 30549/96, Commission decisions of 10 April 1997 (unreported).

²⁰⁵ See e.g. *Mahler v. Germany*, no. 29045/95, Commission decision of 14 January 1998 (unreported); *Bossi v. Germany*, No. 26602/94, Commission decision of 15 April 1997 (unreported); *W.R. v. Austria*, no. 26602/95, Commission decision of 30 June 1997 (unreported).

²⁰⁶ *Zakharov v. Russia*, no. 14881/03, § 23, 5 October 2006.

²⁰⁷ *Zakharov v. Russia*, no. 14881/03, § 26, 5 October 2006.

²⁰⁸ *Lešník v. Slovakia*, no. 35640/97, ECHR 2003-IV.

²⁰⁹ The other ground being the ‘privileged’ status of the public prosecutor as a member of the ‘judicial machinery in the broader sense of this term’ in contrast to position of the head of town council “whose standing is closer to that of professional politicians” (*Zakharov v. Russia*, no. 14881/03, § 25, 5 October 2006.).

²¹⁰ *Zakharov v. Russia*, no. 14881/03, § 25, 5 October 2006.

against *Zakharov*, but in fact supports the proposition that the critical remarks uttered *solely* in non-public communication mitigates the harm to the target of criticism.²¹¹

Nor the critical comments in the appeal are boundless. For instance, the ECtHR had rejected as manifestly ill-founded the complaint of a lawyer reprimanded for a statement in written appeal submissions collectively dismissing judges, public prosecutors and lawyers in a particular locality as incompetent.²¹² In this case, the ECtHR seems to have not taken into account the limited impact of the means of criticism at all. Instead, it focused its analysis on the insulting character of applicant's remarks. This case thus serves as a reminder that highly disparaging statements are capable of rebutting the mitigating circumstances of limited audience.²¹³ Furthermore, it seems that the statements made *after* termination of the proceedings generally deserve lesser protection than the remarks confined in the courtroom.²¹⁴

Criticism in the media represents the third and perhaps the most obvious forum for expressing disagreement with the administration or outcome of judicial process. However, the ECtHR seems to take the voicing criticism in the media as an aggravating circumstance for the speaker.²¹⁵ On the other hand, it may be reasonably argued that the ECtHR is stricter in resorting to media when the trial is still pending²¹⁶ or when other means such as appeal are still

²¹¹ *Accord Lešník v. Slovakia*, no. 35640/97, § 61, ECHR 2003-IV. But leakage to the media in itself does not shift scales in favour of the right to reputation; see *Marônek v. Slovakia*, no. 32686/96, § 56, ECHR 2001-III.

²¹² *Wingarter v. Germany* (dec.), no. 43718/98, 21 March 2002. In fact, the applicant also added that any first-semester law student would have known that the charge against his client was unfounded, and moreover, he claimed that in Mannheim anti-Semitic and Nazi judges had made a career because of their work or their attitude under the Nazi regime.

²¹³ *Accord Meister v. Germany*, no. 30549/96, Commission decisions of 10 April 1997 (unreported); and *Prince v. the United Kingdom*, no. 11456/85, Commission decision of 13 March 1986, Decisions and Reports 46, p. 222. See also cases cited in footnote no. 205.

²¹⁴ *Accord Meister v. Germany*, no. 30549/96, Commission decisions of 10 April 1997 (unreported); where the Commission noted that Mr. Meister had made these statements after termination of the respective proceedings and thus his claim that they served the rightful interests of his clients was weakened.

²¹⁵ *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 with further references. Cf. dissenting opinions of Judge Jambrek and Judge De Meyer in *Schöpfer*; and the Joint dissenting opinion of Sir Nicolas Bratza and Judge Maruste in *Lešník*.

²¹⁶ *Schöpfer v. Switzerland*, judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1054, § 34.

available.²¹⁷ Furthermore, the ECtHR emphasised the role of the press in verifying the fulfilment of the duties entrusted to judges.²¹⁸ One plausible explanation is that it is the dichotomy of criticism vs. insult which is usually decisive and not the publication itself.

Finally, apart from other threats to administration of justice,²¹⁹ Internet-based technologies may also be employed for a scandalising of a judge or a court. Although the number of instances of the ‘cybercontempt’ or ‘cyberscandalising’,²²⁰ is rather rare,²²¹ in particular with the rise of ‘blogosphere’²²² we must take this possibility into account. It is the very nature of the blog postings that they “tend to be short and informal”,²²³ and thus often sharp. Coupled with their easy accessibility, blogs might soon become a ‘favourite’ forum for critics of the judiciary. However, blogs are rather recent phenomenon and thus the ECtHR has not had an opportunity to decide such a case.

In sum, it is difficult to place the different locations of the criticism on the continuum, but it can be reasonably inferred that the speech that is confined to the courtroom and serves the interests of the representative’s client deserves the highest protection. Similarly, any means of communication other than media seem to have been more protected due to the limited audience and as a result also a lesser harm to the reputation of the judge or the authority of the judiciary as a whole. This heightened protection is even more buttressed when the criticism is a part of official complaint or appeal procedure. In contrast, the lowest degree of criticism is attributed to the criticism in media which is usually considered as an aggravated circumstance. And finally, the criticism on Internet is still an open question and we must wait

²¹⁷ Ibid. Mr Schöpfer first publicly criticised the administration of justice in Hochdorf and then exercised a legal remedy which proved effective with regard to the complaint in question (§ 34).

²¹⁸ *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 17, § 34; *Accord Kobenter*, § 29 (ii).

²¹⁹ See Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 212.

²²⁰ Ibid., 210.

²²¹ For one of a few reported cases, see Ibid., 217. But see also a section on ‘Blogging and defamation or liability’ at http://en.wikipedia.org/wiki/Blog#Blogging_and_defamation_or_liability.

²²² On blogs generally, see e.g. J. M. Balkin, “Online Legal Scholarship: The Medium and the Message,” *Yale Law Journal: The Pocket Part* 116 (2006).

²²³ Ibid.: 25.

for the position of the ECtHR on this issue. In sum, we may reasonably conclude that the place of the criticism is less important than the other variables of the particular case. Put differently, the answer to the WHEN-question signals the outcome of a case less than answers to the other Wh-questions.

3.6 WHEN-question and other factors

It would be methodologically more elegant to include also a question WHEN criticism takes place. In fact, this criterion plays a crucial role for distinction of a criticism during a pending trial and criticism after the decision of the court is rendered.²²⁴ But the WHEN-question was already answered in the introduction by narrowing down the topic of this paper. Therefore, it must suffice to add only one more remark; that the ‘lapse of time’ has often ‘opening effect’ for the freedom of speech. The ECtHR itself held that as the time lapses, the public interest in open discussion prevails over privacy interests.²²⁵ Furthermore, certain well-known figures of the judiciary or even a specific group of judges (this is the case of the so-called ‘Brown Judges’ in the post-war Germany²²⁶) have been openly criticized only after the end of their tenure and sometimes even only after their death.²²⁷ Finally, a ‘lapse of time’ may have effect on the ‘transition to democracy’ argument discussed below.

A short note will be devoted to two further criteria that are not fully covered by the 4Wh questions but might have influenced the reasoning of the ECtHR or may do so in future, namely geographical factors and ‘transition-to-democracy’ argument. Geographical nature of

²²⁴ The same seems to apply to the criticism of the lower instance judgment *before* the decision of the higher instance. See *Schöpfer v. Switzerland*, judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, § 34.

²²⁵ *Editions Plon v. France*, no. 58148/00, § 45, ECHR 2004-IV. See also Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," 114, footnote 86.

²²⁶ Whose silent acquiescence, compliance, and active participation in the gravest crimes during Nazi era was addressed only long after the World War II. The same process is most probably to happen in the post-communist states in the CEE region.

²²⁷ But see *Wingter v. Germany* (dec.), no. 43718/98, 21 March 2002; where the applicant evoked the past of a Mannheim judge and two Mannheim lawyers under the Nazi regime.

a particular country, largeness of its territory, and the level of density of its population may have a bite for the outcome of the ‘criticism of judges’ case. In particular, a vast territory coupled with low density of its population may plead for more protective standards of the judges. Albeit this criterion has never been explicitly acknowledged by the ECtHR, it is suggested as an implicit rationale of the *Barfod* judgment, where the necessity of confidence in lay judges in Greenland with its dispersed population might have been a decisive factor.²²⁸ Similarly, when the country is a small island nation where virtually everyone knows everyone and thus the authority of the judiciary may be relatively vulnerable to any challenge, freedom of expression may give way administration of justice concerns.²²⁹

The ‘transition-to-democracy’ argument relates to issue of maturity of a particular democracy and its impact on the degree of permissible criticism. It is often argued that in more advanced democracies the judiciary can sustain robust and vigorous criticism of its decisions whereas in less mature democracies judges should enjoy higher protection.²³⁰ However, there are two views on argument of ‘transition to democracy’. The first approach treats the state of ‘transition to democracy’, which in the context of this paper means a weak and vulnerable judiciary, as a justification for more restrictive approach to free speech.²³¹ This reasoning was rejected in *Castells* both by the European Commission of Human Rights²³² and the ECtHR itself²³³ (albeit only in relation to the Government and not the judiciary). But there is also a second understanding of the state of transition to democracy which is in complete

²²⁸ Ian Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Oxford; Portland, Or.: Hart, 2002), p. 176. Accord David Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd ed. (Oxford: Oxford University Press, 2002), p. 968.

²²⁹ See recent decision of Privy Council on petition from Mauritius, *Ahnee v. DPP* [1999] 2 AC 294. See also Barendt, *Freedom of Speech*, 318 and other cases cited therein.

²³⁰ Feldman, *Civil Liberties and Human Rights in England and Wales*. p. 970. Accord Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 17-18.

²³¹ Accord Joint dissenting opinion of J.A. Frowein and Sir Basil Hall (§ 2), and Dissenting opinion of L.F. Martinez (§§ 15-16) in *Castells v. Spain*, no. 11798/85, Commission decision of 8 January 1991; and another decision of Privy Council in a case from Mauritius quoted by Eric Barendt: *McLeod v. St Aubyn* [1899] AC 549, 561 per Lord Morris, PC.

²³² See also majority opinion of Commission in *Castells v. Spain*, no. 11798/85, Commission decision of 8 January 1991, §§ 53-75.

²³³ *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236.

contrast to the first approach. This alternative view considers the ‘transition to democracy’ as a reason for enhanced protection of free speech.²³⁴ Nevertheless, the discussion on a complex issue of ‘transition to democracy’ or more generally with ‘dealing with the past’ is beyond the scope of this subchapter.

3.7 Trends in the ECtHR’s Jurisprudence

In conclusion, this chapter generally supports the proposition of Michael Addo that the balance between protection of the judiciary and tolerance of freedom of expression has shifted decisively in favour of the latter.²³⁵ However, my position is rather a concurring opinion that must be accompanied by several reservations stipulated in the previous chapters. First, one must not forget that many cases, albeit finally decided in favour of the applicants, in substance upheld a broad protection of the judiciary against criticism, and found a violation of freedom of expression only with regards to the disproportionality of the sanction taken and not the sanctioning itself.²³⁶ On the other hand, it is correct to acknowledge that recent cases seem to have shifted from the finding that merely the sanction was disproportionate to the violation of Art. 10 irrespective of the low severity of sanction,²³⁷ and sometimes even attempt to review whether the invoked aim as such was legitimate.²³⁸ Second, any assessment is complicated by the inconsistency of the ECtHR’s jurisprudence.²³⁹ For instance, all three cases related to the criticism of judges decided by the Grand Chamber in period from 2003 to 2005 reversed the

²³⁴ See a famous ruling of the Hungarian Constitutional Court, Decision No. 60/1994 of December 24, 1994; and Decision of the Constitutional Court of the Czech Republic of 25 July 2007, case no. Pl. ÚS 23/05.

²³⁵ Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 239. Accord Lemmens, *La Presse Et La Protection Juridique De L'individu: Attention Aux Chiens De Garde*, 300, § 407-408.

²³⁶ See *Cumpănă and Mazăre v. Romania* [GC]; *Kyprianou v. Cyprus* [GC], *Nikula and Skalka*.

²³⁷ See in particular *Amihalachioaie, Nikula, Ormanni, and Steur*.

²³⁸ See concurring opinions of Judge Loucaides and Judge Thomassen in *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III.

²³⁹ Accord Barendt, *Freedom of Speech*, 321. See also Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, pp. 238-239.

chamber judgments in favour of freedom of speech²⁴⁰ or vice versa.²⁴¹ As a result, the state of the law has not settled yet.

This chapter also revealed several deficiencies in substantive matters. Most notably, the principle of symmetry seems to have been breached due to the parliamentary privilege that serves the most informed and most powerful individuals in the society, namely politicians. The negative decisions of the ECtHR unfortunately support the thesis that its case law, as it is now, shields the judiciary predominantly from criticism voiced by private individuals and journalists. As a consequence of this restrictive approach, private individuals and journalists are deterred from entering public discourse on the administration of justice. The second group that seems to be underprivileged is lawyers. This case is, however, more difficult since lawyers cannot claim to be insufficiently informed of the consequences of their conduct vis-à-vis the judiciary.

Finally, from the broader prospective it might be argued that the ECtHR takes into account too many variables in its decision-making. This chapter identified 4-Wh questions that can be further divided into more nuanced subcategorisation. This complexity of decision-making in cases on criticism of the judiciary inevitably leads to a high level of unpredictability of the outcome which is detrimental to the legal certainty – a basic cornerstone of the rule of law. Therefore, it would be advisable to send a clear message to the signatory states that criticism of judges is a form of “political speech” which deserves the strongest protection. More specifically, the ECtHR should make one big ‘landscape brush

²⁴⁰ In *Cumpănă and Mazăre v. Romania* ([GC], Application No. 33348/96, 17 December 2004) the ECtHR overruled the 5:2 decision of the chamber prioritising protection of the rights of others and authority of the judiciary. Similarly, in *Kyprianou v. Cyprus* ([GC], Application no. 73797/01, 15 December 2005) found a violation of freedom of speech whereas the chamber unanimously held that it is not necessary to examine separately the applicant’s complaint under Art. 10 of the Convention.

²⁴¹ In *Perna v. Italy* ([GC], no. 48898/99, 6 May 2003), the ECtHR reversed unanimous decision (sic!) of the chamber that was in favour of freedom of speech (as to the applicant’s conviction for alleging, in the form of a symbolic expression, that Mr. Caselli [at that time the Public Prosecutor in Palermo] had taken an oath of obedience to the former Italian Communist Party).

stroke' and establish clear and concise criteria for future. Otherwise, it would not be possible to fully subscribe to Addo's proposition.

4 United States

A statement that the U.S. is a champion of freedom of speech is not exaggerated. As Frederick Schauer persuasively argues, free speech and defamation doctrine in the United States has always been more protective of speakers' rights than any other liberal democratic state.²⁴² The realist, cultural, institutional and political reasons behind the American exceptionalism go beyond this paper.²⁴³ However, it is important to note that this exceptionalism in free speech jurisprudence is not only substantive but also methodological.²⁴⁴ As a result of this two-fold exceptionalism, it requires a completely different mindset to understand the U.S. case law on free speech.

The same exceptionalism is true of model of strict separation of powers adopted in the U.S. and role of the judiciary in particular. As Justice Brennan pointed out, the USSC was able to assert itself as a tri-equal branch of government.²⁴⁵ This means that on the one hand, judicial review is more strongly entrenched in the American system of government than in any other liberal democracy.²⁴⁶ On the other hand, the judiciary is considered a separate branch of the Government and treated accordingly. This 'treatment' embraces *inter alia* specific mechanisms for selection, tenure and removal of judges and broad participation of the public on judicial affairs including open criticism of judicial decisions – to say nothing of legal culture that differs dramatically from Europe. The simplified rationale of the Founding Fathers' and subsequently developed mechanisms was to ensure the accountability of the judiciary to the American people.

²⁴² Schauer, "The Exceptional First Amendment.", 29-56.

²⁴³ See Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton, N.J.: Princeton University Press, 2005).

²⁴⁴ Schauer, "The Exceptional First Amendment.", 30.

²⁴⁵ M. Todd Henderson, *From 'Seriatim' to Consensus and Back Again: A Theory of Dissent* (U of Chicago Law & Economics, Olin Working Paper No. 363, 2007), 24 (quoting William J. Brennan, "In Defense of Dissents," *Hastings Law Journal* 37 (1986). 427)

²⁴⁶ Frank I. Michelman, "Integrity-Anxiety?," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, N.J.: Princeton University Press, 2005).

Due to these specifics, the issue of criticism of judges has never been taboo in the U.S. To the contrary, “state and federal judges weathered cycles of intense criticism that have peaked and troughed throughout the [American] history”.²⁴⁷ The criticism of judges and their decisions “probably began the moment that judges first issued decisions that occupants of other branches found disagreeable.”²⁴⁸ As a result, the courts have been forced to solve cases on criticism of judges on regular basis. This assertion is buttressed by historical periods of attacks upon the Supreme Court of the United States.²⁴⁹

However, a recent study suggests that a new wave of criticism is focused more on state and lower federal court judges than on the ‘Supremes’.²⁵⁰ On the other hand, judges themselves also tend to be more willing to bring civil proceedings for injuries allegedly suffered in their capacity as judges.²⁵¹ Even though these individual judges did not necessarily plan the consequence, but they put more oil into the fire. Due to these developments it is generally acknowledged that criticism of judges in the U.S. has intensified recently and its level reaches a high tide in the historical ebb and flow. As Michael Hawkins observed as early as in 1999, “we seem to live in an era when the criticism of judges is as common as Fantasy Baseball.”²⁵²

This chapter is organized as follows. Part 4.1 will briefly address the methodological exceptionalism, whereas Parts. 4.2-4.6 will focus on the alleged substantive exceptionalism by

²⁴⁷ Citizens for Independent Courts, *Uncertain Justice: Politics and America’s Courts* (New York: The Century Foundation Press, 2000), 131.

²⁴⁸ Michael Hawkins, Dining with the Dogs: Reflections on Criticisms of Judges, 57 Ohio St. L.J. 1353, 1355 (1996).

²⁴⁹ Citizens for Independent Courts, *Uncertain Justice: Politics and America’s Courts*, 132-137.

²⁵⁰ *Ibid.*, 137. But see a recent criticism of Justice Ginsburg in: Orin Kerr, "Speaking Ruth to Power," *Opinion Journal from the Wall Street Journal Editorial Page*, October 31 2007.

²⁵¹ According to the Media Law Resource Center in New York, there were only four suits by judges against the press in 1988 and 13 in 2001, but in 2005 there were 25 (which is nearly 10 percent of all libel suits filed nationwide). For further details, see James Goodale, “Can Judges Judge Judges,” *NY Law Journal*, January 6, 2007; Russell Working, “Kane County paper settles libel suit with Illinois chief justice,” *Chicago Tribune*, October 12, 2007; or Tony Mauro, “Press Frets as More Judges Sue for Libel,” *Legal Times*, June 22, 2007.

²⁵² Michael Hawkins, Mr. Madison, Meet the Modern Judiciary & Its Critics, 24 Okla. City U.L. Rev. 303, 306 (1999) (quoted in Jennifer Goellnitz, "Engendering Resentment or Enhancing Respect: Do Professional Responsibility Rules Restricting Attorney Criticisms of Judges Violate the First Amendment?," (unpublished manuscript (on file with author): 2005)).

answering the four basic Wh-questions. Finally, Part 4.7 identifies trends in the U.S. jurisprudence on criticism of judges.

4.1 General Themes and Structure of the First Amendment

As I mentioned earlier, wording of the First Amendment is seemingly absolutist: “Congress shall make no law ... abridging the freedom of speech or of the press”. As a matter of textual architecture, the American approach thus says nothing at all about limits.²⁵³ This does not mean that the protection of free speech is absolute. However, this feature led Feldman to observation that social responsibilities that accompany European jurisprudence on freedom of expression, exemplified by Article 10 (2) ECHR50, are missing.²⁵⁴ Therefore, it follows that both wording of First Amendment and subsequent jurisprudence reveal structural differences of the approach adopted in solving conflicts between freedom of speech and competing social interests. I will refer to these differences as to ‘methodological exceptionalism’.²⁵⁵

The first limb of methodological exceptionalism rests in the focus of American jurisprudence on the definition of ‘speech’. While the ECtHR and European courts define the scope of ‘expression’ broadly, the American notion ‘speech’ is generally less inclusive.²⁵⁶ This difference is reflected also in the text of the First Amendment since in contrast to Art. 10 ECHR50 it does not enumerate specific components of free speech. Second, the ECtHR defines limitations broadly, whereas the U.S. courts allow only few exceptions to freedom of

²⁵³ Mattias Kumm, "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement," in *Law, Rights, Discourse: Themes of the Work of Robert Alexy*, ed. G. Pavlakos Paulsen (Oxford: Hart, 2007), 4 (quoted to page in version available at SSRN). See also Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 44.

²⁵⁴ David Feldman, "Content Neutrality," in *Importing the First Amendment: Freedom of Expression in American, English and European Law*, ed. Ian Loveland (Oxford: Hart, 1998). p. 162 (quoted in Ian Cram, "Criminal Contempt, Article 10 and the First Amendment - a Case for Importing Aspects of Us Free Speech Jurisprudence?," *Maastricht Journal of European and Comparative Law* 7, no. 3 (2000): 245.)

²⁵⁵ This formulation derives from Frederick Schauer, in: Schauer, "The Exceptional First Amendment.", p. 30.

²⁵⁶ With two important reservations. First, certain types of speech (such as hate speech), which clearly fall within the First Amendment’s definition of ‘speech’ might be excluded from the European Convention’s definition of ‘expression’ on the ground of abuse of rights (Art. 17 ECHR50). Second, in contrast to European ‘expression’, American ‘speech’ covers also wide range of expressive conduct such as nude-dancing.

speech. This distinction flows directly from the first limb of methodological exceptionalism. As Kumm correctly observed the USSC defines narrowly both the scope and the permissible limitations of the rights and „insists that only ... liberty interests that are deemed to be sufficiently fundamental enjoy meaningful protection ... [and] [w]hen an interest is deemed to be sufficiently fundamental, the limitations that apply are narrow too”.²⁵⁷

Third, the tests applied by the courts also differ. The USSC applies to the First Amendment cases the most intensive test – “strict scrutiny”²⁵⁸ – which requires “compelling interests” that must be “narrowly tailored” towards achieving substantial policy goals to justify infringements of freedom of speech. Conversely, the ECtHR follows the 5-step test described above and the test of proportionality in particular. As Schauer correctly characterized, the American approach prioritizes rule-based categorization, in contrast to the European more flexible and open-ended balancing approach that generally rides under the banner of “proportionality.”²⁵⁹

Fourth, the First Amendment does not explicitly stipulate any legitimate aims that the limitation to freedom of speech must pursue. This textual feature coupled with lesser emphasis on social responsibilities in the U.S. leads to protection of speech in the name of content neutrality even where it may result in identifiable social harms.²⁶⁰ This is again in stark contrast to the path taken by the ECtHR which is ready to uphold state interferences on content grounds in order to promote the goal of social harmony.²⁶¹ Finally, even though the USSC did not develop a specific test on clash between rights, it is generally accepted that free

²⁵⁷ Mattias Kumm, "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement," in *Law, Rights, Discourse: Themes of the Work of Robert Alexy*, ed. G. Pavlakos Paulsen (Oxford: Hart, 2007), 24 (quoted to page in version available at SSRN).

²⁵⁸ And even within the areas where the strict scrutiny applies, its application to the First Amendment seems to be the strictest (along with racial discrimination cases).

²⁵⁹ Schauer, "The Exceptional First Amendment.", 31 (referring to Aharon Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy," *Harvard Law Review*, vol. 116 (2002), pp. 16-105; and Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000), pp. 32-75).

²⁶⁰ Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 44. See also Feldman, "Content Neutrality." p. 162.

²⁶¹ Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 44.

speech holds a privileged position among the freedoms enshrined in the Bill of Rights. Freedom of speech can be thus characterized as *primus inter pares*, which translated into Alexy's terminology means that it has a higher abstract value in balancing with other rights. However, it is correct to point out that the distinction between conflicts of rights with public interests *and* clashes of rights has not been in the forefront of American judicial and academic discourse.²⁶²

To sum up methodological exceptionalism, the free speech jurisprudence in the U.S. operates differently from European model. Most importantly, both the definition of area protected by freedom of speech and limitations thereto are narrower, but the level of protection of the protected area is stronger than in Europe. The precise contours of differences between "narrow tailoring" and necessity on the one hand, and between "compelling interests" and proportionality test on the other, cannot be addressed here.²⁶³ It is even less important to do so since I agree with Schauer that methodological exceptionalism (by contrast to substantive exceptionalism) "may be more ephemeral, explainable largely in terms of a natural course of rights complexification" and "what look like methodological differences may be little more than the reflection of longer and more extensive American experience with freedom of communication issues".²⁶⁴ But even though methodological exceptionalism might not be as significant as generally considered, it is still important for proper understanding of substantive exceptionalism.

4.2 WHO is criticized?

Similarly to the ECtHR, the USSC distinguishes between the targets of defamation. In 1964, more than two decades before *Lingens*, the USSC singled-out public officials and

²⁶² Similarly, it is correct to note that the fourth and fifth differences touch upon not only methodological but also substantive exceptionalism.

²⁶³ See e.g. papers by Mattias Kumm cited above.

²⁶⁴ Schauer, "The Exceptional First Amendment.", 31.

departed from the common law tradition that the burden of proof was on the publisher to demonstrate truth rather than on the target to demonstrate falsity. The landmark case is *New York Times Co. v. Sullivan*.²⁶⁵ Under the *Sullivan* rule public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with (1) knowledge that it was false or (2) with reckless disregard of whether it was false or not.²⁶⁶ As Schauer rightly pointed out, this sets a standard of “*intentional* falsity, a burden of proof almost impossible to meet”.²⁶⁷ This conclusion is buttressed by the fact that New York Times has not lost a single case before American courts since the *Sullivan* ruling.²⁶⁸

However, *Sullivan* applied only to civil libel and covered only public officials. But the same year, the USSC extended standard of ‘actual malice’ also to criminal libel.²⁶⁹ Few years later, it extended the *Sullivan* rule to candidates for public office as well as to office holders,²⁷⁰ and more significantly, in addition to public officials also to public figures.²⁷¹ The concept of ‘public figures’ includes among others pop stars, television chefs, and professional athletes, i.e. those who have little to no involvement in or effect on public policy or political debates.²⁷² The ‘constitutionalization of American defamation law’²⁷³ was completed in 1974, when the USSC held that if a defamatory falsehood involves a matter of public concern, then even a private figure must show actual malice in order to recover presumed (i.e. not actual financial damages) or punitive damages.²⁷⁴ Therefore, only when defamatory falsehood does not involve a matter of public concern, a private figure who sues media for defamation is not required to proof ‘actual malice’ and lesser standard applies.

²⁶⁵ 376 U.S. 254 (1964) (hereinafter also “Sullivan”).

²⁶⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

²⁶⁷ Schauer, "The Exceptional First Amendment.", 39 (emphasis in original).

²⁶⁸ I am thankful for this information to David McCraw, head of legal department of The New York Times.

²⁶⁹ *Garrison v. Louisiana*, 379 U.S. 64 (1964).

²⁷⁰ *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

²⁷¹ *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967).

²⁷² See Frederick Schauer, "Public Figures," *William and Mary Law Review* 25 (1984).

²⁷³ This formulation derives from Frederick Schauer, in: Schauer, "The Exceptional First Amendment.", 40.

²⁷⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

To sum up, there are three different defamation regimes, depending on the character of the plaintiff, and the presence and absence of a matter of public concern.²⁷⁵ The American approach thus differs from the ECtHR's doctrinal framework that constructed a unified legal regime, which is applied in flexible way depending on the circumstances of the case.²⁷⁶ As Comella rightly argues, "the public or private character of the plaintiff, and the public importance of the issue the information relates to, are relevant factors to take into account, but they do not trigger the application of sharply different legal rules".²⁷⁷

Due to these reasons, the USSC did not need to develop any hierarchy of 'public figures'. Similarly, there is no need to distinguish the criticized judicial officers along 'quantitative' and 'qualitative' criteria. You are simply 'in' or 'out' of the scope of the concept of public figures, albeit sometimes this categorization may change over time.²⁷⁸ In contrast to the ECtHR's approach, public figures in the U.S. do not operate on a continuum, but rather in 'yes-or-no' fashion. The core question is thus whether judges are 'in' or 'out'. More specifically, do they fall within the concept of public officials?

The category of public officials does not include all public employees. It encompasses only main decision-makers. The USSC clarified this concept in *Rosenblatt v. Baer*:

"There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, *substantial responsibility for or control over the conduct of governmental affairs*."²⁷⁹

²⁷⁵ Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," 87.

²⁷⁶ *Ibid.*, 87.

²⁷⁷ *Ibid.*, 87.

²⁷⁸ For the purpose of this paper, distinction between 'pervasive public figures' and 'limited public figures' is left aside.

²⁷⁹ *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (emphasis added).

According to these criteria, then, the category of public officials would evidently include judges.

This conclusion is clearly supported by the following passages from the *Sullivan* ruling:

“Where *judicial officers are involved*, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision.... Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice.”²⁸⁰

and *Landmark Communications, Inc. v. Virginia*, where the USSC opined that “the law gives judges as persons, or courts as institutions ... no greater immunity from criticism than other persons or institutions. The operations of the courts and the judicial conduct of judges are matters of utmost public concern.”²⁸¹ These passage thus make patently clear that under American law, the protection of the general or objective “authority and impartiality of the judiciary” simply does not constitute grounds for placing limitations upon the freedom of speech.

This position differs considerably from that adopted by the ECtHR. For example, in *Prager and Oberschlick*, where the ECtHR upheld conviction of a journalist for alleging bias and bullying of the accused by some judges s of the Vienna Regional Criminal Court during the court hearings. The ECtHR emphasized that “[the judiciary] must enjoy public confidence if it is to be successful in carrying out its duties [and i]t may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded...”²⁸² Similarly, in *Worm v. Austria*, where the ECtHR found no violation of Art. 10 ECHR in convicting a journalist for exercising prohibited influence on a criminal proceeding by publishing articles about a pending case, where what he wrote clearly indicated his view as to how the case should be decided. The ECtHR opined that this could undermine the “authority

²⁸⁰ *New York Times v. Sullivan*, 376 U.S. 254, 272-73 (1964) (emphasis added).

²⁸¹ *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (U.S. 1978).

²⁸² *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 17, § 34.

and impartiality of the judiciary“, in the objective sense, that is both the accused’s confidence, and that of the public in general, in the impartiality of the judiciary.

Interestingly, it is not entirely clear who exactly falls within the ambit of the term ‘judiciary’ in the U.S. If we consider criticized judicial officers along ‘qualitative’ and ‘quantitative’ criteria proposed in Part 3.2, we arrive at the following conclusions. As to the ‘quantitative’ criterion, it is crystal clear that criticism the judiciary as a whole (i.e. as a branch of government) or the ‘functioning of the system of justice’ as such is unlimited in the U.S. It seems also highly unlikely that a criticism of that criticism of a particular court or courts within certain region would ever suffice to rebut free speech concerns. It is thus only criticism of a particular judge or perhaps the panel of judges sitting on a particular case that might be restricted.

As to the ‘qualitative’ criterion, the answer is more puzzled. We may easily leave out the prosecutors aside since they qualify for the ‘public officials’ anyway. Similarly, there is no ambiguity with regards to the professional judges. However, in contrast to Europe, there is no need to distinguish between lower (or state) and senior (or federal) judges and the ‘Supremes’ since they all are public officials. But the jurisprudence does not provide a clear answer with regards to the clerks to the Justices and jurors. If we apply the definition of public official from *Rosenblatt v. Baer*, clerks hardly meet the condition of having “substantial responsibility for or control over the conduct of governmental affairs”. Leaving aside the specific issue of jury tampering,²⁸³ (which has implications for *pending* trials that are outside the scope of this paper), the same conclusion applies to criticism of jurors after the decision is taken. Put differently, jurors are outside the *Rosenblatt* definition of a public official.

²⁸³ See e.g. *Turney v. Pugh, Commissioner*, United States Court of Appeals, Ninth Circuit, 400 F.3d 1197, March 15, 2005; and Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 93-98.

4.3 WHO is criticizing?

On the first sight, it seems that there is no discrimination of speakers commenting upon the administration of justice and thus it does not matter who speaks. However, this description is not entirely correct. There is at least one group that can be plausibly considered as ‘underprivileged’ and one group whose free speech rights demand further examination. The former is lawyers, the latter is judges.

As to the lawyers, it has been argued that their free speech rights are seriously curtailed. Some courts held that lawyers do not have the same right as non-lawyer to criticize the judiciary.²⁸⁴ Various rationales have been stated why attorneys should not voice criticisms of judges. The states regularly contend that attorneys’ criticisms of judges endangers public confidence in the system of the judiciary, undermines judicial independence, interferes with efficient and smooth administration of justice, and that attorneys surrendered their free speech rights by becoming members of the Bar.²⁸⁵

Nevertheless, lawyers’ criticism of judicial officers contains one more peculiarity. In contrast to other speakers, convictions of lawyers are usually not imposed under the guise of criminal or civil libel nor under contempt powers, but under the codes of professional conduct. Lawyers have been disciplined for statements that fail to uphold dignity of judicial process,²⁸⁶ or that disrupt the administration of justice²⁸⁷ or undermine the ability of the

²⁸⁴ Citizens for Independent Courts, *Uncertain Justice: Politics and America’s Courts*, 167 (quoting Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, §8.2:101 (2d ed., 1998). See e.g. *In re Frerichs*, 238 N.W.2d 764, 769 (Iowa 1976) ("lawyer, acting in professional capacity, may have some *fewer rights* of free speech than would a private citizen" [emphasis added]); *United States Dist. Court for the Eastern Dist. of Washington v. Sandlin*, 12 F.3d 861, 866 (9th Cir. 1993); and *Dist. Office of Disciplinary Counsel v. Surrick*, 749 A.2d 441 (Pa. 2000)..

²⁸⁵ Goellnitz, "Engendering Resentment or Enhancing Respect: Do Professional Responsibility Rules Restricting Attorney Criticisms of Judges Violate the First Amendment?."

²⁸⁶ See *Comm. v. Rubright*, 414 A.2d 106, 110 (Pa. 1980) (there is an absolute duty to uphold dignity of judicial process).

²⁸⁷ See e.g. *Notopoulos v. Statewide Griev. Comm.*, No. CV010510911S, 2003 Conn. Super. LEXIS 2647 (Sept. 24, 2003); *In re Hopewell*, 507 N.W.2d 911 (S.D. 1992);

judicial system to function.²⁸⁸ For example, in Indiana, the courts disciplined lawyers for unfounded attacks on judicial integrity,²⁸⁹ for groundlessly accusing judges of sexual or racial discrimination or personal animus,²⁹⁰ for telling a court that its own decision was "a bad lawyer joke",²⁹¹ for unfair personal attacks on a judge,²⁹² and for unfounded accusations of serious criminal conduct by a judge.²⁹³

It is highly questionable whether all these judgments are in line with the USSC's jurisprudence. For instance, *In re Sawyer* the USSC started "with the proposition that lawyers are free to criticise the state of the law"²⁹⁴ and held that conduct protected by the First Amendment cannot be restricted by ethical codes unless it "obstruct[s] the administration of justice".²⁹⁵ Later on, the USSC opined that a "state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights,"²⁹⁶ and in *Gentile*, it went further and held that states cannot punish speech protected by the First Amendment unless there is "substantial likelihood of material prejudice".²⁹⁷

But I concur to the lamentation of the lower courts that "[the USSC] has not addressed the restraint on free speech inherent in disciplining a lawyer for comments criticizing a judge [after trial]".²⁹⁸ Therefore, on-point guidance on this issue is missing. As a result of this gap, jurisprudence of federal and state courts diverges significantly. While courts mentioned above adopted deferential approach to disciplining lawyers for criticism of judges, several other courts have been more protective to lawyers' speech. For example, in New Jersey attorneys,

²⁸⁸ *In re Raggio*, 487 P.2d 499 (Nev. 1971); see also *In Topp v. Idaho State Bar*, 925 P.2d 1113 (Idaho 1996); and *Matter of Palmisano*, 70 F.3d 483 (7th Cir. 1995), *cert. denied*, 517 U.S. 1223 (1986).

²⁸⁹ *Matter of Wilkins*, 777 N.E.2d 714 (Ind. 2002); 780 N.E.2d 842 (Ind. 2003) (Rucker, J., recusing); 782 N.E.2d 985 (Ind. 2003) (rehearing granted on sanction only), *cert. denied*, 540 U.S. 813 (2003).

²⁹⁰ *Matter of Crenshaw*, 815 N.E.2d 1013 (Ind. 2004); see also *Matter of Atanga*, 636 N.E.2d 1253 (Ind. 1994)

²⁹¹ *Matter of McClellan*, 754 N.E.2d 500 (Ind. 2001).

²⁹² *Matter of Reed*, 716 N.E.2d 426 (Ind. 1999).

²⁹³ *Matter of Garringer*, 626 N.E.2d 809 (Ind. 1994) (all case from Indiana are cited from Donald R. Lundberg, *Lawyers and Judicial Criticism*, 49-MAY Res Gestae 34 (2006)).

²⁹⁴ *In re Sawyer* 360 U.S. 622, 632 (1959).

²⁹⁵ *In re Sawyer* 360 U.S. 622, 636 (1959). See also *In re Snyder*, 472 U.S. 634 (1985).

²⁹⁶ *NAACP v. Button*, 371 U.S. 415, 439 (1963).

²⁹⁷ *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). The USSC thus rejected application of "clear and present danger" test which is stricter. However, *Gentile* involved criticism related to *pending* cases.

²⁹⁸ *In re Green*, 11 P.3d 1078, 1083 (Colo. 2000).

like other citizens, “are entitled to the full protection of the First Amendment, even as participants in the administration of justice”.²⁹⁹ One commentator suggested that variation in decisions occur not only from state to state, but also within the same state.³⁰⁰

In law journals, plethora of articles was devoted to this issue.³⁰¹ Most recently, this issue divided the Michigan Supreme Court that upheld the conviction of prominent attorney Geoffrey Fieger who described the appellate judges *inter alia* as ‘jackasses’, ‘Hitler’, ‘Goebbels’ and ‘Eva Braun’.³⁰² In his dissent, Justice Michael Cavanagh wrote that it matters not whether Fieger violated “a disciplinary rule he swore to obey when admitted to the practice of law”.³⁰³ The point is instead that “the judiciary, upon which is conferred unique powers, significant influence and considerable insulation, must not be so shielded that the public is denied its right to temper this institution”.³⁰⁴

The Federal District Court eventually overruled the judgment for overbreadth and vagueness.³⁰⁵ It observed that “vague and overbroad courtesy provisions’ that enforce silence in the name of preserving the dignity of the bench, does not override an attorney’s right to speak her mind against public institutions, especially an elected judiciary, regardless of whether that speech is in good taste”.³⁰⁶ However, the crucial point of this judgment was distinguishing comments affecting the fair administration of justice on the one hand, and

²⁹⁹ *In re Hinds*, 90 N.J. 604, 614 (1982). See also *Porter*, 766 P.2d 958.

³⁰⁰ Goellnitz, "Engendering Resentment or Enhancing Respect: Do Professional Responsibility Rules Restricting Attorney Criticisms of Judges Violate the First Amendment?.". (quoting *In re Holtzman*, 577 N.E. 2d 30, 43 (N.Y. 1991) and *Justices of Appellate Div., First Dep't v. Erdmann*, 301 N.E.2d 426 (N.Y. 1973)).

³⁰¹ See e.g. Elizabeth I. Kiovsy, First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns, 47 Ohio St. LJ. 201 (1986); Judith S. Kaye, Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticisms of Courts, 25 Hofstra L. Rev. 703 (1996); Erwin Chemerinsky, “Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment,” 47 Emory L.J. 859 (1998); Angela Butcher, Scott Macbeth, Lawyers' Comments About Judges: A Balancing of Interests to Ensure a Sound Judiciary, 17 Geo. J. Legal Ethics 659 (2004).

³⁰² *Grievance Administrator v Fieger*, 476 Mich. 231 (2006).

³⁰³ *Grievance Administrator v Fieger*, 476 Mich. 231 (2006) (Cavanagh, J., dissenting) (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991)).

³⁰⁴ *Grievance Administrator v Fieger*, 476 Mich. 231 (2006) (Cavanagh, J., dissenting).

³⁰⁵ *Fieger, et al. v. Michigan Supreme Court, et al.*, _ F.Supp. 2d _ (E.D. Mich. Sept. 4, 2007).

³⁰⁶ *Fieger, et al. v. Michigan Supreme Court, et al.*, _ F.Supp. 2d _ (E.D. Mich. Sept. 4, 2007). *Cf.* with *Wilkins* mentioned above, and particularly with two dissents in *Wilkins*. 777 N.E.2d at 719 (Sullivan, J., dissenting), and at 719 (Boehm, J., dissenting).

judicial integrity and the public's respect for the institution on the other. Judge Tarnow rightly observed that "the scope of speech that may be restricted is greater when done in the interest of [the former] as opposed to [the latter]".³⁰⁷ Apart from missing guidance from the USSC, it is perhaps conflation of these two interests that may have led to deeply divided view of the U.S. courts on lawyers' criticism of judicial officers.

The second group worthy of mention is judges themselves. Even though there have been strong arguments put forth that judges' free speech rights should also be restricted,³⁰⁸ this does not seem to be the case in criticism of judges by other judges. Such criticism may take many forms.³⁰⁹ Most prominent examples relate to Justice Scalia, both on speaking and receiving end. Scalia once stated that assertions by Justice O'Connor were "irrational" and "cannot be taken seriously".³¹⁰ O'Connor retorted in *Hamdi v. Rumsfeld*, where she referred to the legal framework Scalia would impose regarding the detention of prisoners as creating "perverse incentive".³¹¹ Similarly, Justice Souter once uttered that "Justice Scalia's dissent is certainly the work of a gladiator, but he thrusts at lions of his own imagining".³¹²

These utterances provide a clear evidence that judges are far from being treated as 'underprivileged' group, at least in comments vis-à-vis other judges. In fact, it was observed that judges attacking judges is increasingly common and as early as in 1985 Robert Posner observed that "it is a fashion for the author of the majority opinion, usually in footnotes, to

³⁰⁷ *Fieger, et al. v. Michigan Supreme Court, et al.*, _F.Supp. 2d _ (E.D. Mich. Sept. 4, 2007).

³⁰⁸ See William G. Ross, Essay, Civility Among Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges, 51 Fla. L. Rev. 957 (1999); or Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts*, 173-189.

³⁰⁹ See William G. Ross, Essay, Civility Among Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges, 51 Fla. L. Rev. 957, 958 (1999).

³¹⁰ *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Scalia concurring). Scalia also famously said that the 9th Circuit reasoning would have "perverse consequences" (*Devenpeck v. Alford*, 543 U.S. 146 (2004)) and that the majority opinion was "oblivious to our history," "incoherent," a "jurisprudential disaster," and "nothing short of ludicrous" (*Lee v. Weisman*, 505 U.S. 577 (1992) (Scalia, J. dissenting)).

³¹¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³¹² *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) (paraphrasing a famous quote of Justice Cardozo, in: Benjamin N. Cardozo, *Law and Literature and Other Essays and Addresses* (New York, : Harcourt, 1931), 34). For other examples see William G. Ross, Essay, Civility Among Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges, 51 Fla. L. Rev. 957, 960 (1999).

attack the dissenting opinion (and sometimes even a concurring opinion).”³¹³ Moreover, courts have been very reluctant to impose sanctions for harsh comments made by judges about the fellow judges.³¹⁴ But it must be reminded that, in contrast to the European approach, judges are not ‘overprivileged’ persons either.

As I argued earlier in Part 3.3, categorization of speakers is highly problematic. But in contrast to the ECtHR, this conclusion has explicit support in the USSC’s jurisprudence. Under the First Amendment, the state “is constitutionally disqualified from dictating the subject about which persons may speak and the speakers who may address a public issue”.³¹⁵ The center of a court’s inquiry should be on the speech itself, not on the speaker.³¹⁶ As one commentator observed, focusing on the danger posed by the speech rather than the speaker offers less opportunity to discriminate against a particular attorney.³¹⁷

4.4 WHAT is criticized?

The third WH-question is two-fold and deals with both object of criticism and form of criticism. As to the object of criticism, the U.S. approach does not distinguish between criticism of a judge on the one hand, and criticism of the decision and the reasoning therein on the other. By adopting this position, the U.S. courts avoid of deciding on the thin line between attack against the reasoning of the court and attacks against the judge, which leads to questionable and often artificial results in the ECtHR’s jurisprudence. Criticism which

³¹³ Richard A. Posner, *The Federal Courts: Crisis and Reform* (Cambridge, Mass.: Harvard University Press, 1985), 232-33.

³¹⁴ See William G. Ross, Essay, *Civility Among Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges*, 51 Fla. L. Rev. 957, 966-968 (1999).

³¹⁵ *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 785-86 (1978).

³¹⁶ Lloyd B. Snyder, *Annual Survey of the United States Supreme Court and Federal Law: Rhetoric, Evidence, and Bar Agency*, 28 Creighton L. Rev. 357, 371-72 (1995).

³¹⁷ Goellnitz, "Engendering Resentment or Enhancing Respect: Do Professional Responsibility Rules Restricting Attorney Criticisms of Judges Violate the First Amendment?."

diminishes the standing of a court or judge thus does not exceed the bounds of First Amendment protection unless it affects pending trials.³¹⁸

Similarly, there is no need to distinguish between comments related to professional competency and those touching upon personal characteristic of the judges. As Justice Brennan declared:

“Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The New York Times rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. *To this end, anything which might touch on an official's fitness for office is relevant.* Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, *even though these characteristics may also affect the official's private character.*”³¹⁹

Hence, actual malice standard applies in both cases.

Apart from the argument from democracy and self-government addressed in *Garrison*, the USSC has also invoked the notion of judges as “men of fortitude, able to thrive in a hardy climate”³²⁰ as a reason for affording protection to critical speech.³²¹ This line of argumentation has been buttressed by Justice Frankfurter and more recently by Justice Scalia. The former opined that “weak characters or not to be judges”³²² and the latter once uttered that “judges should adopt a ‘rope-a-dope’ posture when criticized, taking the hits passively until their adversaries wear themselves out”.³²³ John Yoo goes even further and asserts that judges “are not children who need to be shielded from the harsh realities of life”.³²⁴ These assertions have made clear that judges must be robust and thus be able to withstand even

³¹⁸ Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 169; see also Part 4.6.

³¹⁹ *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (emphasis added).

³²⁰ *Craig v. Harney* 331 U.S. 367, 376 (1947).

³²¹ Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 168.

³²² *Pennekamp v. Florida*, 328 U.S. 331, 357 (1946).

³²³ Quoted in Tony Mauro, “Press Frets as More Judges Sue for Libel,” *Legal Times*, June 22, 2007.

³²⁴ John C. Yoo, *Criticizing Judges*, 1 Green Bag 2d 277, 281 (1998).

vitriolic and hostile criticism. Put differently, “the law of contempt cannot be a refuge for judges who are sensitive to the ‘winds of public opinion’”.³²⁵

It is thus not surprising that criticism of judges in the U.S. takes often intemperate *form* and still is protected by the First Amendment. As I already mentioned above, history of judicial criticism in the U.S. is very long. To name few examples, Thomas Jefferson criticized Chief Justice Marshall for having treated the Constitution as a ‘mere thing of wax’ and Andrew Jackson made the notorious and infamous proclamation: “John Marshall has made his decision: --now let him enforce it.”³²⁶ Half a century later, the infamous *Dred Scott* decision provoked Abraham Lincoln to proclaim the USSC’s decision ‘erroneous’.³²⁷ Even giant such as Oliver Wendell Holmes did not escape scathing criticism. Theodore Roosevelt referred to him as a ‘ward-heeler who didn’t deliver the goods’³²⁸ and announced that he could ‘carve out of a banana a judge with more backbone’.³²⁹

Later on in 1940’s, the USSC overruled contempt convictions for threatening with strikes by union leader unless the original ruling of the court is reversed,³³⁰ accusing judges of hindering prosecutions in rape and blackmail cases,³³¹ or for asserting that judges acted in ‘high-handed manner’ resulting in ‘travesty of justice’.³³² In *Garrison* the USSC quashed the conviction for criminal defamation for accusing district judges of taking excessive vacations and speculations about the ‘racketeer influence’ over the judges.³³³ After controversial

³²⁵ *Craig v. Harney* 331 U.S. 367, 376 (1947).

³²⁶ Michael Hawkins, Dining with the Dogs: Reflections on Criticisms of Judges, 57 Ohio St. L.J. 1353, 1357 (1996).

³²⁷ Michael Hawkins, Dining with the Dogs: Reflections on Criticisms of Judges, 57 Ohio St. L.J. 1353, 1362 (1996). Later on Justice Scalia added that Court was “covered with dishonor and deprived of legitimacy” by *Dred Scott*; in *Planned Parenthood v. Casey*, 505 U.S. 833, 998 (1992) (concurring in part, dissenting in part).

³²⁸ Michael Hawkins, Dining with the Dogs: Reflections on Criticisms of Judges, 57 Ohio St. L.J. 1353, 1360 (1996).

³²⁹ *Id.*

³³⁰ *Bridges v. California*, 314 U.S. 252 (1941).

³³¹ *Pennekamp v. Florida*, 328 U.S. 331, 365-369 (1946).

³³² *Craig v. Harney*, 331 U.S. 367 (1947). *Cf.* this result especially with *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313.

³³³ *Garrison v. Louisiana*, 379 U.S. 64 (1964).

decision in *Roe v. Wade*,³³⁴ abortion lawyers regularly use terms like ‘baby-killers’ and ‘murderers’, for those U.S. Supreme Court judges who ruled that women have a right to an abortion without any sanction.³³⁵

More recently, after seeing a \$15 million medical malpractice verdict overturned, a prominent Michigan lawyer, Geoffrey Fieger, had described the appellate judges who ruled against him as among others ‘jackasses’, ‘Hitler’, ‘Goebbels’ and ‘Eva Braun’, said that he was declaring war on them, uttered that they could kiss a portion of his anatomy not generally revealed in public, and repeatedly proposed that various objects be employed to assault a similar location on their persons.³³⁶

While the Supreme Court of Michigan has ruled by a 4 to 3 margin that the First Amendment does not protect “the interests of an officer of the court in uttering vulgar epithets toward the court in a pending case”,³³⁷ the U.S. Federal District Court reversed the decision and held that “the rules are unconstitutional on their face because they are both overly broad and vague”.³³⁸ The Federal Court also found Michigan Rules of Professional Conduct “so imprecise that persons of ordinary intelligence must guess at their meaning”³³⁹ and concluded that:

“One person's courtesy may be another person's abomination. For example, a man extending his hand in greeting may be a courtesy to many. To others, it may be a violation of a fundamental belief. Thus, the chance of selective enforcement based on the judiciary's sensibilities is too great for these rules to withstand constitutional scrutiny.”³⁴⁰

Hence, the *Fieger* case serves as a clear example that even patently insulting speech which would not most probably pass even the admissibility stage before the ECtHR, finds refuge in the First Amendment.

³³⁴ 410 U.S. 113 (1973).

³³⁵ Jack Lessenberry, *So Much For Free Speech*, *Metrotimes*, September 8, 2006.

³³⁶ See e.g. Dawson Bell, *Fieger reprimanded for attacks on judges*, *Detroit Free Press*, July 31, 2006; and Charlie Cain, *High court reinstates Fieger reprimand for comments*, *Detroit News*, August 1, 2006.

³³⁷ *Grievance Administrator v Fieger*, 476 Mich 231 (2006).

³³⁸ *Fieger, et al. v. Michigan Supreme Court, et al.*, _ F.Supp. 2d _ (E.D. Mich. Sept. 4, 2007).

³³⁹ *Fieger, et al. v. Michigan Supreme Court, et al.*, _ F.Supp. 2d _ (E.D. Mich. Sept. 4, 2007).

³⁴⁰ *Id.*

4.5 WHERE does criticism take place?

Similarly to the WHAT-question, the place of criticism does not make much difference. In sum, it is irrelevant if the criticism of *concluded* proceedings appears in media, on Internet, or in non-public communications with judicial officers discussed in Part 3.5 in relation to the ECtHR's jurisprudence. As a result of this irrelevancy, the leakage of the non-public communication to the media has no consequences.³⁴¹ This approach is again in stark contrast with the European approach.

The only relevant distinction which applies in the U.S. case law concerns criticism 'in the face of the court' and other communications with judges in *pending* cases such as teleconferences or court documents (such as briefs).³⁴² But even these contempt powers were construed narrowly. As early as in 1941, the USSC interpreted narrowly the statute allowing judges to punish conduct which obstructed administration of justice and confined contempt to the misbehaviour in the vicinity of the court and, thus, the fact that misbehaviour charged had some direct relation to the work of the court was found insufficient.³⁴³ Hence the letter written to a district judge was found outside the scope of the contempt powers.

However, it is not entirely clear whether criticism of a judge after trial in judicial documents (e.g. in appellate brief) is protected by the First Amendment under any circumstances. Some courts held that there is no First Amendment right to accuse judges of criminal acts during a trial that have no basis in the truth,³⁴⁴ whereas other read the rules of professional conduct to apply primarily to out-of-court statements to the public and *not* to

³⁴¹ For example, in Bridge's comments in *Bridges v. California* in were made in a telegram to the Secretary of State for labour which later found their way into newspapers in Los Angeles and San Francisco (quoted from Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 60, footnote 105). Cf. *Lešník v. Slovakia*, no. 35640/97, § 61, ECHR 2003-IV.

³⁴² See e.g. *In re Holtzman*, 577 N.E. 2d 30, 43 (N.Y. 1991).

³⁴³ *Nye v. United State* 313 US 33, 49 (1941), overruling *Toledo Newspaper Co. v. United States* 247 US 402 (1918).

³⁴⁴ *Ramirez v. State Bar of California*, 619 P.2d 399 (Cal. 1980).

documents submitted to the courts.³⁴⁵ There is also a tension between the obligation to a client and requirement to avoid of false criticism.³⁴⁶ More rarely, the courts distinguish between places of lawyers' criticism of judges on other grounds. For example, *In re Riley*,³⁴⁷ *public criticism* of judge by lawyer was found inappropriate because *private grievance* could have been submitted.

But it must be stressed that the lessened protection of the abovementioned forms of criticism is not primarily the result of the place where the criticism is made but rather the consequence of belonging to the 'underprivileged' group of speakers (lawyers) or the very fact that the comment was made on the *pending* trial. These issues will be dealt with under "WHO is criticizing" and WHEN questions that are more appropriate to address them.³⁴⁸

4.6 WHEN-question and other factors

Timing of criticism is a relevant factor also in the U.S. As to the *concluded* proceedings, both majority and minority of the USSC in *Bridges v. California* accepted that criticism of concluded proceedings 'however unrestrained' would always be constitutionally protected.³⁴⁹ It is thus only comment affecting a *pending* trial that could properly be proscribed without violating the First Amendment.³⁵⁰ More specifically, "distinctions are drawn between comments made *during* or *prior* to a trial, comments made *after* the litigation has been resolved, and comments made *during an election campaign*".³⁵¹ However,

³⁴⁵ *United States v. Brown*, 72 F.3d 25 (5th Cir. 1995) (both cases quoted in Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts*, 169)

³⁴⁶ See ABA/BNA Lawyers' Manual on Professional Conduct §101:611.

³⁴⁷ *In re Riley*, 691 P.2d 695, 705 (Ariz. 1986).

³⁴⁸ Another tricky and novel question worthy of mention is whether the comments in the blogosphere deserve the same protection as classical media. However, this issue goes beyond the scope of this paper and cannot be addressed here.

³⁴⁹ *Bridges v. California*, 314 U.S. 252 (1941); see Black J at 273 and Frankfurter J at 291, 300.

³⁵⁰ *Pennekamp v. Florida*, 328 U.S. 331, 365-369 (1946).

³⁵¹ Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts*, 168 (emphasis added).

discussion on specificities of criticism during election or ‘retention’ campaigns goes beyond the reach of this paper.

Even though commenting upon pending trials is outside the scope of this paper, it is important to stress that this is yet another significant area of American exceptionalism.³⁵² The U.S. courts give precedence to the free speech over the fair trial concerns to the degree unheard of in Europe and in the ECtHR’s case law. Thus, any regulation or restriction of such speech must still meet the quite stringent standards of the “clear and present danger” test.³⁵³ Mere assumption of interference will not be sufficient.³⁵⁴

In relation to administration of justice, this test means that “as a general rule, speech concerning judicial proceedings may be restricted only if it ‘is directed to inciting or producing’ a threat to the administration of justice that is both ‘imminent’ and ‘likely’ to materialize“.³⁵⁵ This specific application of the clear and present danger test might, thus, be referred to as the test of “a clear and present danger to the fair administration of justice”.³⁵⁶ The USSC has been vigorous in application of this test and “in a line of cases” beginning with *Bridges v. California*,³⁵⁷ it reversed a series of contempt convictions for disseminating editorials and other public commentary about pending cases or grand jury investigations.³⁵⁸

The USSC provided the following rationale for placing speech relating to the administration of justice under the strict ‘clear and present danger’ rule, especially where a still pending case is concerned: “restrictions on speech concerning pending judicial

³⁵² See e.g. Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 93-97.

³⁵³ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

³⁵⁴ *Wood v. Georgia* (1962) 370 U.S. 375.

³⁵⁵ *Turney v. Pugh, Commissioner*, United States Court of Appeals, Ninth Circuit, 400 F.3d 1197, March 15, 2005.

³⁵⁶ Quoting from *Pennekamp v. Florida*, 328 U.S. 331, 348 (1946).

³⁵⁷ *Bridges v. California*, 314 U.S. 252, 268 (1941).

³⁵⁸ See also *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947); *Wood v. Georgia*, 370 U.S. 375 (1962). Cf. with *Turney v. Pugh, Commissioner*, United States Court of Appeals, Ninth Circuit, 400 F.3d 1197, where Alaska jury tampering statute was found narrowly applied only to traditionally unprotected speech and thus survived the scrutiny of Federal courts.

proceedings are likely to impede discussion of important public issues ,at the precise time when public interest in the matters discussed would naturally be at its height.”³⁵⁹

As to the ‘largeness’ criterion and ‘transition-to-democracy’ argument, it is not surprising that the USSC has not had even an opportunity to address them. These arguments are thus plainly irrelevant in the American free speech jurisprudence on criticism of judges.

4.7 Trends in the U.S. Jurisprudence

It is difficult to speak of recent trends in the area of criticism of judges in the U.S., since most concepts are firmly entrenched in the case law of both federal and states courts. In order to summarize the jurisprudence of the U.S. courts, we must distinguish between offence of contempt of court and defamation law. In law of defamation, actual malice standard applies in all cases irrespective of whether it is a professional or private life of the judge what is criticized. In cases involving contempt, the timing of criticism is a decisive factor. If the criticism affects *concluded* proceedings, it would be always protected. But if criticism is made on *pending* trials, the test of clear and present danger applies. These conclusions form a part of consistent case law.

However, certain areas of criticism of judges still remain unresolved. Most importantly, the USSC has not explicitly addressed the restraint on free speech inherent in disciplining a lawyer for comments criticizing a judge so far.³⁶⁰ In 2007, the USSC denied a certiorari even in the controversial *Fieger* case which seemed to be a perfect vehicle for solving this issue.³⁶¹ As a result of the absence of clear authority from the USSC, federal and state courts have split on whether attorneys enjoy free speech right to engage in non-

³⁵⁹ *Bridges v. California*, 314 U.S. 252, 268 (1941).

³⁶⁰ See also *In re Green*, 11 P.3d 1078, 1083 (Colo. 2000).

³⁶¹ Certiorari denied on February 20, 2007.

defamatory out-of-court criticism of judges when such criticism is unlikely to interfere with a pending proceeding.³⁶² Hence, the uncertainty stands.

From the empirical point of view, it seems that criticism of judges in the U.S. has now reached its high tide in the historical ebb and flow. What is more disturbing is the fact that judges themselves also tend to be more willing to bring civil proceedings for injuries allegedly suffered in their capacity as judges than anytime in the history. The latter development undermines three generally acknowledged values of *Sullivan* ruling, namely that it (1) discourages lawsuits by public officials; (2) removes courts from examining what is 'fair' and 'ethical'; and that it (3) sets up *clear standard* for journalists.³⁶³

³⁶² Petition for a Writ of Certiorari to the USSC in *Fieger v. Michigan Grievance Administrator*, No. 06-596, Reply brief for petitioner, p. 1.

³⁶³ I am grateful for this comment to David McCraw.

5 Overcoming myths of criticism of judges

The main focus of this chapter is to compare the jurisprudence in both jurisdictions and provide an answer to the core question – when does legitimate criticism of judges deteriorate into illegitimate, independence-threatening intimidation? To this end, this chapter will be organized as follows. Part 5.1 will briefly pinpoint the specifics of approaches adopted by the ECtHR and the U.S. courts and highlight the main differences. Part 5.2 will be devoted to identifying myths about criticism of the judiciary. Part 5.3 will propose how to overcome these myths, and building upon policy recommendations identified by Task Force of Citizens for Independent Courts (hereinafter only “Task Force”) it will suggest how to effectively respond to intimidating and misleading criticism of judges.

5.1 Comparison and evaluation of the alternatives

The main specifics of both ECtHR’s and U.S. courts’ jurisdictions have been to a large extent addressed already in Parts 3 and 4. This subchapter will thus only briefly summarize the most significant differences. Before doing so, this is a good opportunity to reemphasize that certain issues are not covered by this paper. First, comments upon pending trials are outside the scope of this paper. Second, this paper to a large extent overlooks the difference in between state systems in appointing the judiciary. The third point is closely related to the second – specific issues such as the elective factor³⁶⁴ or existence of retention systems in the U.S. are also omitted.

Similarly, it must be reminded that the ECtHR is an international court that operates under the guise of the principle of subsidiarity. Even though the ECtHR aspires to become the

³⁶⁴ Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, 169.

‘European Constitutional Court’,³⁶⁵ this position is still rather wishful thinking. Therefore, the ECtHR still sets only minimum standards of human rights protection. As a result, signatory states to the ECHR50 are entirely free to adopt higher standards and, even with respect to the criticism of the judiciary, this happens.³⁶⁶

As to the main differences, they start from the text of the First Amendment on the one hand, and Art. 10 ECHR50 on the other. While even the First Amendment is by no means absolute, the explicit legitimate aim stipulated in Art. 10(2) ECHR50 – “maintaining the authority and impartiality of the judiciary” – which justifies limitation of freedom of expression, ‘signals’ the different approach taken in Europe. It is true that textual differences are not necessarily conclusive, but this is not the case. On the contrary, the abovementioned textual differences are buttressed by both methodological and substantive divergences.

As to the methodological divergences, the ECtHR constructed a unified legal regime, whereas the U.S. courts developed several tests depending on variables of a particular case. More specifically, the U.S. courts created at least six legal regimes with respect to the criticism of judiciary³⁶⁷, depending on the character of the speaker, the timing of criticism and on what might have been affected by critical comment (personal rights of a judge *or* administration of justice *or* reputation of the court). Thus, both in civil and criminal defamation, the standard of ‘actual malice’ applies (irrespective of speaker and time of criticism). The ordinary speakers’ comments on the reputation of the court are always protected and their comments on the administration of justice (both on pending and concluded proceedings) trigger “clear and present danger” test.

Yet other standards apply to criticism of courts by lawyers who deserve lower protection than other speakers (referred to above as ‘ordinary’ speakers). This is partly due to

³⁶⁵ See Luzius Wildhaber, "A Constitutional Future for the European Convention of Human Rights?," (2002) 23 *Human Rights Law Journal* 161.

³⁶⁶ See Decision of the Constitutional Court of the Czech Republic of 25 July 2007, case no. Pl. ÚS 23/05.

³⁶⁷ This categorization takes for granted that judges are treated as “public officials” in U.S.

the fact that free speech of lawyers is governed by rules of professional responsibility. Comments by lawyers on the administration of justice on *pending trials* trigger the test of “substantial likelihood of material prejudice”, whereas the standard applicable to *concluded trials* is unclear but presumably higher.³⁶⁸ Comments by lawyers on the reputation of the court on pending trials are controlled by “clear and present danger” test and as to comments on *concluded trials* the law again does not provide clear guidance.

The doctrinal framework of the ECtHR is different. The ECtHR always follows the 5-step test described in Part 2 and its balancing approach in the final stage of this test rides under the banner of ‘proportionality’.³⁶⁹ This approach further differs from that adopted by U.S. courts in two aspects. First, the character of the speaker and the target of criticism, the timing of criticism and the importance of the public good that can be affected are relevant factors to take into account, but they do not trigger the application of sharply different tests.³⁷⁰ Second, the ECtHR takes into account more factors than the U.S. courts (such as place of criticism) and certain factors are more nuanced (see both WHO-questions). It is thus possible to conclude that the ECtHR’s approach is more flexible, but also more complicated and less predictable. In contrast, tests developed by the U.S. courts operate rather on ‘yes-or-no’ fashion.

The substantive differences will be revealed by answering the four Wh-questions. As to “WHO is criticized” question, the U.S. response is crystal clear. Judges are “public officials” on a par with politicians and other government employees who have substantial responsibility for or control over the conduct of governmental affairs. The ECtHR’s approach is different. It developed a complex hierarchy of public figures that operates on a continuum, and placed the judiciary closer to the bottom of the ladder. Furthermore, the ECtHR tends to

³⁶⁸ See the *Fieger* case discussed in Part 4.3.

³⁶⁹ This phrase was coined by Frederick Schauer; see footnote no. 259.

³⁷⁰ Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," 87.

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 constitutionality) must withstand harsher criticism.

The second WHO-question focusing on speakers is even trickier. The ECtHR treats different speakers differently. This paper identified one ‘underprivileged’ and four ‘overprivileged’ groups of speakers. The ‘overprivileged’ groups include politicians, ‘elected representatives’ in the broad sense, and more arguably journalists and judges themselves. The sole ‘underprivileged’ group is lawyers. In between are ‘ordinary citizens’. But unlike in the case of targets of criticism, the categories of speakers do not seem to operate on the continuum but rather on categorical underprivileged/normal/overprivileged trichotomy. The U.S. courts, more surprisingly, also deviate from symmetry of speakers in one aspect. They share the view that lawyers do not deserve the same protection of their free speech rights and thus treat them as an ‘underprivileged’ group as well. In the U.S. this triggers the more deferential test, whereas the ECtHR still follows the same test of proportionality, but considers the status of lawyer as an aggravating factor.

It is the WHAT-question, where the difference is the sharpest. 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. Similarly, it takes the *form* of criticism seriously. Therefore, (excessive) insults of the judiciary are not protected by freedom of expression. The U.S. approach could not be more different in this aspect. It does not distinguish between criticism of a judge on the one hand, and criticism of the decision and the reasoning therein on the other at all. Similarly, there is no need to distinguish between comments related to professional competency and those touching upon personal characteristic of the judges. To paraphrase Justice Brennan’s words, anything which might touch on a judge's fitness for office is open to criticism. The same applies to

insults. Criticism of judges in the U.S often. takes a vitriolic *form* unheard of in Europe³⁷¹ and is still protected by the First Amendment.

Finally, the relevance of the place of criticism diverges as well. The ECtHR roughly distinguishes four 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, or during telephone conference etc.; (3) the media; and finally (4) Internet. Putting it briefly, these places operate either as a mitigating or aggravating factor. In contrast, the place of criticism does not make much difference in the U.S. Apart from rare exceptions, it is irrelevant whether the criticism appears in the media, on the Internet, or in non-public communications with judicial officers discussed. As a result of this irrelevancy, the leakage of the non-public communication to the media has no consequences.

The ECtHR’s jurisprudence arguably also relies on other criteria that are inapplicable to the U.S. context. These criteria include largeness of the territory, low density of population and arguments based on transitional-justice concerns. Leaving these specific criteria aside, it is possible to conclude that the U.S. approach is more free speech protective. Every test adopted by the U.S. courts is stricter than the test of proportionality, as applied by the ECtHR in the cases of criticism of judges. More specifically, standards of ‘actual malice’ and ‘clear and present danger’, and even the most deferential test of ‘substantial likelihood of material prejudice’, lead to more free speech protective outcomes than the ECtHR’s jurisprudence. Therefore, the third hypothesis of this paper – that the jurisprudence of the U.S. courts is more speech protective than the ECtHR’s case law – has been fulfilled.

³⁷¹ See e.g. the *Fieger* case, discussed in Part 4.3.

5.2 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 several 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.³⁷² What is more, as this paper demonstrated, judges on both sides of the Atlantic 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.³⁷³ However, the most important concerns stem from the institutional bias of judges deciding on criticism of their colleagues, 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”. This does not mean that internal checks are useless. In fact, the following chapter will argue that after relatively minor modification they might be 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

³⁷² See also Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts*, 144.

³⁷³ See e.g. the Czech experience described in Bobek, "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries.", forthcoming in Vol. 14, Issue 1 (2008) European Public Law, available at SSRN: <http://ssrn.com/abstract=995220>, 13 (cited to SSRN paper).

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.*³⁷⁴

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.”³⁷⁵

The U.S. proposition seems to be true especially when politicians are speaking (or when others’ assertions are shared by politicians). If the courts try to silence its critics, it inevitably leads to another response via other means which are usually more harmful than the actual 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 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 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,³⁷⁶ but requires further clarification. While I fully agree that protection of judicial independence

³⁷⁴ *Bridges v. California*, 314 U.S. 252, 270-271 (1941) (emphasis added).

³⁷⁵ *Fieger, et al. v. Michigan Supreme Court, et al.*, _ F.Supp. 2d _ (E.D. Mich. Sept. 4, 2007) (emphasis added).

³⁷⁶ See footnote no. 21.

is an important public interest, it must not be overestimated.³⁷⁷ 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.³⁷⁸ 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.³⁷⁹

Furthermore, judicial independence is just a proxy to judicial impartiality and fair justice. As a result, it must be coupled with accountability.³⁸⁰ 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”.³⁸¹ 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 criticism” and “[s]uch criticism provides judges with an opportunity to rethink their views and to correct their errors”.³⁸²

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

³⁷⁷ See e.g. Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts*, 147; and Bobek, "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries.", forthcoming in Vol. 14, Issue 1 (2008) European Public Law.

³⁷⁸ See *ibid.*; and Emmert F. The Independence of Judges – A Concept Often Misunderstood in Central and Eastern Europe [2002] 3 European Journal of Law Reform 405.

³⁷⁹ John C. Yoo, Criticizing Judges, 1 Green Bag 2d 277, 277 (1998). Cf. Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts*, 149-150. See also Michael Kirby, Attacks on Judges: A Universal Phenomenon, at [www.hcourt.gov.au/speeches/kirbyj/kirbyj_maui.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_mauai.htm) (last visited October 15, 2007).

³⁸⁰ 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)," 702; Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," 119; Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, 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*, 94-96 and 108, who claims that “judges’ non-accountability is their most precious asset” (at 108).

³⁸¹ Barendt, "Michael K. Addo (Ed.): Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards (Book Review)," 702.

³⁸² Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts*, 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, 1 Green Bag 2d 277, 281 (1998)).

undermines public confidence in the legal system and administration of justice. But the question is: 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. If the remarks are true, the public should certainly be allowed to digest them.”³⁸³

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*”.³⁸⁴ 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”.³⁸⁵ 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, 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 “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 more dangerous.

³⁸³ Barendt, *Freedom of Speech*, 321.

³⁸⁴ *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 17, § 34.

³⁸⁵ Citizens for Independent Courts, *Uncertain Justice: Politics and America’s Courts*, 149.

The final argument against criticism of judges, not elaborated in Part 2.1, is protection of “the *dignity* of the judicial process”³⁸⁶ or “the dignity of judges”.³⁸⁷ If we leave aside the U.S. response mentioned above,³⁸⁸ the best rebuttal is provided by Lord Denning, who referred to an article³⁸⁹ 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.”³⁹⁰

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

5.3 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 chapter is to overcome these

³⁸⁶ Dissenting opinion of Judges Caflisch and Pastor Ridruejo in *Nikula*, § 6 (emphasis added).

³⁸⁷ Dissenting opinion of Judge Pavlovschi in *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III.

³⁸⁸ 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).

³⁸⁹ 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.”

³⁹⁰ *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 including the wording of newspaper article was quoted by Judge Loucaides in his Partly concurring and partly dissenting opinion in *Amihalachioaie v. Moldova*, no. 60115/00, ECHR 2004-III.

myths and suggest policy recommendations that would integrate criticism of judges into the public confidence in justice. But before I will do so, I must add one important clarification.

This paper might be easily criticized because “it under American influence made a fetish of the freedom of the press”³⁹¹ vis-à-vis the judiciary and puts forth the U.S. standard of free speech. However, this is an unsubstantiated simplification. This paper does not call for the adoption of “actual malice” standard. In fact, this standard was rejected in other common law countries as well.³⁹² Instead it calls for a clear and workable rule that would be sufficiently concise and lead to predictable outcomes. The ECtHR’s standard, as it is now, clearly fails to meet these two criteria.

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 well-founded and again punished. In stark contrast is the treatment of politicians and more arguably judges. 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, and on the other hand it leaves the *most harmful* criticism (by politicians) untouched. This approach is clearly incompatible with the argument from democracy. The situation in the U.S. is different since the only group discriminated against is

³⁹¹ This is a paraphrase of Judge Zupančič’s concurring opinion in *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI.

³⁹² *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).

lawyers. However, this does not mean that this approach is less problematic. On the contrary, lawyers are “uniquely well-situated to inform the public of possible problems with the judicial system”³⁹³ and therefore deserve the same protection of their free speech rights. As I argued above, the centre of a court’s inquiry should be on the speech itself, not on the speaker.

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”.³⁹⁴ By adopting this position, the ECtHR would solve three-fold problem. More specifically, it would eradicate uncertainty whether a particular expression amounts to insult, limit the unnecessary chilling effect on freedom of speech, and avoid imposition of charitable interpretation of the utterance – an interpretation that would erode the radical quality of the message that is being conveyed.³⁹⁵

However, it does not mean that unfounded criticism should be left without *any* response. If we aim at preserving the public confidence in judiciary and fair administration of justice, it is important to react 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.³⁹⁶

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.³⁹⁷ The same

³⁹³ Citizens for Independent Courts, *Uncertain Justice: Politics and America’s Courts*, 147.

³⁹⁴ Comella, “Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights,” 109.

³⁹⁵ See *Ibid.*, 109-111.

³⁹⁶ Citizens for Independent Courts, *Uncertain Justice: Politics and America’s Courts*, 156.

³⁹⁷ *Ibid.*, 195.

is true in the case of bar-generated responses or response by the Chief Justice. The Task Force thus recommends that legal educators, civic organizations, community leaders, and other concerned citizens be involved in response efforts.³⁹⁸

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).³⁹⁹ The crucial point is to involve non-lawyers since it buttresses the credibility of the response. 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.⁴⁰⁰

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 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..⁴⁰¹

The first condition is clear and rather technical.⁴⁰² It is the other three conditions that are critical. In fact, the remaining 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.

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

³⁹⁸ Ibid., 127.

³⁹⁹ Ibid., 154.

⁴⁰⁰ Ibid., 156.

⁴⁰¹ Ibid., 155-156.

⁴⁰² For details, see *ibid.*, 201-203.

constitutional rights and responsibilities, they deserve criticism“.⁴⁰³ Task Force correctly observes, that „[t]o attempt to protect judges from legitimate criticism also disserves the individual rights that we seek to protect and preserve“.⁴⁰⁴ 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.⁴⁰⁵

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.⁴⁰⁶ But the public must be aware of its existence and must be able to participate in it.

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. 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 Bar⁴⁰⁷) 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.

⁴⁰³ Ibid., 156.

⁴⁰⁴ Ibid., 156.

⁴⁰⁵ Ibid., 156.

⁴⁰⁶ Ibid., 151.

⁴⁰⁷ That would be similar to assigning attorneys *ex officio*.

6 Conclusion

This paper demonstrates that criticism of judges is alive. It even suggests that the general trend both in the U.S. and Europe is that criticizing judges has become more common recently. But as Yoo rightly observes, it is by no means new, at least not in the U.S.⁴⁰⁸ Others concur that criticism of the judiciary has regularly oscillated between historical ebb and flow. However, it seems highly unlikely that it 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’, 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 courts are even more powerful. It is thus only natural that criticism of judges has increased.⁴⁰⁹

Therefore, this paper does not end with a description of the situation on both sides of the Atlantic. Instead, it tackles the core issue openly. It not only identifies the deficiencies in the case law in both jurisdictions but also acknowledges that criticism of judges might be harmful. To this end, this paper 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 paper represents only the top of the ice-berg. On the one hand, it is a recurring theme that internal criticism on the judiciary, unknown to general public, regularly occurs. On the other hand, Barend Van Niekerk in his pioneering treatise reported numerous examples of *informal* restrictions and *indirect* sanctions on criticism of judges, which never

⁴⁰⁸ John C. Yoo, *Criticizing Judges*, 1 Green Bag 2d 277, 281 (1998).

⁴⁰⁹ *Id.*

come before courts.⁴¹⁰ It would be very peculiar to claim that these informal restraints disappeared in time.

The main message of this paper is that criticism of the judiciary is one of the few checks on their work. Contrary to the prevailing view, it is neither 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 attacks from the more powerful branches of the Government. Similarly, 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.

⁴¹⁰ Van Niekerk, *The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World*, 149-208.

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