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Imperial Venality Defends Itself: Day Two of Julian Assange's High Court Appeal

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On February 21, the Royal Courts of Justice hosted a second day of carnivalesque mockery regarding the appeal by lawyers representing an ill Julian Assange, whose publishing efforts are being impugned by the United States as having compromised the identities of informants while damaging national security. Extradition awaits, only being postponed by rearguard actions such as what has just been concluded at the High Court.

How, then, to justify the 18 charges being levelled against the WikiLeaks founder under the US Espionage Act of 1917, an instrument not just vile but antiquated in its effort to stomp on political discussion and expression?

Justice Jeremy Johnson and Dame Victoria Sharp got the *bien pensant* treatment of the national security state, dressed in robes, and tediously inclined. Prosaic arguments were recycled like stale, oppressive air. According to Clair Dobbin KC, there was "no immunity for journalists to break the law" and that the US constitutional First Amendment protecting the press would never confer it. This had an undergraduate obviousness to it; no one in this case has *ever* asserted such cavalierly brutal freedom in releasing classified material, a point that Mark Summers KC, representing Assange, was happy to point out.

Yet again, the Svengali argument, gingered with seduction, was run before a British court. Assange, assuming all the powers of manipulation, cultivated and corrupted the disclosers, "soliciting" them to pilfer classified government materials. With limping repetition, Dobbin insisted that WikiLeaks had been responsible for revealing "the unredacted names of the sources who provided information to the United States," many of whom "lived in war zones or in repressive regimes". In exposing the names of Afghans, Iraqis, journalists, religious figures, human rights dissidents and political dissidents, the publisher had "created a grave and immediate risk that innocent people would suffer serious physical harm or arbitrary detention".

The battering did not stop there. “There were really profound consequences, beyond the real human cost and to the broader ability to the US to gather evidence from human sources as well.” Dobbin’s proof of these contentions is thin, vague and causally absent: the arrest of one Ethiopian journalist following the leak; unspecified “others” disappeared. She even admitted the fact that “it cannot be proven that their disappearance was a result of being outed.” This was certainly a point pounced upon by Summers.

The previous publication by Cryptome of all the documents, or the careless publication of the key to the encrypted file with the unredacted cables by journalists from *The Guardian* in a book on WikiLeaks, did not convince Dobbin. Assange was “responsible for the publications of the unredacted documents whether published by others or WikiLeaks.” There was no mention, either, that Assange had been alarmed by *The Guardian* faux pas and had contacted the US State Department of this fact. Summers, in his contribution, duly reminded the court of the publisher’s frantic efforts while also reasoning that the harm caused had been “unintended, unforeseen and unwanted” by him.

With this selective, prejudicial angle made clear, Dobbin’s words became those of a disgruntled empire caught with its pants down when harming and despoiling others. “What the appellant is accused of is really at the upper end of the spectrum of gravity,” she submitted, attracting “no public interest whatsoever”. Conveniently, calculatingly, any reference to the enormous, weighty revelations of WikiLeaks of torture, renditions, war crimes, surveillance, to name but a few, was avoided. Emphasis was placed, instead, upon the “usefulness” of the material WikiLeaks had published: to the Taliban, and Osama bin Laden.

This is a dubious point given the Pentagon’s own assertions to the contrary in a 2011 report dealing with the significance of the disclosure of military and diplomatic documents by WikiLeaks. On the Iraq War logs and State Department cables, the report concluded “with high confidence that disclosure of the Iraq data set will have no direct personal impact on current and former US leadership in Iraq.” On the Afghanistan war log releases, the authors also found that they would not result in “significant impact” to US operations, though did claim that this was potentially damaging to “intelligence sources, informants, and the Afghan population,” and intelligence collection efforts by the US and NATO.

Summers appropriately rebutted the contention about harm by suggesting that Assange had opposed, in the highest traditions of journalism, “war crimes”, a consideration that had to be measured against unverified assertions of harm.

On this point, the prosecution found itself in knots, given that a balancing act of harm and freedom of expression is warranted under Article 10 of the European Convention on Human Rights. When asked by Justice Johnson whether prosecuting a journalist in the UK, when in possession of “information of very serious wrongdoing by an intelligence agency [had] incited an employee of that agency to provide information… [which] was then published in a very careful way” was compatible with the right to freedom of expression, Dobbin conceded to there being no “straightforward answer”.

When pressed by Justice Johnson as to whether she accepted the idea that the “statutory offence”, not any “scope for a balancing exercise” was what counted, Dobbin had to concede that a “proportionality assessment” would normally arise when publishers were prosecuted under section 5 of the UK Official Secrets Act. Prosecutions would only take

place if one “knowingly published” information known “to be damaging”.

Any half-informed student of the US Espionage Act knows that strict liability under the statute negates any need to undertake a balancing assessment. All that matters is that the individual had “reason to believe that the information is to be used to the injury of the US,” often proved by the mere fact that the information published was classified to begin with.

Dobbin then switched gears. Having initially advertised the view that journalists could never be entirely immune from criminal prosecution, she added more egg to the pudding on the reasons why Assange was *not* a journalist. Her view of the journalist being a bland, obedient transmitter of received, establishment wisdom was all too clear. Assange had gone “beyond the acts of a journalist who is merely gathering information”. He had, for instance, agreed with Chelsea Manning on March 8, 2010 to attempt cracking a password hash that would have given her access to the secure and classified Department of Defense account. Doing so meant using a false identity to facilitate further pilfering of classified documents.

This was yet another fiction. Manning’s court martial had revealed the redundancy of having to crack a password hash as she already had administrator access to the system. Why then bother with the conspiratorial circus?

The corollary of this is that the prosecution’s reliance on fabricated testimony, notably from former WikiLeaks volunteer, convicted paedophile and FBI tittle-tattler Sigurdur ‘Siggi’ Thordarson. In June 2021, the Icelandic newspaper *Stundin*, now publishing under the name *Heimildin*, revealed that Assange had “never asked him to hack or to access phone recordings of [Iceland’s] MPs.” He also had not “received some files from a third party who claimed to have recorded MPs and had offered to share them with Assange without having any idea what they actually contained.” Thordarson never went through the relevant files, nor verified whether they had audio recordings as claimed by the third-party source. The allegation that Assange instructed him to access computers in order to unearth such recordings was roundly rejected.

The legal team representing the US attempted to convince the court that suggestions of “bad faith” by the defence on the part of such figures as lead prosecutor Gordon Kromberg had to be discounted. “The starting position must be, as it always is in these cases, the fundamental assumption of good faith on the part of those states with which the United Kingdom has long-standing extradition relationships,” asserted Dobbin. “The US is one of the most long-standing partners of the UK.”

This had a jarring quality to it, given that nothing in Washington’s approach to Assange – the surveillance sponsored by the Central Intelligence Agency via Spanish security firm UC Global, the contemplation of abduction and assassination by intelligence officials, the after-the-fact concoction of assurances to assure easier extradition to the US – has been anything but one of bad faith.

Summers countered by refuting any suggestions that “Mr Kronberg is a lying individual or that he is personally not carrying out his prosecutorial duties in good faith. The prosecution and extradition here is a decision taken way above his head.” This was a matter of “state retaliation ordered from the very top”; one could not “focus on the sheep and ignore the shepherd.”

Things did not get better for the prosecuting side on what would happen once Assange was

extradited. Would he, for instance, be protected by the free press amendment under US law? Former CIA director Mike Pompeo had suggested that Assange's Australian citizenship barred him from protections afforded by the First Amendment. Dobbin was not sure, but insisted that there was insufficient evidence to suggest that nationality would prejudice Assange in any trial. Justice Johnson was sharp: "the test isn't that he would be prejudiced. It is that he *might* be prejudiced on the grounds of his nationality." This was hard to square with the UK Extradition Act prohibiting extradition where a person "might be prejudiced at his trial or punished, detained, or restricted in his personal liberty" on account of nationality.

Given existing US legal practice, Assange also faced the risk of the death penalty, something that extradition arrangements would bar. Ben Watson KC, representing the UK Home Secretary, had to concede to the court that there was nothing preventing any amendment by US prosecutors to the current list of charges that could result in a death sentence.

If he does not succeed in this appeal, Assange may well request an intervention of the European Court of Human Rights for a stay of proceedings under Rule 39. Like many European institutions so loathed by the governments of post-Brexit Britain, it offers the prospect of relief provided that there are "exceptional circumstances" and an instance "where there is an imminent risk of irreparable harm."

The sickening irony of that whole proviso is that irreparable harm is being inflicted on Assange in prison, where the UK prison system fulfills the role of the punishing US gaoler. Speed will be of the essence; and the government of Rishi Sunak may well quickly bundle the publisher onto a transatlantic flight. If so, the founder of WikiLeaks will go the way of other prestigious and wronged political prisoners who sought to expand minds rather than narrow them.

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