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The Panama Papers and Material Law.



This photograph taken in 1898^[1] shows the physically demanding excavation works, needed to cut the artificial valley through the continental divide in Panama.

The work was done by men under inhospitable tropical conditions, with daily temperatures ranging from about 24 °C to 32 °C. The French company, encouraged by the success of the Suez Canal, raised funds from many individual investors to build the Panama Canal. It started the works in about 1881 but the tropical jungle climate, wet seasons, landslides and floods, difficult terrain, an environment quite unlike the calm flat surroundings of the Suez Canal, lead to increasing costs. In 1889 the company became bankrupt. 22,000 workers were estimated to have been killed during the abortive construction, 800,000 investors lost their money and the ensuing scandal became known as the “Panama Affair”.

However, unlike now, in 19th Century the financial managers and those with important and high-ranking social positions were not protected by their social status or the law but were in fact held accountable and punished by the law for the social consequences of the financial disaster.



Gustave Eiffel and the diplomat Ferdinand De Lesseps were among those prosecuted, found guilty of misappropriation of funds and sentenced to five years imprisonment.

127 years later, in April 2016, we became aware of another but a modern Panama Affair. This scandal did not involve any direct deaths, or environmental destruction facilitated by engineering promoting trade and commerce, but an apparently lawful diversion of funds by a group of very wealthy entities and individuals from the public national sphere to hollowed-out virtual legal constructs controlled by the super-rich economic and political elite.

Over the last few weeks *The Guardian* newspaper has been publishing finding based on its analysis of the leaked Mossack Fonseca database containing a huge amount of financial and personal information about its clients, their clients' various offshore companies and the associated 'asset protection' arrangements.[\[2\]](#)

Mossack Fonseca is a large international law firm based in Panama, offering a range of legal services focusing on what euphemistically it calls "asset protection, tax and estate planning..." offering *inter alia* "... a wide range of structures to meet the individual needs of each client, using vehicles such as Trusts, Private Foundations, Onshore Midshore Structures, among others."[\[3\]](#) It can open bank accounts and offer escrow services.[\[4\]](#) It can act as a "... Registered Agent [offering]... jurisdictions that are tax exempt regarding any commercial activity or operation carried out outside its jurisdiction."[\[5\]](#)

The quantity and quality of the leaked information[\[6\]](#) is huge and wide ranging. It includes "11.5 emails, passport scans, contracts, share registers and even sound recordings"[\[7\]](#) and has taken many months for the journalists to process. I am not aware of any claims that the information is inaccurate, false or has been forged.

Yet, we may ask why this should concern us, is this not a matter solely for the technocratic lawyers and accountants? What do we care about "asset protection" and "tax planning", rather technical terms representing legal and economic techniques designed to minimise the real amount of income tax and other taxes, individuals and companies pay to the governments where they work and live.

It matters because the release of such private and sensitive information evidences the systematic, organised economic and amoral deceit and financial pilfering committed against the general population by a very small group of financiers and politicians. The global scale of the enterprise concealed behind a distant and opaque facade of respectable legality and order, deeply offends our sense of social justice. It amounts to nothing more than the hypocritical one-way harvesting of money, human capital and ingenuity for individual personal gain, spelling the end of our shared understanding the social contract and its concomitant sense of justice.

Currently, the generally accepted model of social justice is based on principle of *laissez-faire*, the notion that the autonomous but atomised individual[\[8\]](#) is the key to just and fair social organisation, which is best articulated if the individual is allowed unfettered (meaning free from state regulation) freedom to enter into economic transactions with others.

Thereby, the individual only becomes an actualised social being (i.e. a consumer) when recognised by the idealised competitive market. The market, which is nothing more than the aggregation of the multiple individual transactions, operates dispassionately but, we like to believe, naturally, in analogy with biological principles of natural evolution, sacrificing a particular individual organism as necessary to the abstract ideal of the 'trickle down' economy.

The Panama Papers show the real social consequences of the un/just violence of the force of law and economics hypocritically harnessed to promote the ideology of *laissez-faire* and the market. We may have personal sympathy for the named individuals, and perhaps even those still in hiding, blinking, but not as yet blinded, in the harsh light of the revelations, but cannot but be deeply offended, betrayed and angry at the brazen legally sanctioned sleight of hand played on us all. This is not what is meant by society driven by principles of social justice.

In a recent interview, Ed Miliband said that "I certainly understand why he defended his dad and that it must be incredibly upsetting for his mum. [...] But for 30 years, since Reagan and Thatcher, the basic view has been, 'Be nice to the super-rich

and their wealth will trickle down.’ That is the big lesson of Panama for me. It doesn’t trickle down; it gets stashed.”^[9]

‘Stashing’ cash in extra-jurisdictional spaces out of reach governments and those that helped generate the cash though work and spending takes to its logical conclusion the reported principle espoused in the late 1980s by the infamous business woman Leona Helmsley that “We don’t pay taxes. Only the little people pay taxes.”^[10]

The Panama Papers revelations tell us that if we believe in the principle of rule of law as an agent of social justice, we cannot accept ‘law-light’ as the reduced conception of law as the technocratic handmaiden of the market. We must not accept law devoid of any real material significance, law as nothing but an entertaining and to some degree interesting and intellectually challenging abstract game of social chess. To do so would mean we pay a too high a price in human pain, un-freedom, inequality and suffering.

[1] From the Canal Museum available at <http://www.canalmuseum.com/photos/panamacanalphoto003.htm>

[2] Available at <http://www.theguardian.com/news/series/panama-papers>

[3] <http://www.mossfon.com/service/mossfon-trust-corporation/>

[4] The word escrow can be traced to its Old French sense of a ‘scrap, tatter or single parchment, or piece cut off’. Here the idea is that the veracity of a transaction is confirmed by the correspondence of the two torn pieces. The piece carried by one person matches the tears of the other piece to make a whole, rather like using a perforation in a theatre ticket, for instance, to verify the delivery of the promise to perform. In the mercantile period, to facilitate credit trade between strangers, this idea was abstracted into the notion of a trust. The deed, promise to pay, or even money is delivered by A to a trusted third party to hold on trust against the future performance by B of their agreement with A.

[5] <http://www.mossfon.com/service/company-formation-services/>

[6] Garside writes that: “Some 80 gigabytes of data about the firm’s [Mossack Fonseca] customers had been received by [the *Süddeutsche Zeitung*]... in February 2015”, over time the journalists received 2.6 terabytes of information. Juliette Garside, 16 April 2016, *The Guardian*, ‘Panama Papers: inside the Guardian’s investigation into offshore secrets.’ At <http://www.theguardian.com/news/2016/apr/16/panama-papers-inside-the-guardians-investigation-into-offshore-secrets>

[7] Juliette Garside, 16 April 2016, *The Guardian*, ‘Panama Papers: inside the Guardian’s investigation into offshore secrets.’ At <http://www.theguardian.com/news/2016/apr/16/panama-papers-inside-the-guardians-investigation-into-offshore-secrets>

[8] Michel Houellebecq, *Les Particules élémentaires*, 1998, Flammarion, Paris.

[9] Carole Cadwalladr, 17 April 2016, *The Guardian*, ‘Ed Miliband: Panama Papers show that wealth doesn’t trickle down. It gets stashed.’ At <http://www.theguardian.com/global/2016/apr/17/ed-miliband-panama-papers>

[10] 12 July 1989, *New York Times*, pg. B2: Associated Press at http://www.barrypopik.com/index.php/new_york_city/entry/only_the_little_people_pay_taxes_attributed_to_leona_helmsley/

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