Freedom of Expression and the Criticism of Judges

A comparative study of European legal standards

Edited by

MICHAEL K. ADDO
School of Law, University of Exeter

Ashgate

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Foreword

It was relatively easy for Lord Atkin to remark in 1936 that justice was not a cloistered virtue and must be prepared to suffer the respectful, even though outspoken, comments of ordinary men. It was, after all, in the same year that Lord Hewart CJ felt able unblushingly to tell a City audience that His Majesty's judges were satisfied with the almost universal admiration in which they were held. ('Almost' seems an excess of modesty in the circumstances.) Any criticism – and Hewart himself was a worthy candidate for a fair amount of it – tended to be muted and to circulate away from the front pages.

Everybody in the United Kingdom now accepts that judges, as Lord Widgery CJ told the Phillimore Committee on contempt of court, must have broad backs. The same is true, as this pioneering volume shows, throughout the countries which make up the Council of Europe. Olowofoyeku's *Suing Judges* has shown, in parallel, how in most of the common law world criticism of judges can extend to litigation against them.

In Britain today there is effectively no limit not only to the extent but to the degree of comment to which parts of the press are prepared to subject judges. Within the last few years, to take a single example, a conscientious and able High Court judge was described by a tabloid journalist – not some hack but a leading political commentator – as a weevil in the body politic because he had given a decision against the Home Secretary in relation to the conditions of imprisonment of IRA prisoners. It's difficult, by contrast, to remember when one last read an editorial commending a judge for taking an unpopular but principled decision. Ministers for their part have in the not too distant past been prepared to use the lobby system of unattributable briefings, dependant as it is on compliant journalists, to launch attacks on judges whose decisions they have found it easier to criticise than to appeal. This is a world which neither Hewart nor Widgery dreamed of.

With the coming into our municipal law of the European Convention on Human Rights even more regard than hitherto will have to be paid to the right of the media to report and comment as they think fit. There is no corresponding Convention 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 point but as often by journalists who have not even bothered to grasp the issues. They will continue to be given a false picture of the incidence of violent crime and of how sentencing judges deal with it – a process which is not a matter of impression but of quantified proof[1], none of which shows any sign of modifying press behaviour.

Judges for their part have to rely on the quality of their decisions. In the years since Lord Mackay's sensible abrogation of the Kilmuir Rules which prevented judges from taking part in public discourse, judges have begun to speak much more freely in public about the business of adjudication and its social ramifications. But they do not as a rule discuss or defend their own decisions: for plain reasons these have to speak for themselves. This has two outcomes, one much less obvious than the other.

The obvious one is that attacks in the media tend to go unanswered. The less obvious one is that however resolutely they set their minds against it, judges may be affected in giving their decisions by concern at what the media reaction will be. Those whose response is that, for an unelected judiciary, this would be no bad thing should pause. Unelected judges who hear both sides in full and whose reasoning is public and open to appeal are one thing. Unelected editors and columnists with political and sometimes personal agendas of their own are another.

The jurisdiction to punish for contempt of court inexorably makes the bench judge in its own cause, and courts are for that reason among others chary of exercising it. Even so, it is a power which Article 10(2) of the Convention expressly preserves; and it remains to be seen how far section 12(4) of the Human Rights Act, seemingly prioritising the right of free expression over other rights, is itself Convention–compliant.

This brief introductory note is not, however, a call for a return to a culture of deference reinforced by the big stick of contempt. My own belief is that judges need more, not less, feedback on how well they are performing. What I think this book will encourage its readers to reflect usefully on is the difference between judge–bashing, an easy but foolish activity, and a public critique which values the integrity of adjudication and seeks to improve its quality. Those who neglect the difference create the risk that the rule of law will be the real casualty.

Stephen Sedley
Royal Courts of Justice
April 2000

1 M. Hough and J. Roberts, *Attitudes to Punishment: findings from the British Crime Survey* (Home Office Research Study #179, 1998. See also the *Crown Court Study*, #19, for the Royal Commission on Criminal Justice, 1993.

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Michael K. Addo
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Notes on Contributors

Michael K. Addo teaches constitutional law and human rights at the University of Exeter. He is the editor of *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer, 1999).

Michael Bohlander is a judge (*Richter am Landgericht*) currently on leave from his judicial duties; he is the Senior Legal Officer of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia (ICTY). He holds a doctorate in law from the University of the Saarland and is an Honorary University Fellow at the School of Law of Exeter University. He has also been a Visiting Scholar at the Northwestern University School of Law in Chicago. He has published three books and over 50 articles, mostly in the fields of criminal and comparative law, including a book on duty solicitor schemes, *Verteidigernotdienst im strafprozessualen Ermittlungsverfahren* (Peter Lang Verlag, 1992) and another with Christian Latour, entitled *The German Judiciary in the Nineties* (Shaker Verlag, 1998).

Bill Bowring is Reader in Law at the University of Essex where he specializes in human rights in the former Soviet Union and Eastern Europe. He is Consultant on human rights and law reform in Russia to the Department for International Development's Know How Fund, and is a legal expert on a number of European Union and other projects. As Director of the University's Pan-European Institute, he coordinates interdisciplinary teaching, research and consultancy in relation to the European Union, Central and Eastern Europe, and the former Soviet Union.

Marianne Holdgaard is Associate Professor at the Department of Jurisprudence at the University of Aarhus, Denmark. She teaches human rights at the university where she previously graduated with a Master of Laws degree. She has been Guest Researcher at the Norwegian Institute of Human Rights and has published widely on the subject of freedom of expression and fair trial. She holds a PhD in Human Rights from the University of Aarhus.

Leny E. de Groot-van Leeuwen is Assistant Professor at the Law Faculty of the University of Nijmegen, the Netherlands. She holds an MA and PhD from Leiden University. She has written extensively on the Dutch judiciary and co-authored (with N. Doornbos) *Klachten op Orde* (Complaints about Lawyers) (Deventer, Kluwer, 1997).

Annamaria di Ioia is a researcher at the European Public Law Center in Athens. She also works with Article 18, a UK-based non-governmental organization and collaborates at the European Review of Public Law.

Ga'bor Halmai is Professor of Law and Director of the Hungarian Human Rights Information and Documentation Centre from where he continues to act as country reporter for the East European Case Reporter on Constitutional Law. From 1990 he was Chief Counsellor to the President of the Hungarian Constitutional Court. He has published books on *Freedom of Association* (1990), and *The Limits of Free Speech* (1994).

Jørgen Albaek Jensen is Associate Professor and Director of Studies at the University of Aarhus, Denmark, where he teaches constitutional and administrative law. He is the author of *Parlamentarismens statsretlige betydning* (The Constitutional Impact of Parliamentarism) (1997).

Agust Karlsson is a practising attorney in Reykjavik and a member of the Icelandic Bar Association. He has a special interest in human rights law and regularly conducts cases on human rights principles. He holds an LL.M in International Business Legal Studies from the University of Exeter, UK.

Mary Kotsonouris served as a judge of the Dublin Metropolitan District for nine years. She is the author of *Talking to Your Solicitor* and *Retreat from Revolution: The Dáil Courts 1920–1924* and is currently writing a book on the Judicial Winding-up Commission for the Irish Legal History Society.

Lefteris Ktistakis practices law at the Thebes Bar, specializes in business law and he holds degrees from the Universities of Thrace, East Anglia and Exeter.

Hélène Lambert teaches European and international law at the University of Exeter. She is the author of *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (Martinus Nijhoff/Kluwer Law International, 1995). She has also written numerous articles on refugee law.

Rasmus M. Madsen is Master of Laws from the University of Aarhus, Denmark, and holds an LLM in European Legal Studies from the University of Exeter, UK. He is now employed at the Danish Ministry of Justice.

J. Michael Rainer is Jean Monet Professor of European Private Law at the University of Salzburg where he has been Professor of Law since 1995. He is an expert in comparative law and has published widely in various international journals. He has also held visiting appointments at other universities including the University of Trieste and Munich.

Thomas Tschaler is a qualified lawyer in Austria. Until June 1999 he worked as a teaching and research assistant to Professor J. Michael Rainer at the Department of Austrian and European Civil Law in the University of Salzburg. He gained an MA and a PhD from the University of Salzburg.

Dirk Voorhoof is Professor at the University of Ghent where he teaches and researches in media law and copyright law. He has published widely on media-related issues in English, French and Dutch, including *On Freedom of the Press, Broadcasting Law and the New Media* (Kluwer, 1987), *Access to Government Information* (Kluwer, 1991), *Freedom of Expression, Racism and Revisionism* (Ghent Academia Press, 1995) and *Critical Perspectives on the Scope and Interpretation of Article 10 of the ECHR* (Council of Europe Press, 1995).

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PART I
GENERAL INTRODUCTION

1 Can the Independence of the Judiciary Withstand Criticism? An Introduction to the Criticism of Judges in Europe

Michael K. Addo

Introduction

As the key players of the judicial arm of government, judges' role in liberal democratic society is not in doubt. With primary responsibility to uphold the rule of law and to defend the constitution, the judiciary is a uniquely different organ of government whose effective functioning depends critically on its independence. In the allocation of constitutional tasks, the judicial arm of government, unlike its legislative or executive counterparts, is not expected to participate directly in the day-to-day political governance of the country. Theirs is the isolated task of adjudicating on disputes and often overseeing the compliance of the other two branches with the law and the constitution. In practice, judges have been perceived as specialist professionals whose authority must be secured at all costs against public interference. The isolated stage for the performance of judicial tasks is deliberately made unsuitable for public scrutiny and, consequently, judges are today the least understood of the three branches of government. Nevertheless, fundamentally, judges are also public officials, even if they are no more than a special category of bureaucrats who undertake their responsibilities on behalf of the people. They carry out tasks for which democratic doctrine requires that they be held to account.[1] Generally, it is true that judges cannot be held to account on exactly the same terms as politicians – that is, through periodic elections – without undermining

their independence and authority.[2] Furthermore, the law invests judges with full authority to be masters within their court and, in addition, unquestionably imposes respect for judicial authority regardless of how well judges undertake their tasks. Because such respect for judicial authority is presumed to facilitate the independence with which judges are expected to undertake their duties, the very idea of challenging what judges do risks undermining their independence. This therefore makes the courtroom particularly unsuitable for any meaningful debate about the work of the judiciary. However, respect for judicial authority is neither an overriding principle of European liberal democracy for which all other principles (such as freedom of expression, accountability and transparency) must always be relinquished, nor is it incompatible with other principles. Ideally, all liberal democratic principles must complement each other in the long run and thus effective constitutional democracy would endorse forms of accountability which do not undermine judicial independence.[3]

Open discussion, including the criticism of judges and their work which is mindful of its impact on the independence of the judiciary, may provide an acceptable forum for maintaining the accountability of the judicial branch of government.[4] The publicity generated by open discussion and the criticism of judges can contribute to a better understanding of the judiciary. Lord Macnaghten is said to have argued that 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying on trial.'[5] In fact, the value of open discussion in democratic society is more than just the opportunity it provides for judicial accountability. As a component of freedom of expression it is a core value for liberal democratic society because it offers one of the few opportunities for the public to participate in the work of the judicial arm of government. As participation is an indispensable ideal in such a society, there is therefore merit in the proposition that it is improper to curb open debate, especially in matters which are of public interest.[6] It therefore follows that, in so far as the work of the judiciary in general, and of judges in particular, are in the public domain and so of public interest, the value of freedom of expression applies, in principle, with equal force to their work.

However, democratic entitlement to participate in public affairs is not absolute; its scope, in practice, is affected by other equally compelling liberal constitutional values such as the independence of the judiciary.[7] Liberal democratic discourse is full of these competing values which are reconciled through compromises defined by the circumstances of each case, and taking into account the necessary legal, political, cultural and historical factors.[8] Inevitably, the dynamic nature of constitutional democracy itself makes the management of competing values such as freedom of expression, the accountability of public officials and the independence of the judiciary

difficult to prescribe. Conventional wisdom for the determination of priorities may change from place to place and from time to time. Indeed, it is quite possible that the choices which underlie today's conventional wisdom for determining compromises may themselves be overtaken by different circumstances. Consequently, the bias in favour of one constitutional value may often change in favour of another competing value as a result of reappraisal and re-evaluation as and when the doctrines are put into practice.

Within the contexts of a group of countries in, say, Europe, Asia or North America, minimum basic standards of compromise, which can be used as guidelines for the assessment of the acceptability of individual compromises, may be discerned. These guidelines are often the result of decades and, in some cases, centuries of trial and error in the effort to define the most appropriate compromise applicable to the group. Rather predictably, these guidelines for the management of conflicting liberal or constitutional values cover a wide spectrum in which some countries operate at the lowest level while others operate at the highest. The important question in these circumstances is often not whether there has been any doctrinal recommendation or practical implementation of guidelines for the management of conflicting values such as freedom of expression, the accountability of public officials and independence of the judiciary: all over the world, there is evidence of some kind of doctrinal explanation or practical treatment of freedom of expression as it affects the judiciary. The difficulty is rather one of defining and explaining the trend of change in the acceptable compromise used for the management of conflicting values. This difficulty exists in the context of modern Europe as it does in other contexts. This book contains a collection of essays written around the common theme of managing the conflicting claims to freedom of expression, the accountability of judges as public officials and the independence of the judiciary in a European context. The essays collectively explore the factors which affect the determination of the appropriate balance between these liberal democratic ideals.

For a variety of reasons, the assessment of the narrow European focus of subject is of considerable importance to any wider debate. First, since Europe, as the undisputed cradle of modern liberal democracy, moulded the doctrines and defined any compromises on the management of conflicting values, any new and emerging European directions in this field will be of interest to other democracies across the globe. However, European countries – as does the rest of the world – differ widely in law, culture and history; this affects the practical implementation of compromise and, often, different countries have been, and perhaps continue to be, guided by the different levels available across a wide spectrum. Some countries attach more importance to freedom of expression, others may emphasize the importance of judicial independence, but none will dispute the importance of the accountability of public officials. Some,