I am not a Journalist

Part I: Against journalistic privilege and for Mr Julian Assange

by T.P. Wilkinson / March 12th, 2020

I did not complete a journalism degree at university. I do not work for a professional news outlet, whether electronic, acoustic or print in format. I have always understood myself as a curious person, interested in public affairs or what ought to be public, and with a desire and some ability to write both to my friends and to the public at large.

However, I have written and edited periodical publications. I attended workshops and seminars designated as journalism courses. I was briefly recorded as a journalism major at my university. But I do not hesitate to say that was because there was a vacant student senate seat in that college and I was interested in election to the student senate. I wrote for the college paper, co-edited the high school paper and even recorded radio broadcasts on school and educational policy. All of that is ancient history, which in journalism's terms means it happened yesterday or the day before yesterday.

Since at an early age I considered the possibility of the law as a profession — one I did not follow. = I also took an interest in the development of case law pertaining to what in Anglo-Saxon context is called "freedom of the press". Freedom of the Press is often thought together as complementary to freedom of speech. However, they are distinct. The case law establishing the "freedom of the Press" actually emerged and can only be understood in the context of the Press as a commercial enterprise, as property and the use of such property, to print for profit material or immaterial. In the US and subsequently in the minds of those who imagine that the specific conditions of the US constitute universals this freedom emerged from libel litigation, specifically the inherited doctrines of British law pertaining to criminal/ seditious libel against the sovereign and his or her officers.

US law underwent a significant divergence from the still draconian British libel law by holding that it was the burden of the plaintiff to show that he was libelled by the utterance of false or defamatory statements. Under British law it was and is generally held that the defendant had the burden of proving that the utterances were true and/ or not defamatory. Hence there was a presumption against the defendant, especially in offenses like seditious libel or libel against the sovereign (*lese majeste*). By reversing the burden of proof, the principle was established that even an erroneous report could not be held libellous without showing additionally intent or malice in propagation of the utterance. This led to the doctrine that freedom of the Press was to be protected from the so-called "chilling effect" that government actions at libel would have on free and open debate of public policy.

This did not prevent the introduction and enforcement of laws like the Alien and Sedition Acts against opposition

press in the early years of US independence. What all good students of journalism, US history and law learn is that the landmark decision ending the potential for actions alleging seditious libel or libel against the sovereign was *New York Times v. Sullivan*. In this case the US Supreme Court denied relief to a government officer who had sued the newspaper for libel of his person. The decision is understood as requiring a higher standard of proof by a government officer to prevail in a libel action pertaining to his acts or functions as a public official. That higher standard permitted even a falsehood, inaccuracy, or lie to be published which would satisfy the criteria for libel in an ordinary civil action — if the plaintiff could not prove that the false or defamatory utterance was published with full knowledge of its libelous character and/ or reckless disregard for the libelous character of the utterance. In short, a published utterance about — or pertaining to — a government official could not be made subject of a personal action at libel in lieu of an inadmissible action such as seditious libel or libel against the sovereign. This became the foundation of at least a theoretical freedom of the Press in the US far beyond what British or Continental European law permitted.

However, it is essential when interpreting the scope of any "freedom" in the US to see it in the context of who was vested with that freedom. Just as another notorious US Supreme Court ruling, the so-called *Dred Scott* decision, enshrined for decades (if not, in fact, to this day) the principle that "a black man possesses no rights which a white man is bound to respect". The jurisprudence of the US includes elements which are striking in the scope of freedom it ostensibly upholds until viewed, including the legal subjects entitled to assert or enforce such freedom. There, despite the eventual removal of property bars in matters like suffrage, the overwhelming majority of legal freedoms acknowledged by the US courts are vested in those who hold property. In fact, a corporation under US law enjoys legal personality and "human rights" because it is a holder of property.

The development of the freedom of the Press in the US was the development of the doctrine that private property was vested with rights and immunities, even if such rights, privileges and immunities could only be exercised by owners of such property, directly or through agents. At the same time persons without property retained theoretical liberties but these could only be effectively enforced when property was sufficient. Corporations, for instance, have a legal right to immortality; something natural persons cannot exercise — even as a claim against capital punishment in the US.

The freedom of the Press about which so much has been said and written is not so simple or straightforward as, especially its Left/ liberal advocates, would have us believe (or believe themselves). Just as the freedom of the Press evolved as a property right, the extension of that right or its privileges to professional journalists derives essentially from the delegation of duties by masters to their servants. It is not an original right. Even US jurisprudence is very ambivalent as to the scope to which a journalist enjoys "professional privilege" — equivalent to that recognised for lawyers, physicians and accountants. There is, for instance, a great legal confusion among those who assert that the persecution of Mr Julian Assange is a violation of the freedom of the press.

While it may be desirable to assert and have such a freedom, there is no consistent jurisprudence upon which to base such a claim in the case of Mr Assange or for that matter even one of his staunchest public defenders, the respected journalist and filmmaker Mr John Pilger, also of Australia. Professional privilege is exactly that, a privilege and not a right. The notion of professional privilege derives from the idea that an individual has certain rights that he or she can exercise through specialised agents who thereby become protected by the rights of the principal. A lawyer cannot be compelled to testify against his client since his very function is to act for or as an extension of his client. If the client has the right to remain silent, then his legal counsel is privileged to remain silent on his behalf. The same applies to physicians analogously. An agent, however, cannot have more privileges than the underlying rights of his principal. A journalist to the extent he is an agent or servant of a publisher enjoys

the privileges necessary for his principal to exercise his rights through his servant. The question is then whether in any given case the privilege claimed could be traced to the master-servant condition or whether it is a personal act by the agent/ servant in his or her own capacity as natural person.

The State's case against Mr Assange, seen from this viewpoint, is to deny that he enjoys professional privilege since his alleged acts constitute those which would not be protected for the principal — were it a property holder/ corporate citizen and also are not protected as free speech. This free speech principle is far more important to the case and it is therefore very curious that it is not the focus of defence by Mr Assange's supporters. Perhaps this argument is not asserted because there is, in fact, no freedom of speech that can be defended here — within the Anglo-American legal environment. Mr Assange cannot claim he is a US citizen publishing freely information of legitimate interest to his fellow citizens. He is an Australian and at best he could claim to expose Australian information to his fellow Australians. Perhaps I have missed something, but I believe that acts by a foreigner exposing or publishing information from a foreign state, however obtained, is not privileged in any country. It is closely linked to the crime of espionage. In fact, that is the charge levied against Mr Assange.

In the preface to his book *The Age of Surveillance: The Aims and Methods of the American Political Intelligence System* (1980), Frank Donner makes a very strong criticism against the civil liberties approach to political conflict in the US. He says outright that the courts are inappropriate and ineffective means to resolve political conflicts. The fact that conflicts arise which individually must be fought through the courts should not be confused with the underlying political issues which courts cannot and will not resolve.

The gravest problem with the defence of Mr Assange is that the political conflict upon which it is ultimately based cannot be reduced to a judicial question. It cannot be won as a judicial question also because the doctrines asserted in his defence, no matter how desirable, simply do not constitute the law. It is therefore a testimony — and a painful one — that the political forces are not strong enough or sufficiently concentrated to articulate the real conflicts; e.g., the evil of US Empire and its acts either directly or through NATO or its other vassals and agents. This is the kind of information, which released through Mr Assange's efforts, which presents the material evidence against the mythology sustaining support for the US regime in much of the world. However, this information itself cannot crystallise the conflicts — i.e., give shape to strong parties able to contest the power of the US. The US regime knows this and therefore can make the light if absurd assertion that the only way such information could be directed against the US is in the interest of another power; e.g., Russia. A personal conflict with the US cannot be recognised by the State, except in criminal or civil law, not as political conflict since Mr Assange is not a State, nor is he a US citizen.

Still if there is any meaning to the notion of world citizenship as the subject claiming such rights as to peace or sustenance or human rights under the UN Charter, then it must be clear that Mr Assange is exercising rights that are, in fact, universal human rights under the Charter. Perhaps the best of these is the inherent right to self-defence and against the international crime of aggression. From these comes the general jurisdiction over war crimes and crimes against humanity, which permit anyone to complain and file charges. However, as yet an enforceable universal freedom of speech and press, especially given that the legal principles from which such freedom might be derived are inevitably Anglo-American, is far from being recognized, let alone deemed justiciable.

Therefore to claim Mr Assange's defence on the basis of journalistic privilege is both obfuscating and self-serving for the profession at best. It is a weak substitute for facing the political conflict that his work has illuminated and moderately catalysed but not yet organized. It is also an implicit submission to judicial remedies for questions that cannot be decided on the basis of the principles asserted — principles that are not internationally recognised nor even consistently enforced in the US itself, let alone UK courts.

This is not intended to detract from the legitimate and strenuous efforts to spare Mr Assange from being sent to hell, aka the US gulag, where even the acknowledged victims of US political justice have been rotting with no hope of parole or pardon, never mind rehabilitation. Mr Assange was kidnapped — in public — yet kidnapped nonetheless in an action like those performed on Vietnamese when the US invaded Vietnam and established through the CIA the so-called Phoenix Program. There is no doubt he would have been assassinated if that had been possible without undue attention. His case is a theatrical case of the vicious system of extraordinary rendition legalised since adoption of the USA Patriot Act, and implemented with public and secret executive orders since then. Mr Julian Assange is the victim of the eternal "war on terror" which is being waged with all the viciousness of the Papal Inquisition founded by Gregory IX. It is no surprise given the biographies of so many of the responsible officers in the responsible US government agencies.

Mr Assange's counsel and his supporters will have to use every means at their disposal to save him from the *auto de fé* that awaits him in the US. Whatever arguments and means lead to his release and safe recuperation can be justified in this state of war prevailing where every citizen of the world has an inherent right of self-defence. However, it is also a fact that this war involves us all and we are not yet fully aware of the *casus bellum*, of the real reason for this war and what is at stake. For this reason it is necessary to articulate Mr Assange's conflict in comprehensible and comprehensive political terms and not just on the narrow basis of journalistic privilege and the freedoms of property-owning Press.

Mr Julian Assange deserves every protection of life and limb — not because he is a journalist, and his persecution would have a "chilling effect" on journalism. He deserves every protection of life and limb because he is a human being and a legal subject under the UN Charter with the right to peace, freedom from armed aggression and the right to self-defence against violations of the peace and his person by States, just as he would have that right against personal aggression by private persons. His work has been non-violent action to defend all those who are the targets and victims of the greatest war machine the world has ever known. Upon that rock not a church, but human liberty for real human beings should be built.

Dr T.P. Wilkinson writes, teaches History and English, directs theatre and coaches cricket between the cradles of Heine and Saramago. He is also the author of Church Clothes, Land, Mission and the End of Apartheid in South Africa. Read other articles by T.P..

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