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CRITICISM OF THE JUDICIARY *VERSUS* AUTHORITY AND INDEPENDENCE OF THE JUDICIARY

REPORT

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1. A proper reaction to criticism is important to preserve authority of the judiciary and to protect its independence. In order to establish what is "proper reaction" we should balance two constitutional values: freedom of expression on the one hand and authority and independence of the judiciary on the other hand. Both these values play a significant role in a democratic State governed by the rule of law.
The judiciary has always been criticized, as it will always be done. Why is the judiciary criticized? The main reason for such criticism is not always mistakes committed by the court or different opinions in respect to certain legal issues.

1.1. Functioning of the judiciary is a matter of public interest. The court assesses issues that are of great importance to the society, and the society does not always accept and favour even the fair result. Court is often involved in solution of political issues. The society can and it should express its opinion on political issues. Here, it should be noted that those are mainly constitutional courts rather than courts of general jurisdiction that decide political and social issues. Therefore constitutional courts should have a higher threshold for acceptance of criticism.

1.2. Legal experts analyse rulings and case-law of courts. When defending their opinion, they criticise the opposite or different ones.

1.3. Before a court, one of the parties involved would always lose, and there are some who find it difficult accept it. In a constitutional court, this is the legislator that may turn out to be the losing party. The way how politicians justify their mistakes in front of their electorate is not always correct. Moreover, politicians and the court are in rather unequal positions. Possibilities of politicians to express their opinion are almost unlimited, whilst the judiciary is bound to the requirement to express their viewpoint in the form of their decisions by motivating it in such a way that it does not require any supplementary explanations. Before a decision is announced, no opinion on a matter should be disclosed at all. Possibilities of courts to react to criticism are restricted. They are particularly restricted while matters are still pending; and even after pronouncement of a decision courts should restrain from discussions on them.

2. I deliberately broadened the topic. I will not speak only of criticisms of judgments. I will also speak of criticism in respect to the judiciary that includes criticism of judgments, judges, the court and the entire judicial power. Often reaction to an inacceptable decision is manifested through criticism of a particular court or a judge (they are often criticized in relation to issue that are not even related to administration of justice)
It is important to react properly to any kind of criticism because this can have an impact on authority of the judiciary.
"To react properly" means to select the most appropriate way, time, content and person that would respond (react) to criticism; this also includes abstention from any reaction. In fact, the first step, when deciding how to react to criticism, is to assess whether in a particular case the court should or should not react (keeping silent is also reacting).

3. The present topic makes us analysing reaction to "negative criticism". It is important to keep in mind that not every "negative criticism" is ungrounded (undue) criticism. An unfounded and erroneous opinion can be regarded as influence on court; however, a grounded analysis and discussions (even if it is negative) is even necessary.
I have classified "for" and "against" arguments of court criticism.

3.1. Arguments "for" court criticism

1. An open discussion that includes criticism of judges and their work by keeping in mind its possible impact on independence of judges shall be regarded as an acceptable way of discussion that assure accountability of judges.
2. Publicity resulting from criticism of judges and open discussion may facilitate a better understanding of the judiciary. Due to objective reasons, the society cannot control a certain part of work of judges; consequently, the judicial power is the least understood branch of power.
3. An open discussion as a part of the freedom of speech is a fundamental value of a democratic society, and is one of the few possibilities for the society to take part in work of the judiciary and participate in open discussions on court issues (those are matters of public interest).
4. Criticism of committed mistakes pushes judges to correct them.
5. When writing on legal issues, formation of legal policy is facilitated and education of the society on legal issues is assured.
6. Justice should not only be ensured; it is also necessary to create circumstances in which the society would see that justice is indeed ensured.
7. Criticism is a constitutional right of every person.

These arguments are more or less related to grounded and proportional (rational) criticism.

3.2. Arguments "against" court criticism

1. Offensive criticism reduces trust of the society into the judicial system and administration of justice. Trust into the legal system and the judiciary is of great importance to ensure the will of the society to accept decisions and ensure that the society respects judgments (executes judgments).
2. Protection of judges from criticism serves for protection of court independence in the interests of the society. Inviolability of judges is an element of independence. The issue of independence of judges should be regarded in the context of interests of the society, separation of powers and a State governed by the rule of law. It shall be regarded as a prerequisite for judges to fulfil their functions rather than a privilege[1].
3. The society should respect the judicial power and the rule of law. Without questioning this statement, I would like to quote the USA Supreme Court, judgment in the case *Bridges v. California* (1941): "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."
4. Certain protection facilitates an easier administration of work of the judicial power. However, it would be strange if such simplified administration would be opposed to the freedom of speech.
5. Effective mechanisms for controlling work of the judicial power are sufficient (appeal; dissenting opinion, disciplinary liability) therefore there is no need for criticism;
6. Taking into account specific nature of work of judges, they cannot protect them at a sufficient level because the possibilities of judges to react to criticism are restricted (they cannot "fight against it"). Here, two reasons for this should be mentioned: first, judgments speak for themselves (they should be clear and reasoned)[2]; second, judges

[1] Amihalachioaie v. Moldova, ECHR, 20.07.2004, Application no. 60115/00, dissenting opinion of Mr. S.Pavlovschi

[2] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, para 15
"15. Judgments should be reasoned and pronounced publicly. Judges should not otherwise be obliged to justify the reasons for their judgments".

should avoid speaking of matters and issues that can be handed in to particular judge for review.

It is not possible to precisely and unambiguously define what judges can and cannot speak openly about when they are administering justice. This serves as the reason for the fact why many judges avoid expressing their opinion openly. Possibilities and right of judges to express their opinion in public are rather related with unawareness of exact limits. Moreover, not all judges are "speakers". The European Court of Human Rights has also drawn attention to limited possibilities of judges to react to criticism[3].

4. It can be concluded that: (1) it is necessary to criticize the judiciary and (2) it should be distinguished between "permissible" and "impermissible" criticism (consequently, boundaries should be marked off).
How to distinguish between well-founded (permissible) and unfounded (impermissible) criticism?
The answer is as simple as complex: in each case, particular circumstances should be assessed (who, where, what, why, how criticizes etc.). The ECHR has indicated that, when investigating whether restriction of the freedom of speech is permissible based on execution of requirement of a judicial authority, the restriction should be assessed in the light of the case as a whole, including the tenor (content) of the remarks [criticism] and the context in which they were made[4].

5. Impact of criticism on the court and possibilities and necessity of the court to reply (react) to such criticism depends on the following:

1. time, in which criticism has been expressed (when?);
2. kind of critics, content and place where criticism has been expressed (how, where?);
3. persons who criticize (who?).

6. Impact of criticism depends on the **time**, in which it has been expressed: before or after rendering a decision. This also influences the possibilities to react to criticism.
Authority of the court and trust of the society into the judicial power can be influenced by the following:

1. criticism expressed during legal proceedings (before coming into effect of a judgment) in respect to a particular matter – judge, the court, the procedure of administration of justice, etc.;
2. criticism beyond or after adjudication of a particular case which includes:
3. criticism in respect to a decision after it is adopted,
4. criticism in respect to a judge (work or inactivity of a judge, competence of a judge, criticism of individual features of a judge),
5. criticism in respect to the court,
6. criticism of the entire judicial system, etc.

When criticising legal proceedings before a judgment has come into effect (it can be criticism in respect to a judge, the court, adjudication proceedings, etc.), it is rather probable that independence and impartiality of the court would be impacted, if compared to expressing

[3] Prager and Oberschlick v. Austria, ECHR, Application no. 15974/90, 26.04.1995, para 34.
[4] Amihalachioaie v. Moldova, para 30.

criticism to the court or a judge after adoption of a decision. Criticism before a judgment can influence not only authority of the court, but also its independence and impartiality.
Consequently, the possible threat to the court is greater in case when criticism is expressed before a judgment is delivered; moreover, ability of the court to react to such criticism is more restricted.

7. Opinion (criticism) can be expressed in different ways:

1. in public (in press, speeches of politicians, conferences, lections etc.);
2. in private (in letters, direct communication); such criticism would not impact authority of the judiciary;
3. according to procedure established by law (appeal, dissenting opinion).

Dissenting opinion is one of types of criticism. It includes criticism legitimized by law in respect to a court judgment. Dissenting opinion may also influence authority of the court. Attitude of the society would certainly differ (1) to findings established in a unanimous judgment and (2) to the one, in the frameworks of which opinions of judges have split, notably, where a part of judges disagree with argumentation of a particular judgment and, possibly, with the entire ruling. This is why in some countries the law does not provide the opportunity to express a dissenting opinion.

I think that in Latvia the legislation in respect to dissenting opinions of justices of the Constitutional Court can be regarded as progressive. A justice who has voted against the opinion included in a judgment expresses his or her dissenting opinion that is attached to the matter; however, in a court hearing it is not announced (not content, not even the fact how justices voted). Dissenting opinion is published officially two months after the judgment comes into effect. Such regulatory framework is based on two reasons. First, it is related with short and strict terms, in which a judgment should be prepared (30 days). In case if a justice made a decision to disagree with any opinion expressed in a judgment only at the final stage of matter adjudication, then it is impossible to prepare dissenting opinion along with the judgment.

Consequently, dissenting opinion is prepared after the judgment is published. Second [reason], dissenting opinion does not influence content and consequences of the judgment. Dissenting opinion plays a major role in assuring individual independence of the justice and in developing the legal doctrine. Therefore, when dissenting opinion is published in two months after coming into effect of the judgment, the purpose of dissenting opinion is reached by also ensuring authority of the court.

8. Opinion (criticism) can be expressed by different persons:

1. politicians (problems arise when politicians criticise the judiciary and judges; problems might be caused when judges criticize national policy);
2. State officials.
3. judges (dissenting opinions, criticism of a court of a higher instance in respect to a judgment rendered by a court of a lower instance, public commentaries in the frameworks of scientific activities, private commentaries);
4. participants of litigation;
5. press,
6. lawyers, the ECHR restrict criticism of lawyers at a greater extent because it has an overwhelming impact on the society and it could legalize ungrounded criticism in the eyes of the society. At the same time, lawyers play a particular role in communication between the society and the judiciary, therefore qualification of lawyers that renders criticism expressed by them even more convincing makes it the best and the most appropriate source of a fair (impartial, competent) criticism. Lawyers enjoy better position to inform the society on their problems with the judicial system. They should

also ensure that their comments would not hamper administration of justice (they should be able to assess situation and establish limits of criticism); etc.

9. Reaction to criticism ("neutralization" of criticism)

In order to neutralize the criticism it is important to know when it is necessary to respond (react) and when it is not.

9.1. It is necessary to react to criticism in the following cases:

1. if criticism is serious and it is likely to have more than a slight (unimportant) impact on the society;
2. if criticism demonstrates lack of understanding of the judicial system or role of a judge, and provided information is at least partially based on lack of such understanding;
3. if criticism (provided information) is mainly incorrect and imprecise; the incorrect information should constitute the major part of criticism for the reply to be adequate.

9.2. It is better to avoid to react to criticism in the following cases:

1. criticism is a fair commentary or opinion;
2. hatred or conflict exists between the person who criticizes and the judge;
3. criticism is uncertain (minor, unclear);
4. criticism deals with issues of ethics of judges and such a case should be transferred to competent authorities;
5. it is necessary to perform a long-term investigation to establish real facts;
6. a reply would prejudice a particular matter.

10. Role of judges in neutralizing criticism

It is difficult to prove causal relation, namely, the fact that it was criticism that influenced trust into the court. But it does not mean that criticism should be ignored.

Those who say that judges and judiciary should not care for criticism are not right. It is also in judges' (court's and judiciary's) interests to establish why an opinion regarding court rulings expressed in public is incorrect (deliberately or not).

If a judge reacts he/she should do it in a way that his/her action would facilitate trust of the society into judicial impartiality and fairness. A judge should participate in public discussions to obtain practical information that would appear useful when administering justice.

Possibilities of judges to respond (reply) to criticism are restricted[5]. The European Court of Justice has also drawn attention to the duty of judges to "discretion that precludes them from replying"[6].

10.1. A judge may not:

[5] Bangalore Principles of Judicial Conduct

1.6. A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.

2.4. A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

4.6. A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

[6] Buscemi v. Italy, ECHR, Application No. 29569/95, 16.09.1999, para 67, Prager and Oberschlick v. Austria, para 34.

1. [a judge may not] express commentaries in public if this could influence result of a matter to be adjudicated and weakens justice (or at least makes such impression) in respect to it;
2. a judge may not compete with State officials regarding correctness of his or her judgments (judgments speak for themselves);
3. a judge may not act in a way that could cause "reasonable doubt" regarding fairness of a judge, prejudices the office of a judge or hampers fulfilling duties of a judge;
4. a judge should avoid all statements regarding a pending case. Both, abstract public remarks and innocent remarks could be interpreted as such that might cause apparent partiality of the court;
5. when expressing one's opinion on legal issues, a judge should not comment pending cases and should be very careful when commenting issues that he or she would probably have to review later.

10.2. A judge may:

1. in a proper place and way, a judge may express its criticism in respect to certain legal provisions in case if it does not apply completely false interpretation of legal norms and if, when doing so, the judge facilitates trust of the society into independence and fairness of a judge;
2. a judge may and should explain legal terms and notions, procedures and issues in a way that would permit press representatives to prepare their releases in the most compatible way possible;
3. a judge may speak to educate the society on legal proceedings or speak of laws, legal system or administration of justice;
4. a judge may speak to rectify misunderstanding of the society of a decision or to respond to criticism that would diminish trust of the society into the judicial system;
5. a judge may express his/her own opinion on a disputable legal issue if he or she would not later undertake its reviewing.

10.3. Judges should express their opinion beyond legal proceedings:

1. if trust of the society into the judiciary diminishes;
2. if it is rather probable that, after adoption of a decision, the legislator would not execute it or would avoid executing it at the necessary extent;
3. if information on particular judgments, judges or legal proceedings is incorrect.
4. It should be noted that it is necessary to react only in case if the response representing defence of the judiciary would facilitate [opinion on] fairness of the judiciary rather that would undermine it.

11. It is not always the case that a judge or a president of a court (also acting as a judge) is the person who should react to criticism. In situation when a judge cannot react to criticism due to objective circumstances, information and clarifications can be provided by press services of courts. The most preferable way of "neutralizing" criticism is commentaries and explanations provided by lawyers, advocates and law specialists.

Section 9 of the United Nations Basic Principles of the Independence of the judiciary provides that associations of judges represent judges' interests and protect their judicial independence. Section 12 of the Magna Carta of Judges adopted by the Consultative Council of European Judges on November 2012 provides that purpose of (national or international) associations of judges is protection of mission of the judicial power in the society. Section 13 of the same document provides "to ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning [..] functioning and the image of judicial institutions". Creation of "image" means active work of the

Judicial Council, including reaction to criticism, education and information of the society in issues related with court work.

12. Conclusions

1. It is permitted and even necessary to criticize court judgments and work.
2. One should distinguish between “permissible” (grounded and constructive) and “impermissible” (unground, false) criticism.
3. It is reasonable to protect the judiciary from ungrounded criticism.
4. The best way of “neutralizing” criticism is involvement of lawyers, advocates, legal experts, as well as judges associations and the Judicial Council into discussions on decisions of courts and work of the judiciary.