

Press Law in Modern Democracies: a Comparative Study, Edited by Phina Lahav

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PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY. Edited by Phina Lahav. New York, N.Y. and London, England: Longman, 1985, 366 pp.

This volume presents meticulously annotated studies of the press law in three groups of democracies: (1) the Anglo-American (the United States and the United Kingdom); (2) the Continental (France, Sweden and the Federal Republic of Germany); and (3) the non-Western (Israel and Japan). This research project was supported by the Modern Media Institute of St. Petersburg, Florida, and is introduced by Yale Emeritus Professor Thomas I. Emerson. Of the seven scholars chosen to survey the press law of his or her own country, six are law professors and the seventh is an English Middle Temple barrister. Each of these contributors assesses the extent to which his respective country's historical experience and cultural heritage, and present form of government and legal system affect a shared commitment to freedom of the press.

The editor, Phina Lahav, required that the essay devoted to each country be uniformly structured in order to facilitate comparative inquiry. Within the general body of press law the contributors discuss similar topics such as prior restraint, national security, internal order, public morality, free press and fair trial, reporters' privilege, right of reply, and the protection of reputation and privacy. The essays contain random cross references, but what they essentially provide is a wealth of material upon which the reader may base his own comparative analyses, or upon which a practitioner might base the type of comparative law brief Louis Brandeis pioneered in the case of *Muller v. Oregon*.¹ For example, Aviam Soifer asserts in his chapter on the United States that the American press is unusually, "perhaps uniquely, forceful and untrammelled." Editor Lahav agrees, citing, as a good illustration, the American law of defamation which "is unique in the protection it gives false statements about the public conduct of governmental officials, as long as those statements are not published with actual knowledge or reckless disregard of the truth," according to the rule announced in the 1964 decision of *New York Times v. Sullivan*.² Relevant passages from the essays on the press law of the other six countries bear out Lahav's assertion.

1. *Muller v. Oregon*, 208 U.S. 412 (1908). Justice Brewer's opinion for the Court carries, in footnote 1, an abstract of Brandeis' brief citing relevant statutes from Great Britain, France, Germany, Italy, Switzerland, Holland and many states of the United States. *Id.*, at 419-420.

2. *New York Times v. Sullivan*, 376 U.S. 274, 279-280 (1964).

In his opinion in the 1968 case of *Slim v. Daily Telegraph*,³ Diplock, L.J., described the tort of libel in the United Kingdom as "artificial and archaic" and "beyond redemption by the Courts." The "Faulks" Committee on Defamation which was established soon thereafter, however, issued a report in 1975 which rejected a recommendation of the enactment of the U.S. rule relating to public officials as set out in *New York Times v. Sullivan*.

Lahav notes that "other legal systems, such as the French, actually prefer the interest of the state in the reputation of its officials over liberal justifications." The French Law of the Press,⁴ passed in 1881, recognizes in article 12 the right of public officials to be protected from threats, insults, abuse or defamation made against them in the course of their duties. Articles 30-33 impose a special penalty on anyone who defames a public official acting in his official capacity or who defames or insults an administrative or elective body.

German Basic Law article 5, section 2,⁵ states expressly that the guarantees of free expression and communication listed in section 1 are "subject to . . . the right not to be defamed and slandered." More specifically, German Criminal Code section 90 prohibits the defamation of federal and state officials and institutions. In practice this protection has been virtually unused perhaps to some extent because of the Code's imposition of a burden of proof that a defendant "intentionally furthered activity directed against the existence of the Federal Republic and her basic Constitutional rules." This requirement bears some resemblance to the judicially created obligation of proving "actual malice" (*i.e.*, knowing or reckless disregard of the truth) which must be met by public officials—and public figures—who bring defamation actions or for whom such actions are brought in the United States.

Writing on Sweden's practice, Håkan Strömberg concludes that, as a practical matter, the only type of prohibited expression in that country that is of any real significance is defamation. In Sweden a post-1960 wave of liberalization deprived the King, the Riksdag, public officers, foreign heads of state, and diplomats of special protection and placed them on an equal footing with private persons with regard to defamation.

In the case of *Ha'aretz v. Electric Company*, the Israeli Supreme

3. *Slim v. Daily Telegraph*, [1968] 2 Q.B. 157, 179.

4. French Law of the Press of July 29, 1881, as subsequently expanded and amended.

5. GRUNDGESETZ [GG] art. 5 (W. Ger. 1949, amended 1968). The Basic Law is to govern the FRG until unification occurs. At such time the Grundgesetz will be superceded by a Constitution approved by the people of a unified German state. Hobson, *The European Community and East-West German Relations*, 19 VA. J. INT'L L. 45 (1978).

Court rejected the rule of *New York Times v. Sullivan* preferring the English approach based on the belief that the extra exposure of public officials to press criticism would, in the words of Judge Landau, "tend to deter sensitive and honorable men from seeking public positions of trust and responsibility and leave them open to others who have no respect for their reputation."⁶ The Supreme Court opinion also noted that the unrestrained defamation of the leaders of the Weimar Republic helped to pave the way for the rise of Nazism in Germany.⁷ The Israeli Penal Law provides penalties for a person who "by gesture, words or acts insults a public servant. . . whilst engaged in the discharge of his duties. . . ."⁸

Like the U.S. Constitution, article 15 of the Japanese Constitution⁹ has been interpreted as providing justification for less protection for the reputation of public officials than for that of others. Japanese Criminal Code article 230 codifies this distinction but only to the extent of making truth a defense for those who defame public officials and public figures but not necessarily for those who defame others.¹⁰

Professor Soifer tells us that "since the 1925 *dictum* in *Gitlow v. New York*, state judges, legislatures, and officials may not interpret their state constitutional provisions more narrowly than the United States Constitution's First Amendment, as construed by the United States Supreme Court." (p. xx) Soifer glosses over the fact that the First Amendment is a limitation on the powers of Congress, and not on those of the states and over the fact that the due process clause of the Fourteenth Amendment is a procedural and not a substantive limitation on state power. It is to his credit, however, that he does seed his text with hints that First Amendment jurisprudence concerning substantive state legislation dealing with expression may be without foundation in the text or historical genesis of those amendments to the federal Constitution. For example, he cites "the tendency of Americans to invoke First Amendment rights in ways that are partially *mythic* and mostly *symbolic*" (p. 80) and which *romanticize* their origins. He states that "if it is impossible to provide an entirely coherent theory of freedom of expression to cover all the hard cases, it is also difficult to refute the Court's *recent* claim that First Amendment values are '*transcendent imperatives*.'" (p. 82)¹¹ Professor Soifer explains that although

6. *Ha'aretz v. Electric Co.*, 32(3)P.D. 337, 345-46 (1978).

7. *Id.*, at 346-47.

8. Israeli Penal Law, 5737-1977, at § 288 L.S.I. (Special Volume) 79 (1977). The author of this chapter did not, however, come across any prosecutions under § 288.

9. KENPŌ (Constitution) art. XV (Japan).

10. KEIHŌ (Penal Code), L.N. 45 of 1907, art. 230.

11. *Cited in Board of Education, Island Trees v. Pico*, 457 U.S. 853, 865 (1982) (Brennan J., plurality opinion).

there is no definitive source or reliable *grundnorm* for the legal theory supporting such values, a widely-held utopian *dream* of an unfettered press, a web of theoretical claims and powerful *rhetoric* have resulted in a growing network of precedents which have provided "a *gloss* on freedom of expression that simultaneously confirms, and *creates* a part of the American tradition. . . a tradition *transcending* specific cases and events."(p. 83) [Emphases added.]

In a concluding chapter, the editor briefly recalls the transitions of the press in different lands from its early negative status, burdened by licensing and censorship, to one of equal treatment. He also takes note of current demands by some for a privileged press status marked by a reporter's privilege and special rights of access. Lahav also defines recurring or continuing tensions variously characterized as being between freedom of the press and certain other societal interests, between absolute freedom and the rule of law, between universal liberal values and the state, between libertarian/constitutional theory and the authoritarian/instrumental theory, between press and state authoritarianism, and between the press as a political organ and the press as an objective medium. The editor's review and comparison of the preceding accounts of press law developments in countries with a written constitution and without one (as in the United Kingdom and Israel) and in countries with a comprehensive press statute and without one (as in the United Kingdom, the United States and Japan) dramatically illustrates Judge Learned Hand's contention that

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it. . .or even do much to help it.¹²

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12. 12 HUMAN RIGHTS back cover (1985).

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