

CONTEMPT AND FREE EXPRESSION: MULTILINGUAL LESSONS

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Michael K Addo (ed, with a foreword by Lord Justice Sedley)

Freedom of Expression and the Criticism of Judges: A comparative study of European legal standards

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[149] Media law offers few conundrums as fascinating as the relationship between the press and the judiciary. Are the interests of a democratic society better served by encouraging free debate about matters judicial, or by protecting the judiciary and its activities from criticism? Should discussion of judicial processes be treated as an exception to general principles of freedom of expression and if so, why? In particular, what role should be played by the notion of ‘public confidence’ in the judiciary? Is public confidence threatened or enhanced by free discussion, and how do we know? Are society’s interests served when the judiciary enjoys a confidence that is undeserved? Is it consistent with democratic principles to pull the wool over the eyes of the public, in the name of stability of institutions?

In Australia and similar jurisdictions, the closest the law comes to working through these issues is in the law of contempt. Contempt by ‘scandalising’ provides criminal sanctions against those who criticise judges and their actions. Prosecutions are rare but this might be primarily evidence of the ‘chilling effect’ of those sanctions rather than any respect for freedom of speech on the part of the authorities. That is, maybe the rarity of sanctions is because of the rarity of criticism. It helps to focus consideration of the issues to think about the facts of one well-known case, where a commentator was imprisoned for a statement about a court process. This example, in my view a particularly egregious one of judicial oversensitivity, can serve as a touchstone for the development of ideas about what Michael Addo’s book can tell us.

In *Gallagher v Durack*, the appellant was a union secretary whose members had won a case before the Federal Court.² Gallagher had congratulated the members, telling

them that their strike action while the case was pending had [150] paid off. This was interpreted as meaning that the court had been influenced by the union's strike action. Gallagher was tried and imprisoned for 'scandalising' the court. Readers will note the irony in a situation where a satisfied litigant is prosecuted for expressing that satisfaction: Gallagher did not intend his comment as any kind of criticism, but rather the authorities read it that way. They saw in the sub-text an allegation that the court had been influenced by an improper factor, and that was enough. Gallagher's conviction was upheld by the High Court, with a characteristically strong dissent from Justice Lionel Murphy.

I have described Gallagher's statement elsewhere as a 'harmless piece of union bluster'. I believe it is extremely unlikely that anyone would think less of the Federal Court as result of hearing the statement, especially someone who knew the full details of the circumstances in which it was made. It is tempting to say that the case really amounted to an aberration, an abuse of the scandalising power against a powerful and unpopular union leader. That may or may not be the case, but in any event *Gallagher v Durack* can remind us of the inherent danger that a power to control people's speech will be abused. This is an important part of the logic underlying the protection of freedom of speech: we might not object to the censoring of this or that piece of information, but we worry that the same power could be used to censor information to which we think people should have access, or used against people with unpopular ideas.

Now we can ask, would an Icelandic or a Hungarian Norm Gallagher have been imprisoned for the same statement? No doubt it was not part of Michael Addo's project in producing this book to provide systematic answers to this question, but still, we might hope that a book sub-titled 'A comparative study of European standards' would provide the raw materials for a reader to reach an informed view.

The overall impression with which I have been left after reading the book is that it is more likely that a European Gallagher would have been sued for defamation by the

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² (1983) 152 CLR 238.

judge or judges concerned. This idea is in itself a fascinatingly novel one in the Australian context; here it is practically unknown for judges to bring civil proceedings of any kind, but especially for injuries allegedly suffered in their capacity as judges. Indeed, the Anglo-Australian tradition of ‘reticence’, or of keeping silent in the face of criticism, is alive and well in spite of recent occurrences that have put it on the agenda for public debate. In the concept of a judicial defamation plaintiff, then, we have an example of the very best that comparative study can offer: 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. Why do Australian judges not sue their detractors in defamation? It is a question worth considering.

Another novel idea that seems to apply in a few countries is that of a sanction against journalists in their capacity as journalists. In Italy, for example, one of the possible punishments for an offence of criticising judges is exclusion from exercising the profession of journalist (167). This idea has great appeal, as drawing attention to the gravamen of many such offences which is the abuse of a privileged position. Australian law could learn much from these jurisdictions, in identifying media power as just that — a type of power — and developing mechanisms for identifying and controlling abuses of it. Rather too much of Australian media law treats the status of the players as relevant only to sentencing.³ It is well worth considering whether there is a case for the development of substantive media accountability tools within the general law. (Such a reform would no doubt require in tandem the development of a more formal system of accrediting and controlling the privileges of journalists, but this might not be a bad thing either.)

However, as a reader of Addo’s book you might find you have to work harder than you would like to get the full benefit of comparative study. Most of the book consists of self-contained essays from writers in particular European countries, and there is little commonality as to the issues they address. Some do [151] not even have any obvious connection to the avowed theme of the book: rather than talking about

³ The honourable exception is the extended qualified privilege defence available to the mass media in defamation cases: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

'criticism of judges' as a freedom of expression issue, one essay provides only a rather technical account of the procedure for challenging a judge for bias. One can only guess at how the volume came to contain this essay; no doubt an important part of the explanation is different scholarly cultures in different countries, but one cannot help but wonder whether another editor might have been able to extract something more in keeping with the general theme. Even in those essays that are in keeping with the theme, there is little sense of a comparative picture building up. The sense is more one of a vast amount of information being provided, that readers can use in the context of whatever issue concerns them. Hence my strategy of asking what would have happened to Norm Gallagher: unless you have some particular question in your mind, reading this book is rather like wading through a swamp of legal details without any real sense of what it's all about.

No doubt this book can be very useful to people who need a brief introduction to the law of a given country. The essays are concise and the list of jurisdictions is impressive: England and Wales, Ireland, Germany, Austria, Belgium, France, Denmark, Iceland, The Netherlands, Italy, Greece, Russia and Hungary. Also, because nearly all of the authors are nationals of the place about which they have written, the book provides interesting insights into comparative scholarly cultures in those places (though one hesitates to dwell on that, as it can be doubted whether it was part of the editor's project). For my Anglo-Australian taste, the essays in Part III (The Ordinary Law — or Germany to Iceland on the above list) were rather heavy going, being almost exclusively descriptive and technical. Some arrived only at the end at some kind of interesting jumping-off point for analysis, and I wished that such a point had been provided at the beginning instead. For example, the Austrian essay ends with the observation that 'the protection which the judge enjoys is nevertheless indispensable in the interests of a well-functioning justice system'⁴ but this has no foundation in the rest of the essay and it is frustrating not to see the authors develop it.

On the other hand the essays grouped together under the heading 'The Influence of Culture and History' (The Netherlands, Italy and Greece) provided a broader perspective that sparked my interest. Leny de Groot-van Leeuwen from The

⁴ Addo, above n 3, 86.

Netherlands, for example, provides a fascinating account of how the ‘Dutch consensus culture’ has led to a situation where the ‘elites’ generally refrain from admitting to the broader society there is anything wrong with public institutions. Therefore occasions for developing the law on criticism of judges are very limited. Annamaria di Ioia’s discussion of the waning influence of fascism in Italy was also a satisfying read. When essays stand on their own so pleasingly, it is not so much to the point that they do not develop a unifying theme for the book.

Assuming that there are reasons for the disunity that were out of Addo’s control, a heavy burden falls on his ‘top and tail’ pieces to bring things together. His substantial introduction headed ‘Can the Independence of the Judiciary Withstand Criticism?’, by far the longest entry in the book, goes some way to establishing themes or, at least, explaining what is at stake with the subject-matter of the book. It also makes it clear that it is not part of the book’s [152] aim to consider the proper boundaries of freedom of expression when media power is abused. Rather, the book approaches the subject-matter from the standpoint that a mature democracy should allow maximum freedom to its citizens to criticise their institutions. This is fine, as far as it goes, but it is somewhat disappointing in light of Lord Justice Sedley’s comments in the Foreword, drawing attention to the absence in the *European Convention on Human Rights* of any

right in the public to be told the truth. Readers, viewers and listeners will continue to get bite-sized pieces of information about judicial decisions of considerable sensitivity and complexity, produced sometimes by journalists who have worked hard to distil the essential pint but as often by journalists who have not even bothered to grasp the issues (ix–x).

The book closes with two short essays by Addo on the European Court of Human Rights jurisprudence. These are very welcome, especially from the point of view that the perennial problem of contempt — that it creates judges in their own cause — can be circumvented by a regional machinery. This in itself provides Australian lawyers with useful food for thought, even if the idea of joining with our near neighbours for the purpose of improving the relationship between judiciary, government and citizen seems somewhat farcical in the current climate. However, it is somewhat puzzling that Addo has written two essays, one on criticism of public officials and one on

criticism of judges. First it is not explained why an essay — especially a separate essay — on public officials was considered necessary. It might be because the distinction between public officials and judges is not so clear in many European countries — an interesting comparative observation in itself, but this is not stated, much less developed. Second, the essay itself does not appear to develop any appreciable ideas on public officials as distinct from judges. The final essay contains a useful review of the main European cases on criticism of judges and offers some scholarly analysis of the trends that have been apparent at various times. It seems that the Court has some way to go before it has a coherent position on criticism of judges, especially as regards the distinction between criticism of a judicial institution and criticism of individual judges. Also the significance of a defendant's ability (or inability) to prove the truth of his or her allegations needs to be further thought through.

Do Addo's opening and closing chapters fulfil the needed function? Perhaps, but I wonder if they would have been better switched around. The chapters on the European court could have set the stage nicely because so many of the cases to be discussed by authors from individual countries have ended up there. Therefore they paint a picture of the range of cutting-edge practical issues that made the book worth writing. True, not all of the countries included are integrated into the European system, so there would have been some further reference to the issues raised there. Here I am thinking in particular of the two former socialist countries, where the novelty of being able to make any comment at all about a government institution places them in a very different category. It would in any event have been necessary to draw attention to the broader themes, such as the maturity of established democracies, that the socialist examples illustrate. But this need not have been done in such detail at the beginning of the book.

Rather, the reader would benefit from a detailed discussion of the themes and the big-picture issues (as distinct from the more practical or technical issues) at the end of the book. Such a discussion can draw more usefully on examples provided in the various essays, because the reader is by this point familiar with the essays. Of course, there is nothing to stop a reader from going back and re-reading the introduction after finishing the essays. However, a concluding chapter would be cast slightly differently,

and make better use of the reader's foreknowledge. It could be a true drawing-together of the different essays, fitting them in with the unifying themes. In short, it would have made the book truer to its subtitle.

In closing, a comment needs to be made about the obvious pitfall of collecting essays from across Europe: it is very important to pay close attention to translation and/or the supervision of non-native [153] speakers writing in English. While none of the language was incoherent, some readers might find it irritating when they encounter persistent examples of the kind of stilted expression that can result from poor translation. (The essay from Iceland is a particularly strong example of this problem.)

Freedom of Expression and the Criticism of Judges is a book that was inspired by some very challenging tensions in law and society. It has a clear point of view, which is that the time has come to resolve those tensions more in favour of individual freedoms and less in favour of government institutions. The editor is clearly enthusiastic about the activities, both actual and prospective, of the European Court of Human Rights in pushing national legal systems towards that point. However, the book requires a good deal of reading-between-the-lines by a reader who wishes to gain a true comparative picture of the European scene and most of the essays do little to develop the overall themes that inspired the book. It could also do a good deal more to develop cognate themes: the abuse of media power and how law might be used to enhance media accountability.