1. Introduction

Paul Wragg and András Koltay

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Although much has been written about defamation and privacy law, very little of the discussion has been comparative in nature.¹ Typically, it is exclusively concerned with either the UK or US experience. Consequently, it seemed to us that the debate about both defamation and privacy has been deprived of the insights that other Western and, in some ways more importantly, non-Western legal systems offer for these issues. Of course, this criticism is not entirely fair because, certainly in the UK, and especially in the context of privacy, developments in New Zealand, Canada and Europe, at a supranational level, have had a significant influence on the English law. In *Campbell v MGN Ltd*,² the House of Lords consulted decisions from Australia,³ from Canada,⁴ and from New Zealand,⁵ as well as those in the European Court of Human Rights⁶ – and from that inquiry, the misuse of private information tort emerged. Nevertheless, this sort of comparative approach is the exception rather than the rule.

This edited collection addresses that gap. We have gathered contributions relating to ‘Western’ legal systems in the broadest sense of that expression. These include commentators from Australia, Canada, Hong Kong, South Africa and New Zealand (as well as the UK and USA), but also those based in mainland Europe (France, Germany, Hungary, Italy, the Netherlands, Poland, Sweden and Switzerland). We have also included accounts from non-Western commentators – from Korea, China, and Japan. Accordingly, we have amassed a range of insights that extend beyond the Anglo-American tradition of defamation and privacy scholarship. We think that this can only enrich the scholarship in this field.

These accounts provide critical thought on the theoretical, doctrinal and practical issues arising. The book is divided into five distinct parts. After the first, which concentrates on theoretical considerations, the next four are divided into general and specific sections on privacy and defamation law. Thus, Parts II (privacy) and IV (defamation) compare the laws of specific

¹ Notable exceptions include a few monographs – see Eric Barendt, *Freedom of Speech* (OUP, 2005, 2nd ed.); Ronald J Krotoszynski, *Privacy Revisited: A Global Perspective on the Right to Be Left Alone* (OUP, 2016); Andrew Kenyon, *Defamation: Comparative Law and Practice* (University College London Press, 2007); Dario Milo, *Defamation and Freedom of Speech* (OUP, 2007) – some edited collections – see Russell L Weaver et al, *The Right to Speak III: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006); Andrew Kenyon (ed.), *Comparative Defamation and Privacy Law* (CUP, 2016) – and also some journal articles – see Tom DC Bennett, ‘Emerging Privacy Torts in Canada and New Zealand: An English Perspective’ [2014] *European Intellectual Property Review* 298 and Nicole Moreham, ‘Beyond Information: Physical Privacy in English Law’ (2014) 73(2) *Cambridge Law Journal* 350.

² [2004] UKHL 22.

³ *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63.

⁴ *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591.

⁵ *Hosking v Runting* [2003] 3 NZLR 385.

⁶ *Spencer (Earl) v UK* (1998) 25 EHRR CD 105; *Fressoz and Roire v France* (1999) 31 EHRR 28.

countries, while Parts III and V examine the law in context. Part III explores the issues arising in data protection and Part V considers the impact of new technologies upon the development of privacy and defamation law.

Part I begins with John Campbell's fascinating chapter, in which he argues that since privacy is a contested claim, with multiple meanings, it has developed in a sort of haphazard rather than systematic way, in which interesting jurisdictional differences have emerged. Nevertheless, Campbell argues that the common theme linking North America, Europe, India, New Zealand and sub-Saharan Africa is the priority afforded to human dignity in each legal system. This value gives the right to privacy 'its force and coherence'. Campbell provides a compelling argument that greater judicial recognition of this value as the chief interest of privacy rights will eliminate what he calls the 'elementary mistakes' he discerns in the common law development of the right.

By contrast, Thomas Bennett sounds a note of caution regarding the possibility for common law to overcome these discrepancies and imperfections. He focuses on the UK law's lack of an 'intrusion into seclusion'-type tort, of the sort that we see in the US, and compares this with the common law developments in Canada. Using intrusion as his lens, he argues that the UK common law's capacity to develop an intellectually satisfying privacy law is severely constrained by what he calls 'incrementalism', that is, the judge's inability to develop law by anything other than small steps. For him, this formalism signals the reasons why the UK law has not developed in the same way as the Canadian law – but, significantly, it is not an explanation of itself, for, as he says, such formalism has not constrained developments in other areas of English law, nor has it hampered Canadian judges. His illuminating account therefore offers a plausible and compelling means of achieving greater protection against intrusion in the UK.

Jan Oster, meanwhile, examines theoretical issues arising in defamation law. Specifically, he tackles the issue of reputation as a reason to limit free speech rights. As he notes, the absence of consensus, at a practical and theoretical level, concerning the nature of this justification has produced discernible fragmentation. Consequently, as he notes, when we examine German, English and US law and the Strasbourg jurisprudence we see that although each relies upon the justification of protecting reputation, the rationale differs across jurisdictions. There is no unified theory of reputation. This is because, as he notes, there are two conflicting, irreconcilable concepts at stake – that of 'reputation as dignity' and that of 'reputation as property'. He argues, convincingly, that a reconceptualised approach, in which reputation is reimagined as a right to control information about oneself, overcomes these difficulties.

Paul Wragg also examines the discrepancies we find in, in this case, the US and UK approaches to defamation and privacy law. For him, the differences can be explained by the judicial attitudes towards paternalism – for while the English judge, in defamation and privacy cases, is amenable to determining cases in favour of the defendant, so as to protect public interest expression, the US judge is more reticent. For Wragg, the latter approach is more favourable. He argues that UK judges have become too enamoured by the idea that they can discern the contribution of expression to audiences and thus use this metric as part of the balancing test in privacy and the public interest defence in defamation law. By doing so, judges betray the antipaternalism principle inherent in the liberal tradition. Conversely, US judges, led by Oliver Wendell Holmes, have seen the importance of this value clearly enough. Judges, specifically, and governments, generally, are singularly unqualified to determine the value of speech. To conclude otherwise is to compromise the free speech guarantee.

The remaining parts adopt a more doctrinal approach. Part II begins with Matthias Cornils's illuminating chapter, in which he asks whether the European or the US approach to 'balancing' the value of speech against the merits of interference is to be preferred. In this way, he, like Wragg, asks an important question about the capacity of judges to remain content neutral (especially in Europe) while appearing to take into account the social value of speech to determine the strength of the free speech claim. Although he sees great value in the European approach (in both Germany and in the European Court of Human Rights), in which 'necessity' and 'proportionality' provide the appearance of objectivity in decisionmaking, he concurs that the US approach is the more attractive given its consistent belief that government has no 'competence to interfere with the societal processes of information'. This necessitates abandoning the expression 'public interest' as a means of determining privacy (and also defamation) claims.

Jane Reichel, meanwhile, asks whether private information about public officials, specifically that which manifests in data, ought to be treated as private instead of as public interest expression. By comparing Swedish law to the Strasbourg jurisprudence, she argues that there is a disconnect between Sweden's approach to this issue and the supranational approach. Specifically, Sweden provides weaker rights to privacy for the public official, preferring transparency to individual rights. Indeed, by considering the approach of the European Court of Justice as well as the European Court of Human Rights, she identifies that three different approaches to the same issue are apparent. Quite rightly, she asks whether it is reasonable for these diverging standards to exist across the union.

Kyung Sin Park presents an interesting account concerning defamation and privacy rights, in which he asks the provocative question of whether the two deserve to be kept separate. This, as he demonstrates, has been the case in Korea, where privacy and reputation rights have merged under what he describes as the personality right jurisprudence. He traces this development to an adaptation of Japanese law which, of itself, came from an older German law. For Park, the development has been problematic in permitting so-called truth defamations to be penalised. Although, as he shows, such laws are defensible in principle, they have been used, and are capable of being used, so broadly as to chill what ought to be considered legitimate speech. Thus, he presents the pragmatic view that the amalgamation of privacy and defamation law is less attractive than it appears.

Rebecca Moosavian provides an impressive account which analyses the judicial approach to privacy concerns arising in photography. She takes New York law as her focal point in light of its long history of privacy law protection, and for its role in what she calls 'privacy's origin story in the late nineteenth century'. This provides the perfect foil to UK privacy law, which is much more recent. As she says, the courts, in both the US and the UK, continue to grapple with the dilemma of whether privacy-invading photographs raise concerns about commercial property or what she terms 'spiritual dignity' matters. Despite the disparity in their respective histories, Moosavian argues that the UK position on this question is more attractive because it tends to prefer the dignity analysis over the question of property. As she shows through careful scrutiny of the case law, this gives the UK law the advantage of providing a greater range of protection against intrusive practices than is offered by New York law.

The difference between UK and US judicial approaches to privacy also occupies Amy Gajda's attention in her thoughtful chapter on newsworthiness. Using the high-profile Sir Cliff Richard case as her lens, she asks whether the UK judiciary is too restrictive in its interpretation. This case concerned the BBC's decision to broadcast a police raid on the singer's

home (he was overseas at the time), and then engage in what the court described as ‘breathless sensationalism’ by speculating endlessly about the reasons for the raid. Whereas in the UK the court decided that the interference with privacy was unjustified, Gajda notes that had the same fact pattern occurred in the US Sir Cliff would have lost his claim for breach of privacy, for in capturing the police raid on his home, the broadcaster’s actions were entirely defensible as a matter of public interest expression.

Finally in this Part, Che Ekaratne compares New Zealand law to English law in its protection against defamation arising in digitally manipulated photographs. In this way, his chapter provides an excellent companion piece to Moosavian’s work. Through careful analysis of the case law, he argues that New Zealand defamation law is not as effective as it could be, albeit that it is more useful than, say, the tort of passing off. Nevertheless, he identifies a range of issues that cause uncertainty and unpredictability in this area. Specifically, he notes the limited value of the claim where the harm caused is commercial in nature.

Part III provides three chapters which examine privacy law in context, specifically as it relates to data protection measures. Sebastian Bretthauer begins his thoughtful chapter with the important observation that, in the digital age, invasions of privacy are increasingly non-physical and extend beyond the physical boundary of borders. As he says, this fact makes adequate crossborder data protection regimes vital. While the European Union has sought to meet this challenge with the introduction of the General Data Protection Regulation (GDPR), constant developments in new technologies, such as AI, autonomous driving and self-learning algorithms, present new challenges that will test the robustness of the law to the limit.

For Joanna Kulesza, that limit has already been reached in relation to Art 3 of the GDPR, which seeks to bind individuals living outside the EU. As she says, this presents serious difficulties in relation to, say, US citizens, since US law ostensibly restricts privacy protections to US citizens. Looking at this problem through the lens of the so-called right to be forgotten, she argues that the GDPR has the greatest value in setting the political agenda and so providing a global moral standard by which local laws are to be judged. The alternative, she fears, is that the GDPR is not universally followed, leading to a fragmented system, which would be highly damaging to not only privacy rights but also, in the long run, the world economy.

Rolf Weber and Dominic Staiger take this theme in an interesting direction. Their chapter considers the capacity of individuals to enforce their privacy rights through data access requests. In this, they examine the key differences between the EU and US approach, with an emphasis on German corporate practice. In common with Bretthauer and Kulesza, they address the problem of inconsistency between states and argue for greater harmonisation to address issues of transparency that exist. Although, as they acknowledge, data access rights have improved dramatically over the past decade, there is still much to be done, especially in relation to the obligations on private enterprises. A new culture of transparency needs to be inculcated into corporate life as it has been, more or less, into public institutional life. Whilst this might emerge organically from a bottom-up approach, they call for a greater top-down agenda.

Part IV examines the state of defamation law generally. It begins with Russell Weaver’s insightful chapter, which examines the development of defamation law in the UK, US and Australia since the US Supreme Court decision in *New York Times Co v Sullivan*, in 1964. Despite some measure of common heritage, all three jurisdictions have adopted wildly different approaches, in which, at one point, the UK and US were at opposite ends of the spectrum. Although, as he notes, the UK’s pro-plaintiff approach has been tempered by the introduction

of the Defamation Act 2013, there remains a notable gulf between these two jurisdictions and the third way that Australia has adopted. Interestingly, Weaver not only explores the case law, but also draws upon extensive empirical research concerning editors' and journalists' attitudes to defamation law, with fascinating results.

Part IV concludes with a compelling account of the treatment of corporate reputation in Australian and UK law. In this chapter, Peter Coe critically analyses the Australian restriction on companies pursuing defamation claims, compared to the UK position in which companies have a stronger, albeit imperfect, right. As he argues, both jurisdictions seriously undervalue the significance of corporate reputation and its importance in the global economy. Through his detailed examination of the legislative process which led to both statutes, he draws our attention to the faulty logic apparent in both, and to the flawed empirical position on which both are built. As he says, one of the key problems with these restrictions is the disproportionate impact felt not by the larger companies (to which governments thought the restrictions would most apply) but by the much smaller ones.

In Part V, David Rolph commences our discussion of new technologies and the law by examining the multiple problems raised by defamation claims brought against third party internet intermediaries, such as search engines. As he says, this type of litigation generates issues for which 'no clear solution has yet suggested itself. Through meticulous scrutiny of two recent Australian decisions, he demonstrates that these problems are exacerbated through the courts' apparent insistence on treating these claims as issues of publication. He argues, convincingly, that a more profitable approach would be to consider the question of defamation capacity and the prospect of applying the qualified privilege defence instead, rather than overburdening the concept of publication.

András Koltay continues this theme. Through careful scrutiny of the position in the EU, US, England and Australia, he discusses the roles and responsibilities of internet service providers to guard against defamatory statements. As he says, these providers act as important gatekeepers of information and so play an important role in the distribution of information, not only vertically, between citizen and state, but also horizontally, between members of society. The cross-jurisdictional nature of these activities presents serious difficulties, which the law is yet to resolve. Moreover, the position of internet gatekeepers presents novel problems, for internet service providers are neither publishers, in a traditional sense, nor neutral actors. As Koltay says, although the law currently provides a partial solution through the imposition of limited liability, further, more tailored measures are required as a matter of some urgency to properly address all the issues that these new forms of media raise.

Part V concludes with a fascinating chapter by Ronald J. Krotoszynski, Jr, who examines the problem of courts issuing extraterritorial injunctions to protect privacy interests. As he explains, this presents serious, but apparently overlooked, issues concerning conflict of laws. He argues that this could lead to a 'race to the bottom', in which jurisdictions with the least protective free speech laws seek to impose onerous conditions on actors in other jurisdictions. This, he fears, is a serious and troubling development in privacy law which, if left unchecked, could be seriously damaging to the flow of information across states and so could inculcate a regime in which valuable political expression concerning less tolerant states could be prevented from escaping that jurisdiction.

Part VI concludes the volume and explores country-specific legal regimes, beginning with France. In this chapter, Guilhem Gil explores politicians' ability to protect their personality rights. As he explains, public officials in France are subject to onerous obligations of transpar-

ency, which require them to disclose not only financial information but also political activities, including their involvement in charities. This has obvious, unsettling implications for privacy. Nevertheless, despite the blanket approach of these obligations, the Conseil Constitutionnel has consistently held these provisions to be constitutional. Gil carefully critiques this view and offers compelling reasons for doubt.

The Italian position on defamation and privacy is addressed by Vincenzo Zeno-Zencovich. In common with Campbell, he locates the law in its Roman origins and traces its development through to modern-day Italy. Accordingly, he provides a rich historical account which takes in the full range of Roman law as it applies to both categories, and expertly shows how these have adjusted through time. He compares this to the protection both rights receive at the supranational level. As he demonstrates, Roman law has fared remarkably well in the modern age and remains a valuable source of principle. Nevertheless, and in keeping with other contributions, he argues that more should be done to modernise the law to suit new technologies.

In his chapter, David Mangan argues that Canada has taken more hesitant steps than other Commonwealth countries in its modernisation of both defamation and privacy law to accommodate the digital age. While Canadian law, generally, is characterised by its close approximation to the English common law, it has lacked the same impetus the UK has enjoyed to develop a more rights-friendly civil law, such as when the Human Rights Act 1998 was passed. Mangan demonstrates that the picture is made complicated, though, by certain aspects of Canadian privacy law, especially, which has in some important respects moved ahead of English law in its more overt protection against intrusive behaviour, following the decision in *Jones v Tsige* and the introduction of the Intimate Image Protection Act. Nevertheless, Mangan argues it is deeply problematic that – this apart – developments in cyberspace have not been at the forefront of law reform and, in that respect, Canadian law is lagging behind.

Mark Pearson and Virginia Leighton-Jackson also recognise the benefit that the UK received from the more rights-directed approach heralded by the Human Rights Act 1998 and lament the absence of similar constitutional protections for free speech and privacy in Australia. Using the phenomenon of celebrity gossip as their lens, they examine the gap arising between Australia and the UK given the latter's overt protection for privacy under the misuse of private information tort. In this way, they provide a fascinating analysis that takes in four decades of law reform proposals to achieve greater protection from privacy invasion in Australia.

Pearson and Leighton-Jackson's chapter provides a sharp contrast to Dario Milo's, which examines the position in South Africa, and begins by recognising the constitutional protection that both free speech and reputation enjoy. This has generated problems of the opposite kind, for, rather than problems of liberty–no right, using the Hohfeldian analysis, the issue has been one of reconciling clashing rights claims. This has presented particular problems in the context of public interest expression. In his thoughtful chapter, Milo addresses the point by comparing the South African approach with the UK's. As he argues, in both jurisdictions, conceptual problems remain large. In South Africa, these relate to the meaning and nature of 'reasonable publication' and 'lack of negligence'; in the UK, they concern the scope of s4 protection under the Defamation Act 2013. As he concludes, although both jurisdictions can boast of significant developments in the past 20 years, neither can claim to have solved the problems lying in the path of improvement to defamation law and much work remains to be done.

Jun Shimizu uses his chapter to explore the development of defamation and privacy law in Japan. He compares these laws with those existing in the US and argues that Japanese law is noticeably stricter in its approach to freedom of expression. He attributes this to the profound

cultural differences that exist in these two jurisdictions. Of specific interest to Western commentators is bound to be Japan's more generous treatment of politicians, in which damages are more readily available for defamation than would be certainly in the US, as Shimizu amply demonstrates, but also the other Western countries considered in this volume.

Finally, Mei Ning Yan surveys 40 years of Chinese defamation law, beginning with the measures put in place by the People's Republic of China in 1979 to better protect personal reputation rights, which, supplemented by the 1982 Constitution, sought to recognise the ancient Chinese phrase of *feibang*. As she notes, this has led to restrictions that have impacted on citizens' capacity to communicate with each other using social media and online forums, and has, problematically, offered a level of protection to local officials that sits uneasily with the principle of free speech.