British Institute of International and Comparative Law

The Right to Privacy and the Freedom of the Press: From the European to Domestic Perspectives… and Back

Temple Garden Chambers Seminar Series in International Adjudication

23 May 2013

Report on the seminar

On 23 May 2013, the British Institute of International and Comparative Law hosted an event comparing European and domestic perspectives on the relationship between the right to privacy and the freedom of the press. This was the first in a series of seminars on international adjudication sponsored by Temple Garden Chambers. Sir Stephen Sedley chaired the panel composed of Judge Boštjan M. Zupančič as keynote speaker and Sir Geoffrey Nice QC as discussant.

Judge Zupančič began his presentation by approaching the right to privacy from a historical perspective. Drawing on Warren and Brandeis' seminal article, "The Right to Privacy," he traced the origins of the debate in the philosophical and jurisprudential questions concerning personality rights and highlighted the polemic Kantian and Roman law stances. Tension subsists in the contemporary distinction between human rights – opposable primarily vis-à-vis the state – and personality rights – opposable horizontally between legal subjects and forming the subject of human rights litigation in domestic courts only subsidiarily when the State fails to sufficiently secure their fair protection. Judge Zupančič then proffered that the British tradition, by reason of its underpinning in the Magna Carta, "is more in the vein of human rights," in contrast to the Continental tradition which effects the protection of personality in private law, reflecting its Roman law foundations. Whereas Kant wrote of a "protoright", attaching "to the person as such," under Roman law it was "protected personality interests" that vested in the person in se. These were not initially considered 'rights' stricto sensu, rather their violation amounted to a criminal act, not a private wrong. Later, under the influence of natural law, such interests came to be perceived as "innate, natural 'rights'", which today are both human rights as well as personality rights, in the context of private law.

According to Judge Zupančič, in contemporary law the conflict between the right to privacy and the freedom of the press is one between fundamentally competing legal interests protected in various international instruments, as instances of which he cited Articles 12 and 19 of the Universal Declaration of Human Rights, Articles 8 and 10 of the European Convention on Human Rights (ECHR), and Resolution 1165 of the Parliamentary Assembly of the Council of Europe on the Right to Privacy. Protection of such competing interests, however, is not unqualified and calls for a dynamic balance between the right to privacy – essentially, "the right to be let alone" – and the "right of the public to know". There is an additional nuance with respect to and in furtherance of the latter; whereas the right of the public to be informed is originary and primary, the right of the press to publish is conferred only secondarily, deriving from the right of the public to be informed. In this respect, if the press fails to behave sua sponte responsibly, the legitimising nexus between the primary and secondary is severed.

Judge Zupančič then considered the notion of "the right to know". Though its definition is seemingly elusive, this is unproblematic as there is no requirement that it be defined in abstract terms in advance. He highlighted the beginnings of change manifested in the finding of the European Court of Human Rights (ECtHR) in the Tammer v Estonia case, in which the Court recalled the public interest function of the press in a democratic society, circumscribing permissible criticism in respect of public figures, such as politicians and governments. Judge Zupančič made reference to his concurring opinion in the 2004 ECtHR decision, Von Hannover v. Germany (No. 1), in which he considered the appropriate delineation of the right privacy as "the degree to which one's private life does not intersect with other people's private lives." Further, he suggested that "In their own way, legal concepts such as libel, defamation, slander etc. testify to [the right to be left alone] and to the limits on other people's meddling with it," thereby affirming the existence of the notion of privacy by reference to the legal mechanisms which seek to guard it.

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Judge Zupančič highlighted recent comments by Lady Justice Arden decrying the absent "culture of privacy rights in the UK," before posing the question – what are privacy rights, and making reference to various Continental notions, for instance, French droits de personnalité and German persönlichkreitsrechte. He suggested that a balancing test reconciling privacy and public interest be predicated on the evolutive practice of the common law, a self-regenerating legal system based on precedent, rather than on the rigidity of the civil law tradition. Such a test, he concluded, could be found in US and ECtHR jurisprudence pertaining to criminal cases, for instance, Katz v. US and Halford v. UK, these decisions evincing case-by-case assessment of an 'objective', 'legitimate' or 'reasonable expectation of privacy'. Judge Zupančič expressed the expectation of privacy as related to but narrower than a right of privacy.

Drawing his remarks to a close, Judge Zupančič again cited comments by Lady Justice Arden, namely her observation of the change effected in English Law by the ECHR, in the form of acceptance by English law of the imperative of balancing the rights to privacy and freedom of expression. The turning point was the coming into force of the Human Rights Act, which founds action at English law, providing "a remedy for the invasion of an individual's privacy."

Sir Stephen Sedley noted in approval that the current ECtHR jurisprudence evidences a degree of inflexibility, leaving little room for differential decisions. In the same vein, he adhered to a more case-specific approach informed by common law principles. Sir Stephen raised two additional points of discussion; reflecting upon the ways that a balanced approach could be implemented, he inquired whether, drawing on the experience of the Leveson Inquiry, self-regulation of the press could play a role. In more substantive terms, he considered the ambit of the freedom of expression: could it include a right of the public not to be lied to? Overall, he suggested an approach combining elements of self-regulation and legislation as preferable.

Sir Geoffrey Nice QC invited the audience to reflect on two fundamental legal policy questions; he questioned whether judges and lawyers have the adequate background to aptly resolve a problem they could only, if at all, experience vicariously. Furthermore, referring to the facts of the Von Hannover v Germany case, he pondered whether there are certain issues – in casu intimate details – that inherently merit a strong presumption in favour of privacy protection.

A question and answer session followed the presentations, during which a diverse set of important issues was raised. An initial line of inquiry addressed the intricate interplay between the protection of reputation, privacy, and freedom of the press in the light of the outcome of Tammer v Estonia. Although the panel conceded that the pronouncement might subject public figures to considerable scrutiny, it should not be considered as unmindful of reputation rights. In respect of false accusations, all persons still enjoy protection under the Article 8 of the ECHR and the relevant national libel laws. On another note, Sir Nicholas Bratza, former ECtHR President, raised several questions and provided further insights on the criteria relevant to the balancing of the right to privacy against the freedom of the press, as elaborated in the Von Hannover v Germany (No. 2) judgment. Although those criteria provided a yardstick for judicial assessment, the Court recognised a wide margin of appreciation in favour of the State, perhaps in an attempt to counter certain States' anxieties about judicial interventionism. Moreover, the elusiveness of certain criteria – such as the 'contribution to a debate of general interest' – could be viewed in the same light.

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