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Transparency, Scrutiny and Responsiveness: Fashioning a Private Space within the Information Society

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Introduction

THE RECENT series of WikiLeaks revelations have placed the question of the responsiveness and transparency of public institutions clearly back on the political and media agenda. The Embassy Cables campaign, which has provided so many column inches for media outlets from November 2010 to the current day (and which also spawned numerous speeches, debates and statements from politicians and commentators on both sides of the transparency and accountability debate),[1] is only one of the latest of a series of high profile activities of WikiLeaks who see their function as 'keeping governments open' and who in their mission statement describe themselves as 'non-profit media organization dedicated to bringing important news and information to the public'.

Before the Embassy Cables there were a number of WikiLeaks releases, which generally attracted less media coverage. Among higher profile releases were the Guantanamo Bay operating manual release in December 2007, the BNP membership list of November 2008 and the Climategate emails of November 2009. Less well publicised releases include the collected secret 'bibles' of Scientology, published in March 2008, the Bank Julius Baer documents of December 2007 and the Love Parade planning documents of August 2010. The scope of these illustrate that WikiLeaks is not only interested in public bodies or political institutions; private banks and religious institutions are also subject to its transparency procedures. Yet while much is written about the political role of WikiLeaks and its wider role in media and journalism in general, as most famously seen in Alan Rushbridger's contribution to the book *WikiLeaks: Inside Julian Assange's War on Secrecy*,[2] one aspect of the WikiLeaks story remains under-developed: the legal question of both the operative structure of WikiLeaks and the activity it undertakes. This article will attempt in part to rectify this and perhaps to stimulate a debate on both WikiLeaks and the large number of mini-Leaks it has spawned such as OpenLeaks.

Is transparency desirable at any cost?

The WikiLeaks debate is a fascinating one for lawyers. It is framed against a distinct but not unrelated debate currently taking place in the media outlets, political fora and coffee houses of the United Kingdom. Should the privacy of individuals be protected by wide-reaching injunctions of anonymity or even superinjunctions? This has arisen in respect of a number of well-known cases mostly involving injunctions of anonymity for bankers, footballers, actors, celebrities, musicians and even politicians and journalists. Such injunctions allow for the reporting of the fact that an injunction is in place while prohibiting the naming of

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the parties involved and often the activities at the centre of the injunction. These may be contrasted with the so-called 'superinjunction' where the very existence of the injunction may not be reported, such as in the Trafigura case. In this debate, the media have argued that the imposition of these injunctions, with such regularity as has been reported in 2011, is a severe restriction of their right to free expression as found in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as given direct effect in the United Kingdom by the Human Rights Act 1998. The counterpoint to this, of course, is Article 8 of the same Convention.

This tension is common across media and communications law. Rights are not absolute, and tension exists where two opposing interests seek to prosecute their rights to the fullest. It is the role of lawyers and judges to attempt to navigate these choppy waters in a way which balances the interests of the parties proportionately. With regard to the privacy/expression debate, that duty was passed to a committee of judges chaired by Lord Neuberger, Master of the Rolls. In their report, the committee noted that the law of privacy in the United Kingdom has developed apace since the introduction of the Human Rights Act and noted that Article 6 of the Convention (the Right to a Fair Trial) subjected itself to Article 8 rights by specifically noting that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of . . . the protection of the private life of the parties.[3]

It is thus immediately clear that in the view of the framers of the Convention, transparency may sometimes be sacrificed in favour of competing privacy rights—even transparency in the reporting of the events of a trial, a type of speech usually afforded greater protection than others as is evidenced by s.14 of the Defamation Act 1996, which privileges reports of court hearings.

This seems at odds with the WikiLeaks claim that 'publishing improves transparency, and this transparency creates a better society for all people'. It is clear that both the framers of the Convention and the Neuberger Committee members believe there are times when transparency does not necessarily create a better society for all. Herein lies the WikiLeaks tension: it promotes the right to free expression above other rights such as privacy and in so doing states that it does so in the interests of society. But is it true that a more transparent society is a better society for all?

WikiLeaks, transparency and the law

Interestingly, although WikiLeaks espouses transparency as being good for society as 'better scrutiny leads to reduced corruption and stronger democracies in all institutions, including government, corporations and other organisations', this does not seem to extend to the governance of WikiLeaks itself. All WikiLeaks states of its ownership and governance is that 'WikiLeaks is a project of the Sunshine Press'. There is no registered office, company registration or email address. If WikiLeaks were a European Union information service provider this would place them in breach of Article 5 of the Directive on electronic commerce (Dir.2000/31/EC). This may become a problem for WikiLeaks quite soon as the paper trail behind Sunshine Press leads to an Icelandic company registration,[4] and with Iceland due to join the EU possibly in 2012 Article 5

could then apply to WikiLeaks, were a court to view the activities of WikiLeaks as being 'a service normally provided for remuneration'. WikiLeaks surely would argue they are not directly remunerated for their service, but it is clear that they seek funding to directly support their activities:

> WikiLeaks brings truth to the world by publishing fact-based stories without fear or favour. You can help support our independent media by donating financially. . . . Your donations are vital to pay for Wikileaks' servers and infrastructure, staff and travel expenses and for the legal protections and advice Wikileaks needs to operate.[5]

Should a court find WikiLeaks fell within the ambit of the Directive then by Article 5 they would be required to publish their geographic address, email address and company registration details at the very least. Now admittedly it is unlikely that a court would find WikiLeaks/Sunshine Press were subject to the Directive as they do not supply a service for direct remuneration, but this little case study demonstrates that WikiLeaks doesn't believe transparency is good all the time. The question is why does WikiLeaks believe in secrecy for WikiLeaks and transparency for others?

WikiLeaks would suggest that their structure protects both the organisation and their sources from attack. The recent attacks on the WikiLeaks domain name host and upon Julian Assange personally following the Cablegate Affair would seem to bear this out. But there are consequences of this complex and murky corporate structure. The *Wall Street Journal* reported that the linchpin of WikiLeaks' financial network is the Wau Holland Foundation in Germany, but also that Julian Assange confirmed that '[w]e're registered as a library in Australia, as a foundation in France and as a newspaper in Sweden' and that 'WikiLeaks has two tax-exempt charitable organizations in the US, known as 501C3s, that ''act as a front'' for the website'.[6] This means no single state can take control of the activities of WikiLeaks. Because it does not have a traditional domicile, as is usual for persons and corporations in the physical world, it can simply move its base of operation at any time in an attempt to avoid the direct control of any court or legal order. In a real sense WikiLeaks is above the law. This has been seen on at least two occasions where WikiLeaks has committed potential legal infringements and yet has avoided a full trial.

In the first, the Bank Julius Baer case, there were a number of court hearings but the action was dropped before trial.[7] The action related to the publication by WikiLeaks of confidential banking records regarding anonymising trusts the bank had set up in the Cayman Islands for clients. This publication appeared to be directly in breach of Californian (and indeed American Federal) laws designed to protect confidentiality and consumer banking. The bank, unable to target WikiLeaks directly due to their decentralised structure, named WikiLeaks domain host for the wikileaks.org domain name, Dynadot, as co-defendant in the action. At first this met with some degree of success. WikiLeaks, as may be expected did not respond and an ex parte order was sought. On 15 February 2008, District Judge Jeffrey White made two orders. A temporary restraining order (TRO) against WikiLeaks ordering them to immediately cease dissemination of the Julius Baer material and a permanent injunction against Dynadot preventing the use or transfer of the wikileaks.org domain name. On 26 February, a number of parties raised amicus briefs regarding a First Amendment threat including the American Civil Liberties Union, the Electronic Frontier Foundation and the Californian First Amendment Coalition. Interestingly, despite eighteen amicus briefs being lodged, WikiLeaks themselves did not lodge a reply to the TRO.

It was reported at the time that WikiLeaks had not attended the original hearing as Bank Julius Baer did not inform them in which court the complaint would be lodged—yet the complaint was lodged on 6 February and the order was not made until 15 February. Further, once the order was made WikiLeaks could have responded but they did not. It appears WikiLeaks felt no need to appear before the court. Following the interventions of the amici, the order against Dynadot was dissolved on 29 February and the action dropped, amidst a flurry of bad publicity for the bank, on 5 March.

WikiLeaks had survived its first legal challenge without a scratch. It had not even appeared at the hearings; instead, a number of amici proxies had done its work for it. Despite the slight inconvenience of not being able to use the wikileaks.org domain name for two weeks WikiLeaks now seemed to be above the law, for although it was not clear they had breached Californian and Federal laws, they had not even been called to defend themselves against the charges.

A similar outcome occurred almost immediately in the Scientology case. On 24 March 2008, WikiLeaks published the so-called 'collected secret bibles of Scientology'. On 27 March, representatives for the Church wrote to WikiLeaks by email indicating that they believed WikiLeaks were in breach of their copyright.[8] They asked WikiLeaks to remove the documents but WikiLeaks did not do so. Instead, they indicated that this proved the veracity of the documents—in essence goading the Church to take further action. Having seen the outcome of the Bank Julius Baer case, the Church declined.

Wikileaks continues to publish documents in potential breach of copyright and confidentiality including the BNP membership list, the Climategate emails, the Bilderberg Group reports and the Kaupthing Bank documents. It does not clear them for publication with copyright holders and it does not defend claims of infringement because in a very real sense the Bank Julius Baer case demonstrated the futility of legal action (as an aside, this is why much of the focus of American political anger after Cablegate was focused on Julian Assange and not WikiLeaks as an organisation). So WikiLeaks appears to be judge, jury and executioner when it comes to publishing confidential data, but this is okay because 'publishing improves transparency, and this transparency creates a better society for all people', right? Well maybe not.

Transparency and privacy in the public sphere

The problem is the decision-making process employed by actors in both public and private bodies. WikiLeaks, and the media in general, view public sector bodies and private corporations as monolithic. This of course is not the case. All bodies corporate (be they private or public) are in fact organisms made up of thousands, or even tens of thousands, of decision makers; individuals who collectively form the 'brain' of the organisation. The problem is that individuals need space to make decisions free from scrutiny, or else they are likely to make a rushed or panicked decision. This in part is why Article 8 exists.

Six years ago I wrote a paper entitled 'Should States Have a Right to Informational Privacy?'.[9] There I argued that because we think of states as non-human actors, they do not benefit from traditional privacy rules designed to protect individuals. This leads to a lack of personal space for the decision maker. But this lack of space at the earliest stages of policy formulation carries with it the danger that with the changes to society brought about by the rise of the information society (and sites like WikiLeaks) we may now not be affording the necessary level of privacy protection to decision

makers to allow them to properly carry out this 'initial staging process'.

Prior to the advent of digital media, the relationship between the policy forming decision makers of the state (that is, government ministers) and their citizens was well defined by a clear social contract. These decision makers were primarily scrutinised by other elected, and in the case of the House of Lords—unelected, representatives. External scrutiny came from a variety of sources, all of which were to a greater or lesser degree in a relationship with the decision makers. Primarily, this external scrutiny was affected by the Fourth Estate. Media organisations, be they print or broadcast media, employed lobby correspondents: the relationship between decision makers and lobby correspondents being a closely defined one. If a journalist failed to respect the privacy of any representative—particularly a government minister—sanctions would quickly follow. As editors have a duty to protect their lobby correspondents, they would often self-censor any story that breached this relationship of trust. In this fashion the social contract was respected by both the state and the media.

Second, a degree of information was put into the public domain through Hansard and through official reports and papers. Such reports and publications, though widely available in public libraries, were little read. Expensive to buy, individuals wishing to read such documents usually had to obtain them through their library, frequently encountering a delay should the report prove popular. In effect, these reports were mostly only read by two sets of interested parties. The first of these were journalists, who, as already discussed were required to respect the privacy of decision makers in order to cultivate access. The second were academics. Scholarly comment on government initiatives and policy implementation would in time follow from academia. Such comment was, though, of no impact upon the initial staging process for three reasons. First, they were usually generated by reference to publicly available documents; thus the data carried little privacy implications. Second, the extended time before publication of such reports usually meant that the 'staging process' had long since concluded. And finally, they were overwhelmingly written by academics for academics; the readership of such commentaries being on the whole extremely narrow.

The advent of the always on, digital society has blasted this social contract wide open. Maybe this is a good thing—the expenses scandal showed how the agreement had arguably got too cosy, but just because we can point to one positive example does not make a statement proven. The WikiLeaks cables have arguable undone a considerable amount of goodwill and diplomacy. WikiLeaks argues that 'publishing improves transparency, and this transparency creates a better society for all people'. Not necessarily. Publishing may lead to greater obfuscation. In future, records may not be kept at all or may be 'spun' to give a different impression should a leak occur. This we have already seen. In response to the 'greater transparency' of 24-hour news the United Kingdom Government has employed more 'communications directors' and staff and fewer civil servants. We know their names: Alastair Campbell, Charlie Whelan, Damian McBride, Andy Coulson, Craig Oliver. All are massively controversial individuals. All did the same job: spin the news to suit their masters. Spin is the natural response of governments to invasions of their privacy. Spin does not improve transparency. We cannot know yet what harm the Cablegate Affair may do. Already there is evidence it may have harmed a carefully nurtured position with Beijing over North Korea; more harm will undoubtedly have been done though. We should not publish because

we can, but because it is in the interests of society to do so. This means complying with legal and social normative principles.

Notes

1 The political debates culminated in a Westminster Hall Debate on Diplomacy and the Internet on 22 December 2010, moved by Joseph Johnson (Con. Orpington) (Hansard HC vol.520 col.438WH, 22 December 2010).
2 A. Rushbridger, 'Introduction', in D. Leigh and L. Harding, *WikiLeaks: Inside Julian Assange's War on Secrecy*, London, Public Affairs, 2011, pp. 1–11.
3 Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice at [1.23].
4 The certificate of incorporation, which names Julian Assange as one of four directors, may be accessed online at: http://www.scribd.com/doc/47601520/SUNSHINE-PRESS-PRODUCTIONS-EHF-FOR-PROFIT-LIMITED-COMPANY-DOCUMENTS
5 Taken from http://wikileaks.org/support.html
6 J. Whalen and D. Crawford, 'How WikiLeaks keeps its funding secret', *Wall Street Journal*, 23 August 2010.
7 All documents relating to the case may be found at: https://www.eff.org/cases/bank-julius-baer-co-v-wikileaks
8 The letter may be accessed at: http://wikileaks.org/wiki/Church_of_Scientology_collected_Operating_Thetan_documents
9 A. Murray, 'Should states have a right to informational privacy?', in A. Murray and M. Klang, eds, *Human Rights in the Digital Age*, London, Glasshouse, 2005, pp. 191–202.