Too late to close the box?

John Gould examines the troubling implications for privacy & the rule of law when vast swathes of information are released in the name of transparency

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It is a journalistic meme that very rich people don't play by the rules. Their financial affairs are likely to be complex and obscure, crossing many borders and tailored by professionals to their client's advantage. Some may have obtained great wealth from crime or corruption, and some may not have paid all their tax. Some may profess no personal social responsibility, and some may be hypocrites.

Offshore jurisdictions sit beyond the reach of national laws and policemen and harbour, we are led to believe—an amorphous mass of white-collar criminality and sharp practice. Politicians do nothing, it is suggested, because they are part of the same establishment system of double standards.

Confronted with this injustice and systemic abuse, surely direct action by right-thinking individuals and organisations is amply justified. Exposure and public opprobrium are not only deserved, but are what people want to read about.

Does the 'offshore problem' require that the legal rights of individuals are overridden? Is punishment by public exposure, rather than by judicial process, by journalistic vigilantes justified? If the moral standard to be enforced is not that of the law, then whose moral standard is it, and where does its legitimacy come from? Who decides how much collateral damage to blameless individuals is acceptable?

The recent assembly and reporting of the 'Pandora Papers' should make us think how the rule of law, the exposure of wrongdoing, the protection of the rights of individuals under the law, and journalistic self-interest are being rebalanced without much democratic mandate or accountability.

Pandora's box

The Pandora Papers may not be the best name for the release of papers in the public interest. The exercise is said to build on the legacy of the Panama Papers and the Paradise Papers, but the Pandora Myth is about the folly of releasing things (namely all the woes of the world) from their container. Perhaps, however, where the intention is to acquire attention, alliteration is always allowed.

The documents span five decades, but mostly date from the period between 1996 and 2020. They include information on 29,000 beneficial owners tied to 27,000 companies. The documents come from 14 'offshore service providers' which operate in jurisdictions including Anguilla, Belize, Singapore, Switzerland, Panama, Barbados, Cyprus, the United Arab Emirates, the Bahamas, the British Virgin Islands, the Seychelles and Vietnam. Their clients come from more than 200 countries and territories. The documents are said to include: spreadsheets; tax declarations; invoices; PowerPoint presentations; and emails and company records listing directors and shareholders. They also include: suspicious activity reports; sanctions lists; due diligence reports; know-your-customer forms; passports; utility bills and photos. One can only speculate whether the leak was from one source or many sources, but it seems likely that laws have been broken.

Within a football stadium's worth of beneficial owners, there are said to have been more than 330 politicians and public officials. There are 'big political donors', billionaires and celebrities. The general point made by the consortium of journalists responsible for the disclosures is that secrecy can give cover to illicit money flows enabling bribery, money laundering, tax evasion, terrorist financing, human trafficking and other human rights abuses. Against such evils, rooting through the affairs of numerous individuals who are not in those categories and breaking the law, are, it is suggested amply justified.

Poor nations may suffer disproportionately by wealth being stashed in tax havens, and the very leaders who might make that more difficult are themselves at it. The consortium denies that offshore service providers judiciously vet clients or strive to act within the law. Links—sometimes apparently very indirect—are made by the journalists between financial secrecy and numerous types of activity including: impeding criminal or civil proceedings; the smuggling of art and antiquities; complex inheritance arrangements; profiteering from evictions, and even sex abuse. It is said that the publication comes at a critical moment in the debate over the role of Western professionals in the 'shadow economy'. It is a bit like reasoning that criminals use banks and therefore anyone who also uses a bank should allow open access to their bank statements, just in case.

It does not seem to be alleged that any particular number of the 29,000 beneficial owners whose information has been scrutinised by presumably self-selected individuals in numerous countries have done anything wrong. Celebrity status seems to have been as likely to attract attention as being a real-life James Bond villain.

General searches

Is it justifiable to 'search' the information of many people in the expectation that wrongdoing somewhere by someone will be revealed? It has long been acknowledged under the common law that general search warrants are not a permissible way for the state to pursue the public interest. If I search every house in a street, I may find a stash of drugs or stolen property in one of them. A

few innocent front doors kicked in is surely a small price to pay.

A type of general search warrant was one of the major grievances against the British in pre-revolutionary America and led to the Fourth Amendment to the United States Constitution. The principles that search warrants should be authorised by a judge, justified by a probable cause and be specific to a place and person are self-evidently a necessary protection of the rights of the individual. So far as the state, at least, is concerned, the ends do not justify the means. Can it be right that the powers of self-appointed actors are greater?

Sometimes confidentiality must give way to the public interest. A person who is in possession of documents which show serious wrongdoing is both morally and, under English law, legally entitled to disclose them in the public interest. Sometimes the right recipients are journalists. Effective whistleblowing is a public good.

In some countries, breaking the law is the only way to fight dictatorship, but that does not mean that the law of every country and the rights of global citizens must be subordinated unconsidered to the pursuit of those struggles.

Mining for stories

The Pandora Papers appear to be something new. The scale of the information obtained is unprecedented, including more than 11.9m financial records. The consortium organised and led 'an investigation' lasting almost two years, involving more than 600 journalists in 117 countries and territories. Information relating to 14 service providers has been obtained, which suggests a systematic approach to the gathering of information. It does not appear that disclosures were limited to those individuals in relation to whom disclosure might be argued to be in the public interest. It is not clear whether information was disclosed by individuals within organisations or taken covertly by someone else. This looks and feels like a general search by a large and well-resourced organisation.

It might be said that the Pandora Papers exercise is the industrialisation of journalism, in which the open-cast mining of information is undertaken so that stories can be produced on a conveyer belt like coal from spoil. The obtaining of a mass of information about numerous individuals in order to examine it to find out who has done anything which might be publicly criticised is not the same as the disclosure of information directly related to particular allegations. Once all information is fair game because somewhere within it might be something that might arguably justify disclosure, the legal protection of privacy is at an end. It is no comfort that individuals self-identify themselves as investigative journalists and claim a public interest motivation.

The unifying feature adopted by the consortium is that the investigation concerns the 'offshore world' and 'tax havens'. The countries mentioned, however, are not limited to islands with tropical beaches. Few would think of the USA as an offshore tax haven or assume that activity involving Singapore, Switzerland, the UAE or Vietnam merited scrutiny for that reason alone. It does not follow that owning shares in a company in another country or failing to publish a list of one's assets should invite suspicion. A substantial proportion of the UK's population has an interest in foreign assets often held by nominees, because they have pensions. How many people make their bank statements publicly available, or would welcome the scrutiny of a regiment of journalists, on the basis that the proceeds of crime almost certainly pass through their chosen High Street bank?

Even if someone chooses to adopt legal measures to avoid tax, who gets to decide whether they should be named and shamed for doing so? Should the decision depend on the moral or political views of the person who has obtained the information? Am I to be judged fit for exposure by an unseen person who has no legal or democratic authority over me without either my consent or due process?

If that is right, we have moved a long way from the constitutional principle of a judge deciding for a good reason that a specific place relating to a specific person needs to be searched to investigate crime.

It is something of a cliché to distinguish between the public interest and what interests the public. Most people are interested, at least to some extent, in the private lives of others, particularly if they are celebrities. The fact that a story is presented sensationally may be the only way to attract attention to something which it is in the public interest to know. In the past, however, intrusion, such as the hacking of telephones, has largely been about the financial self-interest of those doing the hacking.

This is not to excuse or justify any of the criminality that is made possible in jurisdictions where nominee companies thrive and transparency is limited, but the balance between the rights of individuals and the public good are decisions which require a democratic mandate and the application of the law. Perhaps the Pandora Papers investigation is a shortcut and the justifiable means of reaching an otherwise unreachable goal. It may also be a step along a primrose path towards a destination in which the law comes second to the indignation of journalists and a good story.

Dodgy lawyers & accountants

The consortium also puts forward the view that the role of western professionals in the shadow economy is part of the problem. So far as English lawyers are concerned, the legal consequences of breaking the law, including by facilitating money laundering, are pretty clear. The legislation is broad and covers facilitating or not reporting a wide range of illegal activity, including laundering the proceeds of crime, political corruption, bribery and tax evasion. It is not news that a very small proportion of lawyers break the law.

The great majority of lawyers do not break the law. If a lawyer chooses to be a tax specialist, they may expect mainly to be paid for advice which reduces the tax payable, because professional advice is rarely needed to increase tax liabilities. Lawyers may be expected to act in the best interests of their clients as those clients see those interests. Celebrities or royalty may not want fans or assassins tracking down their holiday homes too easily. To criticise lawyers for the possible moral deficiencies of their clients is to misunderstand the role of lawyers in a way which might come to erode the independence which is fundamental to their role in the system.

It is now widely acknowledged to be unethical for a professional to promote the use of contrived or artificial tax schemes, particularly if they don't actually work. But it is not, for example, unethical for a lawyer to advise a client that transferring a potential inheritance to children well before death may save inheritance tax. A lawyer who kept quiet about that option in a relevant case on the basis of a belief that in the public interest the receipts of inheritance tax should be maximised, would be failing in his duty to his client, have a potential liability to compensate for any losses, and probably be guilty of professional misconduct.

Lawyers must act within the law and with the integrity expected of their profession. They must never knowingly facilitate illegality or impose their own views of the public interest on those who consult them. They are not a moral circuit breaker to be tripped simply on the basis of disapproval of their clients. The work of lawyers, properly understood, is an essential element of the rule of law, and the rule of law is the greatest public interest of all. **NLJ**

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