

Making Transparency Possible

An Interdisciplinary Dialogue

Roy Krøvel and Mona Thowsen (Eds.)



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Roy Krøvel and Mona Thowsen, Editors

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AN INTERDISCIPLINARY DIALOGUE

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Introduction

Mona Thowsen

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Many recent examples of international investigative journalism seem to follow the same pattern: Someone employed in a large and often multinational company such as a bank or a law firm becomes so dismayed by the things they witness that they decide to tell someone. This someone is typically a journalist. For the whistleblower, life will most likely never be quite the same. For two years, Raphaël Halet writes in this volume, he “lived a real thriller, a story worthy of a spy novel”. In retrospect, however, most whistleblowers realize that the thriller aspect quickly fades. As Halet notes after years of legal struggles, in reality he had “sacrificed” his “personal welfare for the common good”. For the journalist, working on a major leak could bring professional recognition and personal satisfaction. Most journalists can count on the backing of a community of journalists and other supporters. Nevertheless, as Craig McKune, Lina Chawaf, Rodrigo Véliz and others in this book explain, investigating the rich and powerful can also lead to serious legal or personal safety problems.

This book is about illicit financial flows. More precisely, it is about journalists, auditors, lawyers, activists, whistleblowers and others who have risked much to shed light on this opaque world. The stories range from revelations of murky deals in South Africa, the fallout from the

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Panama Papers in Iceland, Syria and Armenia, the dirty business of coal mining in Guatemala, and the luxurious life of bankers in Spain. The whistleblowers behind some of the most notorious financial scandals speak, as do lawyers and specialist auditors. The book also includes peer-reviewed articles from an interdisciplinary group of researchers and practitioners from the fields of law, economics and journalism. Revelations such as Lux Leaks, Swiss Leaks, the Panama Papers and Paradise Papers demonstrate how much societies around the world lose because of illicit financial flows, corruption and tax fraud. The articles in this book ask what can be done to make transparency possible. Only when key financial information is transparently reported for each country it will be possible to expose and hinder illicit financial flows and to discuss how to distribute wealth fairly between states and within states, and to see how value is created and distributed within a company.

Much of what we know about illicit financial flows is because of whistleblowers and investigative journalists. The Luxembourg Leaks, for instance, was a journalistic investigation conducted by the International Consortium of Investigative Journalists published in 2014 based on confidential information about Luxembourg's tax rulings set up by PricewaterhouseCoopers from 2002 to 2010. The tax rulings for over three hundred multinational companies based in Luxembourg were made public. The investigation shed light on a tax regime that was highly beneficial to multinational companies. International accounting firms set up tax rulings with schemes to transfer revenues to Luxembourg. Findings also showed that multinationals used mechanisms such as transfer pricing and intra group loans to move profits out of countries to reduce taxes.

Swiss Leaks (2015) has been called the biggest leak in Swiss banking history. It was started by information leaked by a computer analyst concerning the accounts of 100,000 clients and 20,000 offshore companies held by HSBC in Geneva. HSBC later agreed to pay €300 million to avoid going to trial in France for enabling tax fraud. More recently, the Panama Papers and the Paradise Papers have made headlines for revealing more about global illicit financial flows and those who make them possible. According to the International Consortium of Investigative Journalists, 140 politicians

from more than 50 countries have been connected to offshore companies in 21 tax havens in the Panama Papers. In 2018, international networks of journalists continued producing investigative journalism resulting in, for example, the Football Leaks and the Implant Files investigation.

These investigations are complicated and the financial mechanisms immensely complex. The point here is not the details of transfer pricing, tax rulings or intra group loans. The important lesson is that when society learns about financial secrecy, the information rarely comes from governments or transnational companies (TNCs). More likely, it comes from whistleblowers, investigative journalists, civil society organizations, and increasingly also from academia.

An interdisciplinary problem

This book is a result of two interdisciplinary conferences and workshops. In 2016 we organized the first Making Transparency Possible conference, a three-day event with 40 speakers from 19 countries. Since then, we have continued organizing workshops and conferences annually. The approach has been to invite a broad range of professions, disciplines and institutions. They each bring their own unique experiences, expertise and analyses of increasingly complex global financial integration. The varied backgrounds help highlight different aspects of illicit financial flows. The debates have underlined the many implications illicit financial flows have for, for example, national and international law, accounting practices, investigative journalism, labor unions, international development.

In this process, we have collaborated closely with 30 investigative journalists from countries such as Guatemala, Ecuador, Colombia, Nigeria, Ivory Coast, Ethiopia, South Africa, Russia, Iceland and Norway. Additionally, we have been helped by whistleblowers, journalism scholars, economists, professors of law, and auditors, as well as tax authorities, financial prosecutors, development agencies, etc.

As Sambrook and co-authors write in the aptly titled *Global Teamwork*, “journalists should stop thinking they can always ‘go it alone’” (Sambrook et al., 2018, p.95). The financial complexity, the legal issues and the enormous volume of information involved in investigating such leaks

demand cooperation on a massive scale across borders and disciplines to succeed. Completely new types of global networks of investigative journalists have emerged over the last few years adhering not as much to the logic of competition as to the logic of mutual aid. ‘Sharing’ and ‘cooperation’ have become the new buzzwords.

Similarly, journalism scholars should stop thinking they can always “go it alone”. Understanding the emerging global networks investigating these and similar leaks requires insights from economics, law, computer science and a range of other disciplines.

The significance of illicit financial flows (IFFs)

Investigations into the Luxembourg Leaks, Swiss Leaks, Panama Papers, Paradise Papers and similar revelations of illicit financial flows matter. The harm is perhaps most clearly seen in illicit flows out of developing and emerging economies, although wealthy economies also suffer. Estimates of illicit financial flows will always be by definition uncertain. Nevertheless, a study from Global Financial Integrity has taken on the challenge. It estimates illicit financial flows from developing and emerging economies at US \$1 trillion in 2014 (*Global Financial Integrity, Illicit Financial Flows to and from Developing Countries: 2005–2014*, 2017). The outflow of capital impoverishes communities and societies especially in the global South.

The UN acknowledges that illicit financial flows increase inequality within and among countries. Therefore the UN Sustainable Development Goal 10.5 seeks to, “Improve the regulation and monitoring of global financial markets and institutions and strengthen the implementation of such regulations.” The UN Sustainable Development Goal 16.4 additionally connects curbing illicit financial flows to the main target: “To promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”

Despite international focus on capital flight, corruption, secrecy jurisdictions, corporate havens, money laundering and criminal activities, efforts to increase transparency continue to face significant opposition. These efforts are met with resistance from politicians, official institutions,

legal firms, accounting firms and multinational companies in all regions of the world. The political tendency seems to be inertia, to do nothing or to pretend to be doing something while at the same time making sure that the core privileges for these same groups remain largely unchanged. While the journalistic investigations mentioned above are impressive and important, much remains to be done. Perhaps the most serious challenge is to create sustained public interest, which over time can contribute to challenging the structures and mechanisms that make illicit financial flows possible, and challenge those who benefit from maintaining the current situation.

The structure of the book

The book mirrors the workshops and seminars. We start with investigative journalists sharing practical experiences from researching illicit financial flows, tax avoidance and corruption. The journalists frame the issues and help us ask the right questions. This is followed by articles by civil society activists, whistleblowers, lawyers and auditors. The second section of the book contains peer-reviewed articles discussing and analyzing some of the many questions raised in the first section.

Interdisciplinarity is necessary to begin to understand illicit financial flows and this type of emerging investigative journalism. Thus it is crucial to bridge the divide between practitioners and researchers. Scientific research can help shed light on the issues raised in this book. Moreover, those who practice investigative journalism produce important knowledge on a daily basis. A dialogue between researchers and practicing investigative journalists helps advance both the knowledge and understanding of illicit financial flows and investigative journalism. So far, a number of topics have emerged from discussions at the Making Transparency Possible conferences.

First, global teamwork within the international networks of investigative journalists points to a future of cross-border cooperation in journalism that could enhance journalism's capacity to investigate complex issues, such as illicit financial flows. Second, the increasing opacity of financial markets requires interdisciplinary teamwork. Teams

investigating illicit financial flows need to build alliances with experts in law as well as economics. Third, those investigating these issues must take digital as well as physical safety seriously. As several chapters in this book point out, special consideration needs to be made regarding the safety of members of international teams working in or from regions with high levels of violence, and relatively few legal protections for journalists. Finally, as these chapters demonstrate, without whistleblowers we would know little of the world of illicit financial flows. The role of the whistleblower needs to be further investigated.

This book is an attempt to start a discussion of these questions. We hope that it will be a small step forward.

Part I

Craig McKune is a South African investigative journalist who has worked on a number of high profile cases in South Africa. At the 2016 Making Transparency Possible conference, McKune discussed safety with other investigative journalists. He explained that while South Africa was very violent, journalists were not physically in danger. In “It Happens Overnight”, McKune recalls how one of the other journalists warned him that “these things happen overnight”. McKune tells the story of investigating the Gupta brothers who built a South African business network using a web of offshore companies to channel financial flows, while maintaining strong ties to President Jacob Zuma. Investigative journalists such as McKune spent years researching the Gupta leaks. In the process, McKune explains, journalists were increasingly targeted. While a vigilant and organized civil society is important, he is not confident that it is enough.

“The Coal-Case of Guatemala” is written by **Rodrigo Veliz Estrada**, a Guatemalan investigative journalist. Veliz worked for the newspaper *Nómada* when it received information linking judges, lawyers, public prosecutors, immigration officers, an ex-US ambassador, high-ranking politicians and the then president’s son-in-law to complex and illegal schemes aimed at inducing institutions to give priority to a US electric power company. It is hard to estimate the precise degree of corruption

and volume of capital flight, as the core problem is secrecy. Still, people in places like Guatemala feel the cost of corruption and capital flight every day. Veliz also contributed to revealing how groups on the far right, formed by retired military officials and supported by companies, were behind death threats and groups linked to massacres. During the process, Veliz himself received implicit death threats, as have so many investigative journalists in Guatemala.

“Armenian ‘Hero’ of Panama Papers Becomes a Fighter Against Corruption” is written by **Kristine Aghalaryan**. Aghalaryan works for the NGO Hetq, the Investigative Journalists Collective of Armenia, which participated in the Panama Papers investigation and uncovered ties to Armenia. The Chief Compulsory Enforcement Officer in charge of overseeing that all court rulings are properly enforced was one of the officials found to have ties to offshore economic zones. His political position had made it possible for him to advance his private interests, while at the same time hide his income. The NGO filed a complaint with the Special Investigative Service (SIS) to carry out a proper investigation in the public interest. While initially dismissed, they later managed to reopen the case. In this chapter, Aghalaryan explains how the NGO spent years on the case witnessing firsthand the dubious investigation that in effect prevented any prosecution.

“Do Stories from Your Heart” is by the Icelandic investigative journalist **Jóhannes Kr. Kristjánsson**, whose interview with the former prime minister of Iceland, Sigmundur Davíð Gunnlaugsson, led to his resignation after he was asked about his wife’s involvement in companies exposed through the Panama Papers leak. The interview went viral. The former president’s reaction was to attack the journalists conducting the interview, the media, and reporters in general, rather than admit to any wrongdoing. Kristjánsson writes that the Directorate of Internal Revenue has demanded almost half a billion krona in outstanding taxes from 16 individuals based on information in the Panama Papers, and in addition, hundreds of names remain to be investigated. Kristjánsson points out that for this kind of journalism to happen everybody involved needs to leave their egos at the door and work together.

Lina Chawaf, executive director of Rozana Radio, won the 2018 Reporters Without Borders Press Freedom Award. During the Panama Papers investigation, Rozana worked on the story of Rami Makhlouf, a cousin of the head of the Syrian regime, Bashar Al-Assad. In “Safety in Journalism in Syria”, Chawaf discusses the dangers of speaking truth to power in a country such as Syria. “Delivering the truth threatens all those carrying guns on all sides of the conflict,” Chawaf explains. The chapter details some of the many examples of threats and violence experienced by investigative journalists and reporters in Syria. The chapter ends with a brief account of the safety programs being developed there for journalists.

Simona Levi is a theatre director and co-founder the Spanish group Xnet and 15MpaRato, a “citizens’ device to bring to court those responsible for the economic crisis in Spain”. In “‘We, the citizens, can fight against corruption.’ Open Source Jailing of Corrupt Bankers and Politicians Device: A Case Study”, Levi narrates how ordinary citizens investigated the Spanish banking ‘crisis’. The campaign led to the exposure of an extensive misuse of funds. In 2018, at least 65 high-profile bank executives and board members received sentences from Spain’s Supreme Court after the revelation that the group had spent €12.5 million on personal expenses ranging from vacations and jewelry, to meals in expensive restaurants. 15MpaRato is not made up of experts such as bankers, lawyers, economists or attorneys, Levi explains, but of non-specialists. Instead of relying on experts, Xnet launched an anonymous online service that people could contribute to (the Xnet Mailbox for Citizen Leaks). Additionally, the activists launched a “political crowdfunding” campaign to finance judicial costs.

William Bourdon and **Amélie Lefebvre** build on more than 15 years of experience defending whistleblowers. In “A Long Way to Go for Whistleblowers”, Bourdon and Lefebvre sum up some of the key battles. The recognition of whistleblowers is primarily a question of protection, the authors write. Being seen as courageous informers is secondary. If the status of being a whistleblower does not afford them protection, they will be vulnerable. According to Bourdon and Lefebvre, it is imperative for a potential

whistleblower to consult with a technician such as a lawyer, in order to measure possible support from unions, associations or from the media. Journalists can support those who are about to blow the whistle by invoking the right to protect their sources. However, contacting journalists can in some cases run the risk of exposing whistleblowers to legal proceedings, the authors remind us.

Antoine Deltour is a former PricewaterhouseCoopers employee who provided information to French journalist Edouard Perrin. The so-called Lux Leaks scandal shed light on how Luxembourg had helped large corporations cut their global tax bills. It was the biggest leak of its kind until the Panama Papers. In “Whistleblowing on Luxembourg’s Tax Practices”, Deltour explains how the company had been logging everything that happened on their computer network. The company was thus able to find traces of Deltour’s copying two years after the events. He then had to emerge from anonymity. Numerous lawsuits and appeals later, the Luxembourg Supreme Court finally recognized the right to whistleblow according to the case law of the European Court of Human Rights. Deltour sees this as an “undeniable victory for the right to information”. However, he simultaneously fears that the length of his legal battle may deter other potential whistleblowers.

Raphaël Halet is the second former PricewaterhouseCoopers (PwC) employee who leaked information to the media. The first round of the Lux Leaks scandal erupted in 2012 (see above). At the time, Halet worked in a strategic department and had access to all tax documents created by PwC for their clients. Watching a documentary based on the first leak, Halet realized that the “documents presented as proof of tax evasion are the documents I handle every day. Now they are like fire in my hands.” If he did nothing, he would be complicit in the system of tax evasion; if he reacted, he would put his future at risk. “I cannot continue without doing anything,” Halet writes in “Being a Whistleblower”. However, when Deltour was acquitted in 2018, the court upheld the conviction of Halet. Halet did not meet the whistleblower criteria. Nevertheless, Halet writes, “Thanks to my revelations, the European Commission found that

Luxembourg gave illegal tax benefits to Amazon worth around €250 million. Apple (€13 billion), Ikea (€1billion) and dozens of companies are also being sued by Margrethe Vestager (the European Commissioner for Competition).”

Frian Aarsnes draws on nearly 30 years of experience in auditing extractive industries, as well as international consulting, and asks: “What Tools Can States Use When Faced with Systematic Tax Avoidance?” According to Aarsnes, states seemed unable to handle the issues arising from the behavior of multinational companies. The chapter presents tools that can be used unilaterally by states to reduce tax avoidance to a minimum. “Put simply, if states individually or collectively use the toolbox, they can handle almost all the issues in international taxation identified today,” Aarsnes writes.

Part II – Academic Perspectives

In “Combating Corruption: Investigative Journalists on the Frontlines”, **Kalle Moene** and **Tina Søreide** seek to understand how investigative journalism contributes to controlling corruption. The authors are interested in what the disciplines of journalism and economics can learn from each other. Writing from the perspective of economics, Moene and Søreide find, “The more authoritarian leaders weaken integrity standards in governance, the more financial secrecy providers facilitate grand scale crime; and the more barriers there are for journalists who seek to disclose misdealing, the more important it is to join forces across countries and across disciplines.”

“Investigative Journalism on Oil, Gas, Mining: Has Technology Made a Difference?” by **Anya Schiffrin** and **Ryan Powell** builds on existing literature and the authors’ extensive experience with global investigative journalism to discuss why investigative reporting on oil, mining and tax avoidance is thriving. Schiffrin and Powell find that “digital tools and data-driven reporting has helped journalists do a better job of holding governments and corporations to account”. Journalists now use big data

and data visualization to report and write powerful stories. Mobile and social media platforms make it easier to disseminate the work effectively.

Jenik Radon, Mahima Achuthan and **Nandini Ravichandran** explain the benefits of transparency through disclosure of the real or ultimate owners of a company (beneficial ownership) in their chapter, “Beneficial Ownership: Filing the Gap in Transparency and Accountability in the Extractive Industries and Improving Governance”. The authors argue that increased transparency helps reduce natural resource revenue leakages. Precious financial resources can instead be invested in public priorities such as education, healthcare and infrastructure. Additionally, transparency helps foster competition, reduces corruption and promotes fair business practices.

As the global economy becomes increasingly opaque, new forms of collaboration between journalists and civil society are emerging to protect democracy and the rule of law. In “It’s All in the Game: Journalism, Whistleblowing and Democracy Under the Rules of the Global Economy”, **Petter Slaatrem Titland** analyzes discussions of whistleblower protection in the EU and Norway in light of the Lux Leaks whistleblower–journalist collaboration and the internal whistleblower in the Telenor/VimpelCom corruption case. Titland calls for parliaments to update legislation affecting collaborative investigative journalism, and whistleblower protections in particular.

“What Is a Leak, Who Is a Whistleblower? An Evaluation Within the Scope of the *Cumhuriyet* Newspaper, Can Dündar and MİT Trucks Case,” written by **Dr. Behlül Çalışkan**, examines the famous MİT Trucks Case in Turkey. The former editor-in-chief of the center-left newspaper *Cumhuriyet* was later awarded prestigious international prizes for whistleblowing, and for the reporting on weapons shipments to Islamist fighters in Syria. In this chapter, however, Çalışkan questions the definition of the MİT Trucks scandal as a “whistleblowing leak” that “served the public interest in terms of its revelations, the identities of its sources, its wider political entanglements, and the timing of its emergence into the public domain”.

Elisabeth Eide continues the examination of the journalist–whistleblower relationship in “Chilling Effects on Free Expression: Surveillance, Threats and Harassment”. According to Eide, whistleblower Edward Snowden played a pivotal role in helping investigative journalism expose modern global surveillance. Her chapter addresses global surveillance and presents examples of how it deters public intellectuals and other citizens from voicing their opinions in the public sphere. In addition, the chapter discusses consequences for the future of investigative journalism.

“Reporting on Unfinished Business: Emerging Digital Media and Investigative Journalism in Guatemala”, by **Ingrid Fadnes**, takes the reader back to Guatemala (see also Rodrigo Véliz). Fadnes calls for more knowledge of specific local and national contexts in order to develop manuals for in-depth journalism. Fadnes is particularly concerned about safety and security issues. Cross-border reporting on links between national political elites and illicit financial flows increases the risk of attacks on journalists. However, little research has been done on the safety and security risks of partners in countries, for instance in Latin America, when they participate in global collaborative investigative journalism.

In “‘What someone wants kept in the dark.’ An Analysis of the Norwegian Panama Papers Coverage”, **Birgitte Kjos Fonn** asks whether the Panama Papers investigation contributed to influencing public understanding. Did the revelations raise public awareness in relation to transparency? Fonn sees leaks as valuable journalistic tools, and international cooperation in deciphering the contents of the leaks as essential. However, leaks are not enough, Fonn writes. “To make the system transparent, journalists have to monitor law-making and international cooperation (and the lack of such) also in between ‘the great leaks.’”

“Making Sense of Overwhelming Flows of Financial Data”, by **Mona Thowsen** and **Roy Krøvel**, asks what journalism educators can learn from investigative journalists working on revelations such as the Panama Papers, Paradise Papers, Lux Leaks and Swiss Leaks. Can this type of cross-border cooperation help prepare journalism educators for a future

in which money increasingly flows across borders? The authors argue that educators need to provide students with at least a basic understanding of core economic and financial concepts. At the same time, building on qualitative interviews with journalists around the world working on stories connected to illicit financial flows, corruption and tax havens, Thowsen and Krøvel find that investigative journalists demonstrate a considerable capacity for collective, self-organized learning while they investigate and together solve problems as they arise.

Part I

CHAPTER 1

It Happens Overnight

Craig McKune

South African investigative journalist

In December 2016, in Oslo, a group of journalists traded tales of intimidation, arrest, repression and murder. The Russians had a list of dead colleagues. A Somali journalist had been forced to work in exile, while a Briton had hired bodyguards to guard against men lurking outside her home.

She was Clare Rewcastle Brown. She showed us photographs of a corpse cemented into an oil drum and thrown into a swamp – a public prosecutor in the 1MDB Malaysian corruption case. We had met at a conference at the Oslo Metropolitan University to discuss how we investigate and tell tales of corporate and political corruption, bad government, nepotism, and so on, and what threats we face as a result.

There is a straightforward logical argument: By exposing the bad things powerful people do, we pose a threat to their wealth, reputation and power. Therefore, it is in their interest to fight back against us. They might fight by trying to convince us to retract our stories. Or they might try to convince the public and authorities, through some sort of statement or campaign, that we are wrong. They could follow some sort of legal process, such as suing us. Or, they might try to hurt or kill us.

On that last point, I felt I had little to add. But unfortunately my risk analysis proved to be flawed.

Risk analysis

I am from South Africa, where I worked for eight years for the non-profit amaBhungane Centre for Investigative Journalism. Our (recently deposed) president Jacob Zuma and his cronies had seized control of our criminal justice and state intelligence apparatuses, and Zuma openly used these to target enemies. Violent organised criminals had infiltrated the same structures, and journalists exposed the Zuma family's links to a number of them. Zuma's people had also captured state-owned companies with big spending budgets, and they were skimming off the cream. Over many years, we investigated and wrote about this.

Recent developments have demonstrated the level of risk we posed to them. The ruling African National Congress pushed Zuma from the presidency in February 2018. He and his cronies' reputations are now mud, and an apparently criminal enterprise that thrived under his rule has fallen apart. Many of those involved now face the prospect of going to jail.

We do our accountability reporting in a violent context. Our government has been openly hostile to dissenters – to the point of gunning them down, like the police did at Marikana in 2012. Meanwhile, numerous local-level politicians have been killed in political violence throughout the country. We also know the South African state, and other Zuma sympathisers, have spied on journalists. And in repressive regimes throughout our continent, places like Lesotho, Mozambique, Zimbabwe, Somalia and Sudan, journalists are often attacked. Zuma sympathised with many of these governments.

In sum, powerful people have had both motive and means to repress journalism with violence, because this might have seemed close to a normal thing to do in the regional and local climate. But physically hurting or killing journalists in South Africa? Not quite, I used to think. So, I told the journalists in Oslo, it felt to me like we were standing with our backs to the edge of a cliff while we taunted and threw rocks and sticks at thugs. They *could* easily push us over that edge. Yet they did not.

Clare, the Briton, raised her hand and cautioned me. It happens overnight, she warned. You have to be vigilant. She was right.

The SABC 8

Wind back to mid-2016: The chief operating officer of the SABC, our state broadcaster, had ordered that the SABC not show any videos of attacks by protestors on public property. The attacks were part of civil unrest brewing in South Africa, fuelled by poverty, corruption and a weak, racialised economy. A campaign group took to the streets to protest the SABC censorship. Then the SABC banned its journalists from covering the protests. Eight of them objected publicly, but they were suspended. This group came to be known as the “SABC 8”. Their story was widely reported, capturing the public imagination – but in spite of widespread support for the Eight, the SABC fired them.

As it turned out, just a few days after I had said in Oslo that South African journalists were not being attacked physically, one of the SABC 8, 32-year-old Suna Venter, walked out of a Johannesburg restaurant, where she was shot in the face with an unidentified weapon. Surgeons later removed metal pellets from her face, but she survived.

In fact, for months before that, Venter had received numerous threatening messages on her phone. According to her family: “Her flat was broken into on numerous occasions, the brake cables of her car were cut and her car’s tyres were slashed. She was shot at and abducted – tied to a tree at Melville Koppies, while the grass around her was set alight.”

She had survived that too, but in June 2017, she died of broken heart syndrome, and her family said they believed her heart condition was caused by the stress of the intimidation.

“White Monopoly Capital”

On the same day Venter’s body was found, a small mob gathered outside the house of Peter Bruce, a well-known news editor and columnist.

The mob called itself Black First Land First, or BLF. Their placards read: “Peter you murder the truth”, “Peter Bruce wa Hemba [you are lying]”, “Land or death” and “Peter Bruce propagandist of WMC”.

This situation and “WMC” need some explaining.

Since about 2010, South African journalists have investigated and reported on the brothers Tony, Ajay and Atul Gupta and their relationship with Zuma. This is the Zuma looting project I described earlier. To combat negative press, the Guptas hired the UK firm Bell Pottinger to redirect public resentment in a campaign against Zuma’s critics. This ended spectacularly, when a UK public relations industry group investigated and suspended Bell Pottinger. It said the Gupta campaign “was by any reasonable standard of judgement likely to inflame racial discord in South Africa and appears to have done exactly that.” Bell Pottinger subsequently went out of business.

Linked to the Gupta campaign was an army of social media accounts and websites that attacked named journalists and campaigners. Journalists like Peter Bruce – the one who was targeted in June 2017 – were painted as racists seeking to protect “white monopoly capital”, or “WMC”.

On at least one occasion, the Guptas commissioned a leader of the BLF – one of the protesters outside Peter’s house – to write an article criticising a journalist. BLF promised to stage more protests at the homes of other journalists whom it named and branded “askaris”. In South Africa, “askari” is an inflammatory term used during apartheid to brand liberation fighters who changed sides and joined the oppressive regime.

Had such rhetoric flared up further, it could have led to real violence. So, the group of journalists went to court and won an interdict banning BLF from further intimidation or harassment.

Ten days later, BLF supporters accosted and threatened my amaBhungane colleague Micah Reddy. He escaped unharmed, but when he tried to lay charges at the nearest police station, the officers refused to take his statement. Three weeks later, amaBhungane hosted a public meeting about a leaked cache of data from the Guptas’ business empire, which had become a news sensation. A group of people interrupted the meeting. They sang, shouted and physically threatened people.

The BLF was there again, and another amaBhungane journalist, Stefaans Brümmer, later described how a BLF leader “stood up, grabbed me with two hands and tried to shove me to the ground, shouting words like ‘You fuck with me’. A second person then threw me to the ground.”

The incidents were widely reported on and criticised in the South African media. A court also found the BLF mobs to be in contempt of the earlier interdict. They were fined and their leader was sentenced to three months in jail – although the latter conviction was suspended. The judge extended the original court order to protect all journalists from BLF harassment.

Whistleblowers

Investigative journalists are just one part of a community of dissenters. There are activists, politicians, upstanding officials, journalists’ sources and other whistleblowers. I believe the sources and whistleblowers face the biggest risk because they are usually anonymous, so it is easy for bad people to quietly get rid of a serious threat without public outcry.

Indeed, when I made my comments in Oslo in 2016, I was ignorant of earlier attacks on two whistleblowers central to one of the Gupta-Zuma scandals. The story involved a fake state dairy project, allegedly used by the Guptas’ as a personal ATM.

In one case, the police allegedly opened fire on an outspoken local politician as he drove through the gate at his home. The politician also claimed he was physically assaulted by “supporters” of the dairy, who called him an “enemy of employment”. In the second case, a provincial state auditor investigating the dairy was hijacked and then tortured. He died after three months in hospital. Five years later, the police had not solved the murder.

Journalists whose stories are not picked up by other media also face a distinct risk.

In 2016 and 2017, News24 investigative journalist Caryn Dolley wrote a string of articles describing an underworld war on the streets of Cape Town. Mobsters fought one another to control nightclub security and

the right to trade drugs and more. They met in the shadows with senior politicians and police officers, monitored by layers of competing spy groups – unofficial and official.

After Caryn watched and photographed one such meeting, one man emailed her: “I don’t think I need to explain to anY ONE who I meet or why! I meet lotsa people all the time would you like to no WHO THEY ARE ASWELL [sic].” He followed up with a sinister message: “WE HAVE EYES EVERY WHR [sic].” This was accompanied by a photograph of Caryn as she staked out his meeting with the politician.

As it happens, this man was more recently photographed socialising with Zuma’s adult son Duduzane, who has also been on the Guptas’ payroll since Zuma became president.

Among her reports, Caryn described how the organised criminals used guns smuggled from police vaults – apparently with the help of police officers. Then she received another message, this time anonymous. It said: “Ms doley! That. same. guns. that. the. cops. sold. is. going. to. be. used. on. your. head. at. work. or. your. house. or. your. mom. house. and. your. dog. [sic]”

The incidents generated a little bit of press coverage, but until a recent court case, Caryn was alone in her crusade to cover Cape Town’s mob war. It would have been so easy for someone to snuff out further reports from her. Thankfully, she remains safe.

Overnight

I have had to readjust my risk analysis of the threat to South African journalists. On the one hand, I maintain that South Africans recognise and support their investigative journalists, and this helps keep bad, violent people from our door. If I am right, this might be rooted in apartheid, when people learned the importance of civic activism supported by journalists who held a racist, oppressive government to account.

We also have brave people willing to speak out from within government and elsewhere, and our courts are independent and strong. We have vibrant opposition politics, and by peacefully replacing the Zuma regime, the ANC proved our democracy is alive.

On the other hand, my risk analysis of December 2016 ignored the thugs who had already started pushing people over the “cliff edge”, and many of the other aggravating factors outlined in this article remain in place, even with Zuma gone. Indeed, an opposition party, the Economic Freedom Fighters, has since embarked on a verbally and physically violent campaign against journalists. As we go to print, my amaBhungane colleagues did not go to their Johannesburg office after a purported EFF member threatened on live radio that party members would invade our premises.

I cannot pretend to compare South Africa to Syria, Russia, Mexico or Lesotho, but I am forced to concede that, as Clare warned, it *does* happen overnight.

CHAPTER 2

The Coal-Case of Guatemala

Rodrigo Véliz Estrada

Independent journalist

The coal-based power plant battle

At the end of 2013 a state-owned Chinese construction company and a small US electric power company started a legal (and in time, physical) fight with each other. The conflict was over the property rights to a \$900 million coal-based power plant in southern Guatemala. It represented the first big investment of a Chinese company in the country, which has a long political and economic tradition of bonds with the US. Panama, Costa Rica, El Salvador and Nicaragua had all begun to receive Chinese investment. Only Honduras and Guatemala had still remained “loyal” to the US area of interest in Central America. The coal-based power plant case was the first challenge to that historical hegemony.

In a way, it was a fight between China and the US on Guatemalan territory. But the fight was conducted by proxy, in local politics. Parallel politics (*para-política*) is a term coined by the American historian Robert Paxton to describe organizations or institutions that are “state-like” in their practice, but not a part of the government. In the Guatemalan case, key parallel networks, civil and military, licit and criminal, have a long history of using *para-política* to make their interests prevail. These networks act in the shadows, corrupting state institutions. In this sense

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para-política in Guatemala links these interest groups with brokers and public officials, distorting the public function of state institutions.

In the December 2011 general election, the Patriot Party (PP), savvy regarding this type of politics, made it all the way to the executive branch and achieved a majority in the National Congress (and was therefore able to appoint the highest positions in the the judiciary system).

When the crisis between the Chinese construction company and the US company exploded, local lawyers representing each side began activating their political contacts. Two opposing, opaque and parallel networks unfolded in 2014, both looking to displace the other in an escalating confrontation.

In 2007 the International Commission against Impunity in Guatemala (CICIG), a UN financed body mandated with investigating and prosecuting high-profile and *para-política* crimes, was created. The CICIG would then work hand in hand with the Public Prosecutor's Office (Ministerio Público, MP), supporting and enforcing their work. By the end of 2015, the CICIG and the MP presented a preliminary case against one of the networks, the one supported by the PP government.

The judicial case has since been stalled, mainly due to the strategy of frivolous litigation employed by the defence lawyers, where motions and lawsuits are made in bad faith, with the sole goal of prolonging the case while they wait for better political conditions.

In early 2016, with the first phase of the frivolous strategy in place, a series of documents containing a significant portion of the evidence (letters, call transcripts, documents, etc.) was leaked to *Nómada*, the digital newspaper where I was working at the time. Equipped with interviews, more legal documents and field visits, we could supply details to the case in a four-piece newspaper report.

The coal-case showed that judges, lawyers, public prosecutors, immigration officers, an ex US ambassador, high ranking politicians and the then president's son-in-law were involved in complex and illegal schemes aimed at inducing institutions into favoring Jaguar Energy, the US electric power company.

Jaguar Energy was a subsidiary of Ashmore Energy International Ltd. (ex-Enron). Enron had a long tradition of bribes and parallel politics in

Latin America and in the US, and an infamous account fraud scandal led them to file for bankruptcy in 2001. Ashmore Energy acquired part of Enron's business in 2006.

How to reveal the “counter-forces”?

After the coal-case, many more cases have piled up against other parts of the parallel networks aligned with the PP government, thanks to the work of the CICIG-MP. And that is perhaps the most significant result of the coal-based power plant case and the other cases that followed: they revealed exactly how these networks operate; the level of impunity their activities achieve; and how the networks have been able to retain power and perfect their strategic criminal schemes through various political parties since the democratic transition from military rule in 1985.

It was no coincidence that the main figures in the criminal networks, many now in jail, were key military personnel and businessmen from this transition process. They have molded and weakened public institutions for the last 30 years.

The work of the press through journalists' reports helped to deepen and provide a historical framework for the cases presented by the CICIG-MP. Both the press and CICIG-MP officials met aggressive responses from the political and economic groups they scrutinized. These responses included threats, intimidation, spurious demands, physical aggression, and in some cases murder. They targeted all the independent and corporate media and investigative journalists who were striving to reveal the nature of the parallel political networks.

One of the groups reacting aggressively to the UN institution CICIG, was a far-right organization which called itself the “Foundation Against Terrorism”, formed by retired military officials and sponsored by local big business. The organization's real interests were soon discovered: the group's ties with “illegal structures” were revealed by more CICIG-MP cases. It was disclosed, for example, that one of their members had a contract in the Supreme Court, attached to a magistrate accused of corruption; and another one was linked to massacres during the war in Guatemala. Other members were recently sent to jail for forming a criminal

structure within the prison system, where they managed payments of transfers between prisons and benefits inside the prison.

Death threats

One of the far-right politicians, part of the Foundation Against Terrorism, used his Facebook profile in May 2017 to accuse me, a journalist, of “being behind the attacks” (meaning the reports) against him, and stated that a criminal lawsuit would follow. A day later he wrote a column welcoming me to the “world of mortals” – an implicit death threat.

This was not the first time a member of Indymedia or Nómada has received threats or other kinds of intimidation. Guatemala has a long history of journalist repression, even though the trend has declined after the Peace Accords were signed in December 1996. In any case, that personal and collective experience has helped us become more prepared for attacks. So we activated a network of support including the UN, key embassies, and the Guatemalan ombudsman. All showed us public and private support, and counseled us, step by step, in how to protect ourselves. Social media support from our readers ensued, condemning the threats and backing up the work that we do. We received no further threats, and the tension did not escalate, thanks to this support.

Some features of the support we received, however, demonstrated that we are a fairly privileged part of the journalist community. The key network of support that we have developed was mainly built through years of working and living in Guatemala City, the country’s capital, with a significant history of centralized resources and urban functions. The embassies, key to human rights protection, are all located in Guatemala City. The city also, therefore, supports a concentration of rights protections, mainly for their middle class inhabitants, who are also some of the main actors in the recent massive mobilizations against corruption scandals.

In contrast, the rest of the country is mainly impoverished, not controlled directly by the central state but by local or regional groups, some linked to *narco* ringleaders. The position of local journalists, in such a situation, is very different from ours. Their relationship to the newspapers

in Guatemala City and our defense networks may be crucial to their security.

The assassination of three journalists in the southwest city of Suchitepéquez, and the subsequent ramifications, is a tragic example of what can happen without such defense networks.

The deepening of the political crisis

Journalists Luis Juárez Pichillá, Jorge De León Cabrera and Danilo López were murdered in April 2015 in Suchitepéquez. The murder case did not gain much attention until Guatemala City's newspapers started raising questions. A joint group of Guatemala City's journalists, in which *Nómada* was represented, started an investigation. The published report suggested that four mayors of the Patriot Party and LIDER, another party linked to criminal groups, were involved in the murders. Soon after the report was made public, the hitman and two policemen were captured.

But the case did not attract much attention in public opinion, and the four mayors were able to participate as candidates for Congress in the 2015 elections. The main suspect, Julio Antonio Juárez Ramírez, was in the first place for Suchitepéquez on the election list for the LIDER party. Besides being a mayor, he was also a local businessman who from 2005 to 2011 received \$15 million in state contracts. That helped him run for mayor and then for the National Congress. He was elected Congressman in September 2015.

Soon Juárez switched parties, moving to the official FCN-Nación, of President Jimmy Morales Cabrera. President Morales showed support for Juárez amid escalating criticism.

It was not until Donald Trump's application of the [Magnitsky Act](#) in December 2017 that the situation changed. Trump named 13 persons from around the globe linked to the "severity of human rights abuse and corruption". Among the accused was congressman and ex-mayor Julio Juárez. The next month, Juárez was arrested. He is now in jail awaiting trial for the murder of the journalists.

The case is important because it reveals, again, how the traditional relationship with the US can save the lives of journalists or impose pressure

to investigate repression cases. Paradoxically this happened parallel to their own para-political actions, defending their economic interests against the threat of Chinese competition. It was also important because of the Guatemalan president's support for Juárez and the present crisis.

In contrast, the CICIG has received little support from President Jimmy Morales (2016–2019), who has at least twice demanded (in vain) the expulsion of its commissioner, Colombian citizen Iván Velásquez. Morales is being investigated by the CICIG, accused of money laundering during the 2015 election campaign. His brother and son are part of another case and are now awaiting trial.

The implication of the country's President accentuates the opposition that the CICIG work met from 2015 onwards, as we saw above. Guatemala City's mayor, ex-president of Guatemala Álvaro Arzú Irigoyen, was also summoned for a pretrial hearing so the CICIG could investigate him. Arzú, more experienced than Morales, had taken over the reins of the CICIG opposition: his son was elected President of the National Congress (although he is the only elected member of his party) in January of 2018, and has made public threats saying that you either "hit or pay the press", to both national and international outcries. That all ended in April of 2018, when Arzú Irigoyen died of a heart attack while playing golf.

The present political situation, in which *para-política* style politicians shield themselves while they continue to run important institutions of the state, is a reminder that things will not change in an instant. The political and economic networks that created the coal-based power plant case, as well as many other implicated actors, continue to have power.

Attacks on journalists, thus, remain a threat to be prepared for.

CHAPTER 3

Armenian “Hero” of Panama Papers Becomes a Fighter Against Corruption

Kristine Aghalaryan

Investigative Journalists of Armenia (Hetq)

Armenia’s Special Investigative Service (SIS) dropped the offshore business case against former Chief Compulsory Enforcement Service Officer Mihran Poghosyan in January last year. Since then, the Investigative Journalists NGO has been struggling to get a copy of the SIS’s decision on dropping the case. They want to understand and convey to the public why the scandalous disclosure is being covered up by the law enforcement body.

The Chief Compulsory Enforcement Officer is in charge of overseeing that all court rulings are properly enforced, a job that requires extensive knowledge of the ins and outs of Armenia’s laws, rules and regulations. Nonetheless, Major General of Justice Mihran Poghosyan, Armenia’s former Chief Compulsory Enforcement Officer, was among the country’s group of officials who had planted deep roots in offshore economic zones.

Where his companies, which were registered in those zones, operated Poghosyan used his position to advance his business interests, all the while concealing his income. The SIS says that its investigation into the offshore business interests of Poghosyan failed to reveal any incriminatory evidence of wrongdoing.

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A Panama Papers resignation

The investigative journalist collective wrote in the news outlet, Investigative Journalists of Armenia (Hetq), about Poghosyan's shady financial dealings in Panama and his Swiss bank accounts in April 2016, using data uncovered in the Panama Papers. The data was (first) obtained by the German newspaper *Süddeutsche Zeitung* and shared by the International Consortium of Investigative Journalists (ICIJ) with the Organized Crime and Corruption Reporting Project (OCCRP) and more than 110 media partners from 82 countries, including Hetq.

While the Ethics Committee of Armenia is entitled to order an investigation based on these findings, the body failed to do so, arguing that it first needed a third party petition.

On 8 April 2016, Armenia's Transparency International Anti-Corruption Center (TIACC) filed such a petition. They requested the Ethics Committee for High-Level Officials launch a case to investigate the offshore business dealings of Major General of Justice Mihran Poghosyan, head of the Armenia's Compulsory Enforcement Service.

Mihran Poghosyan tendered his resignation on 18 April. The Compulsory Enforcement Service issued the following statement on behalf of Poghosyan:

My name has recently surfaced in the Armenian and international press regarding the Panama offshore matter. I am saddened that my name is being raised alongside the family of Azerbaijani President Ilham Aliiev, who has actually privatized billions of dollars. I find it unacceptable that I might be the reason for any possible comparison to be drawn between my country and despotic Azerbaijan. Thus, I have tendered my resignation. I will publicly respond to the offshore reports as a civilian, with no state leverage at my disposal.

The Ethics Committee of High-Ranking Officials subsequently decided to refrain from taking any action regarding Mihran Poghosyan. They argued that the General Prosecutor's office was examining the case and would send it to the appropriate law enforcement bodies to proceed.

On 2 May, the Special Investigative Service of the Republic of Armenia instituted a criminal case against the former Chief Compulsory Enforcement Officer. The criminal case was launched under the requirements of

Article 310 of the RA Criminal Code (illegal participation in entrepreneurial activity). Soon after that, Mihran Poghosyan started to "clean up" the offshore traces of his Armenian companies by removing companies registered in Panama from the shareholders list.

The SIS told reporters from Hetq that on 11 January 2017 Switzerland had turned down its request for legal assistance in the case. No details were given. The SIS also alleged that it had not received any word from Panama regarding its request for legal assistance in the Poghosyan investigation.

The criminal case filed against Poghosyan by the SIS is thus a non-starter. Soon SIS ended the probe into Mihran Poghosyan's Panama Papers scandal for "lack of evidence".

"Lack of evidence" or "the request had not been fulfilled ..."

SIS Press Secretary Marina Ohanjanyan told Hetq that the decision to drop the case against Poghosyan was due to the refusal of legal assistance by Switzerland and Panama.

However, the Swiss Federal Department of Justice told Hetq and its partner OCCRP that they turned down the Armenian request for legal assistance on 8 November 2016 because the requirements of the request were not fulfilled. However, "The Armenian authorities can at any time specify the request," the email from Ingrid Ryser, a spokesperson for the Swiss Federal Department of Justice, added.

In the 2017 parliamentary elections in Armenia Mihran Poghosyan was elected a member of Parliament. He was appointed by the Republicans in Armenia, the ruling party at that time. As an MP, he then had political immunity. This case clearly illustrates that in Armenia, friendly and family connections very often prevail over the law.

Mihran Poghosyan got his position in June 2008, after the Republican Party leader Serge Sargsyan became president. The Armenian press has written many times that Poghosyan's two uncles are Serzh Sargsyan's close friends. The friendship of this trio also derives from their Karabakh origins.

Unable to provide information in the public interest

On 4 September, a Yerevan court rejected a suit filed by the Investigative Journalists NGO to force the Special Investigative Service (SIS) to hand over a copy of its decision to drop a criminal investigation into the off-shore business interests of Poghosyan.

Last January the SIS, quoting Article 262, Part 1, of Armenia's Criminal Procedure Code, said that copies of a decision to drop or halt criminal proceedings are sent to the suspect, the accused, the defense lawyer, the injured party or their representative, the civil plaintiff/defendant, or their representative. According to the law, a copy is also sent to an individual or legal entity upon whose statement the criminal investigation was launched in the first place. The SIS argued that the Investigative Journalists NGO (which publishes Hetq) cannot be provided a copy of the decision since the news outlet is none of the above.

The NGO's lawyers, in their suit, argued that Hetq requested the copy in order to carry out its mission to provide information in the public interest. Public interest is a priority here, because society should know what steps and actions have been taken to resolve this scandalous off-shore story. It should be considered a democratic right to know how the law enforcement body justifies its decision not to punish an official who had businesses registered offshore.

The Investigative Journalists appealed this case to the Court of Appeals. The appeal was rejected too, on 26 December 2017, with the same argument that a copy of the decision is sent to an individual or a representative of the legal entity upon whose statement the criminal investigation was launched. Hetq, as a legal entity, had not submitted any statement, the Court of Appeals said.

The body conducting the criminal proceedings initiated a criminal case on its own initiative, based on the materials published by www.hetq.am. Consequently, the court concluded, the body responsible for the proceedings, in this case the SIS, has no obligation to provide a copy of the decision on dropping the criminal case.

In the past, Hetq has been sent copies of decisions to drop criminal proceedings that were launched based on Hetq articles, for example,

about violations of law during elections and monkey smuggling. The Hetq editorial office was sent copies of these decisions, even though Hetq did not report on the crime to the law enforcement agencies and did not even ask for these decisions in writing.

In the meantime, Poghosyan continues to affirm that he was not involved in any offshore business deals. Furthermore, he frequently gives “anticorruption related” interviews to journalists, posing as a fighter against corruption.

Armenia re-opens Panama Papers case after the Velvet Revolution

Following the Spring 2018 “Velvet Revolution” in Armenia, Hetq attorney Ara Ghazaryan again petitioned the SIS for their decision. This time, they complied.

It has taken almost two years and two legal suits, but Armenia’s Special Investigative Service has finally provided Hetq with its decision to drop the “offshore” criminal investigation of Mihran Poghosyan, Armenia’s former Chief Compulsory Enforcement Officer. The decision document confirms Hetq’s original suspicion that the SIS dropped the investigation due to political expediency and merely went through the motions of conducting an investigation. The SIS questioned only Poghosyan and his relatives, taking their denials of any wrongdoing at face value.

Poghosyan testified that in 2011, Eduard Harutyunyan, a distant friend, asked for his help in founding international organizations. According to Poghosyan, Harutyunyan wanted to set up a company in Armenia with international backers. Harutyunyan wanted the Armenian firm to be credible. Poghosyan testified that he acceded to the request and contacted a man called Richard Varchuk, who had the authority to create offshore companies. Poghosyan instructed him to set up companies in Panama registered in Harutyunyan’s name. Varchuk did as instructed, but since Poghosyan was the applicant, the new companies were mistakenly registered under his name, not Harutyunyan’s. Poghosyan testified that he was never aware of this since the companies were never active. Poghosyan claimed he did not even know the names of the companies. Poghosyan

testified that he only found out about the registration name mix-up after Hetq published its story. Harutyunyan backed up his testimony.

SIS Senior Investigator D. Kostandyan could have gone online to research the primary data held by the ICIJ or Hetq to find out how Poghosyan's 100% share ownership certificate was written up and later surfaced online. He could have requested that the ICIJ provide him with the relevant emails in order to shed light on correspondence between Mossack Fonseca lawyers and Poghosyan and the various documents shipped to Armenia.

These documents also include scanned copies of passports belonging to the individuals in question. It is highly unlikely that such copies were sent to Mossack Fonseca without their knowledge. In addition, money was transferred for these legal services. The SIS could have, if it wanted to, requested information about these transfers. Senior Investigator Kostandyan did send an inquiry about the offshore companies to Armenia's Central Bank, but his request was rejected. The bank said it did not have the authority to provide such secret bank data.

The investigator had started down the wrong path of inquiry from the beginning since the SIS had already decided to drop the case against Poghosyan. The charges against Poghosyan would have included money laundering, and the Central Bank would then have been obligated to provide the information. The SIS conducted no investigation into this matter. They believed Poghosyan when he testified that no bank account had been opened by him. SIS has since reopened a Panama Papers related case after a new government came into office.

CHAPTER 4

Do Stories from Your Heart

Johannes Kr. Kristjansson

Investigative journalist in Iceland

My roots are in the western part of Iceland. Mountains and valleys surround hardworking people, mostly fishermen and farmers. For several years I labored on trawlers and farms but failed to find contentment there. I already knew I wanted to be a journalist.

In secondary school, I was the editor, reporter and layout person on my school newspaper, eventually creating a news magazine that was distributed to all secondary schools throughout Iceland. It made me feel good to see fellow students receive information that was important to them or to read interviews that they liked and that maybe inspired them.

The first scoop

My first professional job was for a small weekly newspaper in the southern part of Iceland. I discovered the US army was secretly planning to leave the airbase in Keflavik, which would have been a major blow to the local economy. The story won me a job offer at the television station Channel 2. I quickly recognized how powerful television was in bringing a story to life, but I chafed at the meaningless tasks assigned to a junior reporter. After pestering my bosses, they allowed me to investigate the growing influence of the Hells Angels in Iceland's drug trade, as long as I did so

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on my own time. I produced five segments on the subject, prompting a debate about the establishment of organized crime in Iceland.

Taken off air

When Channel 2 decided to launch a weekly news magazine program called “Kompás”, they offered me the position of editor. We aired over 100 episodes and did almost 300 stories. The program quickly earned a reputation for hard-hitting investigations. At “Kompás”, I learned how to use television to reveal the hidden stories of the vulnerable, as well as the immense responsibility that comes with that power.

The CEO of Channel 2 once said in a speech that “Kompás” was Channel 2’s most valuable brand. That changed quickly when we did a story on tax havens shortly after the banking crisis in Iceland. The piece implicated the owner of Channel 2. Three months after the program aired, my coworkers and I were fired. Soon after, the program was taken off the air.

A personal investigation

In June 2010, my 17-year-old daughter died from an overdose of fentanyl, a powerful opioid. I tried to bury my pain in work, writing a book about a young Icelander imprisoned in Brazil for drug trafficking. The project failed to exorcise my demons. I found my daughter’s letters and began to piece together the final year of her life. I investigated her 29-year-old boyfriend who it appears injected her with the fatal dose of drugs but was too stoned himself to do more than watch her die. I unearthed new evidence that convinced the police to reopen the case, but it was not conclusive enough to convict the boyfriend of murder.

I was in a black hole for months after the police decision. I needed to find meaning in my daughter’s death. Through journalism I decided I could help others like her. State television in Iceland agreed to back the program project I embarked upon. I took my camera deep into the underground drug culture of Icelandic teenagers. Through hidden camera (work), Icelanders entered this netherworld with me and saw kids shoot up and live in squalor. After all of that, I could no longer simply observe.

I helped rescue one girl and get her to treatment. The core of the series was my daughter's story. I spoke on camera, played the 911 call and traced the ambulance rushing to her.

One year after my daughter's overdose, a six-part series was aired on the daily news magazine program on RUV, the state television. It shook Iceland, forced the problem of drug abuse into the open and sparked a national debate. Afterwards, the Directorate of Health clamped down on doctors overprescribing to drug addicts.

The Panama Papers and cross-border journalism

In 2015, I received a call from Marina Walker, deputy director of the International Consortium of Investigative Journalists. She told me about a massive leak of offshore information. Many Icelanders were involved, including the prime minister and his wife, who held a secret offshore company called Wintris. The Icelandic public was unaware of Wintris. I knew the information would be explosive.

For almost a year, I worked alone in my apartment on what would become the Panama Papers. It was a hard time for me and my family since I had no income and was working on stories involving the most powerful people in Iceland, both in politics and business. Our filmed interview with the prime minister, in which he abruptly ended the conversation after being questioned about the company, went viral. When he resigned in response to the attention, it became one of the iconic moments of the Panama Papers worldwide.

The former prime minister has tried to degrade the journalists who worked on the story including me. In March last year he was interviewed by the Icelandic TV program "Viglinan". He was asked if it would have done more for his political career if he had not walked out of that infamous interview.

"I doubt it would have changed much, how a person reacts to one interview," Sigmundur said. "Especially in light of the fact that the interview was staged. They had written everything ahead of time, from beginning to end, had rehearsed it, which is of course without precedent, had

rehearsed how to most confuse the interview subject to make him look the worst.”

The former prime minister has attacked the reporters and Icelandic state television on several occasions, trying to taint their journalism. This is a known method that all investigative reporters are familiar with – denigrating the journalists instead of answering their legitimate questions.

The Directorate of Tax Investigations in Iceland bought information based on the Panama Papers from an unknown person for 37 million Icelandic krona. After months of investigation the Directorate of Internal Revenue has demanded almost half a billion krona in outstanding taxes from 16 individuals, based on information in the Panama Papers.

Following the Panama Papers publication, Julius Vifill Ingvarsson, a city councilor in Reykjavik, had to resign after it was revealed that he owned an offshore company and bank account. The Reykjavik district attorney has charged Mr. Ingvarsson with money laundering.

Also an Icelandic fish exporter has been implicated in a possible tax fraud. His properties and bank accounts have been seized.

The Directorate of Tax Investigations in Iceland and the district attorney in Reykjavik are still investigating names from the Panama Papers. Hopefully they can recover outstanding taxes.

In my opinion cross-border journalism is the most important thing for democracy. And the International Consortium of Investigative Journalists is one of the most important organizations for a better world.

I hope we will see many projects with journalists all over the world working together on important projects, where everyone leaves their ego outside the room.

Iceland is safe and small

Around 350,000 inhabitants live in Iceland – fewer than in an average European city. “In Iceland you know almost everybody,” is a common joke among Icelanders. Working as an investigative reporter in Iceland is not considered a dangerous job like in some other parts of the world. It is very rare that a journalist in Iceland is attacked or is threatened because

of a story he or she is working on. The only time I have been threatened because of a story I worked on was when I did stories about the drug scene in Iceland. Some debt collectors or druglords have made threats towards me.

The Icelandic investigative reporter faces other kinds of obstacles. The small size of the population is in itself one of the main obstacles. If a journalist is snooping around word will travel fast within the company or institution under scrutiny. Someone working there probably knows the journalist or at least knows someone who knows the journalist. Maybe someone will try to call the journalist and ask about the story and what he or she is looking for. So if I get a story tip that involves a relative of mine or a friend I will not work on the story but advise the person to find another journalist.

Working with sources

Working with a source on a sensitive story in Iceland can be a problem. Under no circumstances can the journalist meet with the source at a café, a restaurant or other public place. There is always the danger of someone knowing the journalist and the source and people will start to think, “What are they doing together?” I usually meet my sources in remote places, such as industrial areas.

The hard ones

Some sources are easy to work with, while others are hard to get. Sometimes you can develop a really good relationship with an important source with just one phone call. But some are hard to get. When I need to get to a source that I know can give me important information I usually park outside their home, call them from there and tell them, “I am in a car outside and you do want to talk to me. Trust me!” I do not threaten them or anything. I just tell them plainly that it is important for the public to know what is going on inside the company, the ministry, the organization or the institution. This method has not been effective all the time, but sometimes. That is enough for me.

Leaking out bits and pieces

Sometimes when I am stuck in my research and cannot get the information I need to fill out the puzzle, I deliberately leak bits and pieces of the story to someone that I know will shout it out inside the company or the institution. After some time I will get a message, an email or a phone call from a staff member who wants to give me the information I need. This has worked on several stories I have done.

Protecting the source

I have been interrogated by the police at least a couple of times because of my sources. The police have tried to get information about my sources due to a leak from some governmental institution. My rule is simple – I do not say a word and plead to a section in the Icelandic media law. As a journalist the most important things are trust and your sources. Nobody would want to talk to a journalist who cannot protect his sources. The trust is gone. So it is extremely important to protect your sources by any means. The journalist has to find secure ways of being in contact with their source.

In my opinion, all journalists should know how to use OpenPGP encryption for emails when they are working on a story. This is important when working on a story involving sources or sensitive information. I have an add-on for my email program and I also use Hushmail when I need to be in contact with sources who do not know how to set up OpenPGP. When OpenPGP has been installed it is easy to use and according to computer security analysts, it is safe.

I use Signal for messaging and phone calls. My computer security analyst tells me it is the safest on the market. It is easy to get as an app.

The complicated story

After the financial crisis in Iceland in 2008 every news program had stories about the banking market manipulations. Few knew what that was. Even the words are hard to understand. In 2011 I received a leak containing charges from the Financial Supervisory Authority in Iceland to the

special prosecutor. The charges included detailed information about the alleged market manipulation within the three biggest banks in Iceland during the years before the financial collapse.

I read through the pages and tried to understand these illegal acts myself. It took me some time to understand what was going on inside the banks and how they bought shares from themselves to raise the share price. I started to figure out how to explain this in a TV documentary so the public would understand. It would have been easy to use old footage of the banks over my voice explaining alleged market manipulation, but I knew I had to do something better.

I sat down with my graphic designer and we created a picture of a machine showing how the banks, the Iceland stock exchange, the traders and the buyers were involved. The machine showed how this complicated scheme worked, and all of a sudden the public in Iceland understood what market manipulation means. (The story about the alleged market manipulation of Kaupthing can be seen here: vimeo.com/41317731)

The story was really important for the public to understand, because the market manipulation scheme by the Icelandic banks is considered one of the main reasons for the financial meltdown in Iceland. In my work as a TV reporter I always try to present my stories so everyone understands them, and I try to engage the viewer through personal stories or by putting things in context.

When I am working on a complicated story, especially about something financial, I put my effort into making it simple. My mentor used a good phrase for this. Once when I was working on one of these stories he put an A4 paper on the wall in front of my desk with the word KISS – Keep It Simple Stupid. Today I always write this word on a piece of paper and put it somewhere near me when I am working on a story of this kind.

Journalism students often come to me for career advice. I always tell them the same thing: “Whenever possible, do your own stories from the heart – not the stories others find for you”.

With this as my guide I have been incredibly fortunate to be involved in work that has had real positive impact. People open up to me on camera because I am genuinely interested. I do not shy away from holding the powerful accountable, and I seek the truth wherever it leads me.

CHAPTER 5

Safety in Journalism in Syria

Lina Chawaf

Rozana Radio

Safety for journalists has never been more significant. Compelling evidence for such a statement can be found in developments all over the Middle East, and most of all in Syria.

Syrians started their revolution in 2011 chanting for freedom. They demanded the release of political prisoners, the reinstatement of political freedoms and freedom of speech. In short, they wanted a democratic life.

The unprecedented violence meted out by the Syrian regime, the support and direct intervention of Russia, and the inaction of the international community have made Syria the most dangerous country in the world for any human to live in. Doubly so for journalists and citizen journalists: Delivering the truth threatens all those carrying guns on all sides of the conflict.

Working in the media sector inside Syria nowadays has a great psychological impact on journalists, especially when their physical safety and life are at risk. To overcome the effects of this psychological impact in high-risk areas, it is absolutely crucial to have flexible safety procedures and emergency plans in place. Rozana Media, like many other independent media institutions in Syria, has experienced many incidents affecting its staff inside Syria. These examples show that safety is both a physical and a digital requirement.

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Stories from the field

Examples of repression and physical reprisals abound.

Nineteen-year-old Yaser from Hama was arrested and tortured to death in prison by the regime. He was working for Rozana as a correspondent, reporting what was happening in his local area, when the regime found out about his activities and arrested him. He was detained for a couple of months before his body was returned to his family. Bashar, an engineering student and resident of Raqqa, worked as a correspondent when ISIS took over his city. Bashar unfortunately did not have a viable plan for protecting himself, either physically or digitally. ISIS raided his home, arrested him and seized his camera and laptop in 2014. Bashar's fate since then remains unknown.

Mohammad, another Rozana Media correspondent from Idlib, was shot dead by an armed group while covering news in his area.

The assassination of the journalist Naji Al-Jarf in 2015 in Gaziantep, Turkey, made it to the headlines. Naji edited a magazine tracking and exposing crimes by the regime and ISIS alike. He was hunted down through his social media accounts and killed. He was shot in downtown Gaziantep in the middle of the day, in a very crowded place, by a teenager on a motorbike. The Turkish authorities arrested his assassin a few months later. He was given a life sentence.

Naji did not follow basic safety procedures that he should have, being the journalist he was with the profile he had, and working on such sensitive matters in such a high-risk environment. He was very vocal on social media and his movements and location were easily traceable. This tragic situation could have been prevented if he had been more cautious about his movements and his communication with people and on social media.

Two citizen reporters who lived in Orpha, Turkey, were slaughtered by one of their former friends in their home, because of their work. They both fled their hometown of Raqqa when it fell under ISIS control. Both were open about their work in documenting the crimes of ISIS and the regime. Their assassinations were linked to ISIS. They

were both tracked through their social media postings, which revealed their location.

One local media group received threats from the Free Syrian Army (FSA) and was forced to withdraw an article it had published containing criticism of the armed Syrian opposition.

Safety inside Syria

Saad, who lives in Homs and works as a freelance correspondent for several news agencies, opened a malicious link on Skype. His device froze and started to do things on its own, his emails and social media accounts were hacked.

Mohammad was a reporter working on the frontline in Idlib during a major opposition offensive to capture the strategic regime base of Wadi Al Dayfe. Mohammad says: “The concept of safety for journalists is a new concept for us. We do not have a thorough understanding of the steps to be taken to ensure our safety. However, while covering news I wear a helmet and a bulletproof vest, although I know these devices do not protect me 100%, especially under the conditions in which I operate. It is more important for me to hide my personal views so the fighters won’t cause me harm.”

Omar, who worked for the Union of Revolutionaries in Deirezzour, was arrested by ISIS because of a post he published on Facebook. He published a picture of a child stoning the bodies of fighters who had killed ISIS members. He warned against rising hatred. His intention was to raise awareness of the dangers of such incidents. He was released later and left for Turkey.

Muhammad al-Hamed was in prison for 5 months. After his release, he needed about 50 days to leave the country with his family to escape from ISIS. He endured difficult moments that he may not forget in his lifetime. Even though he is far away from Syria he has been hesitant about recounting his experiences in the ISIS prison, out of fear for his family who are still close to ISIS controlled areas. Mohammad lost his archive and the results of his work during his arrest, so he remains in a very vulnerable position.

Digital and personal safety policy

It is under these circumstances that numerous safety programs have been organized to support Syrian media organizations. Hundreds of journalists and citizen reporters have been trained in personal and digital safety by various international organizations.

A safety policy was developed and put into use to provide a modicum of security to Syrians working in the media sector. Keeping them abreast of real-time news and updates is one way of helping them stay safer. They also received training and special courses in personal safety. Syrian media institutions follow international journalistic ethics and place great importance on protecting the safety and security of their sources, especially those involved in investigative journalism. A special procedure is followed by many Syrian media organizations to respond to the arrest/apprehension of any of their staff.

Marwan lives in Turkey and works for a Syrian media organization. He received online threats from ISIS. The messages said they would track him down and kill him. Subsequently, a special plan was put in place to secure him and ensure his safety.

M.F. lives in Damascus. One day he was arrested by the regime because they suspected he was delivering information to an opposition media organization abroad. An emergency plan to secure all his online accounts was implemented immediately by this organization, so that he would be protected from death under torture. The regime thus could not access his information to prove that he was working as a correspondent for this media organization.

Journalism carries a very high responsibility in the general fight for freedom of expression in a place like Syria today. No story in the entire world warrants the death of journalists. Destiny, chance or luck play a big role in keeping us alive. But sometimes following safety regulations diligently can also help journalists survive – and do their job of fighting to deliver the truth in the most dangerous fields of all.

CHAPTER 6

“We, the citizens, can fight against corruption.” Open Source Jailing of Corrupt Bankers and Politicians Device: A Case Study¹

Simona Levi

Xnet and 15MpaRato

Like many other normal, ordinary people we, Xnet, participated in the Indignados Movement in Spain in 2011. And on the first anniversary of this movement in Barcelona, Xnet launched an action called “15MpaRato”.

“15MpaRato” is a play on words difficult to translate from Spanish. “Rato” means “quite a while”, so “15MpaRato” implies that the 15M Indignados Movement will last for quite a while. Furthermore, the name suggests an adversary of the Indignados Movement, namely Rodrigo Rato, former Minister of the Economy and former head of the International Monetary Fund (IMF). At the time he was also Spain’s top banker – president of Bankia – even seen as a probable future prime minister.

¹ This chapter is excerpted from the author’s theatre piece “Become a Banker” and from the Introductory Statement for the FCForum 2015–International Forum on the Internet and Democracy organised by Xnet.

<https://xnet-x.net/en/become-a-banker/>

<http://2015.fcforum.net>

<http://xnet-x.net/en>

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The idea of the 15MpaRato action was thus to show that there are powerful people – specific individuals with proper names are responsible – behind what was called the “crisis” (and which we all know is really a financial scam). The aim was to bring these scammers to justice, starting with Rodrigo Rato and his cronies.

We singled out Rato for two main reasons:

- 1) Rodrigo Rato was the president of Caja Madrid Savings Bank and merged it with other banks to form the bank BANKIA. They made a concerted effort to increase the number of public shareholders with a massive campaign visible everywhere: “Become a Banker”. However, in less than seven months, Bankia shares plummeted, dragging down and ruining 300,000 people who had placed their faith in that campaign.
- 2) With a crisis comes the bailouts, and the usual logic of “too big to fail.” Almost half of the bailout money in Spain went to Bankia, formerly Caja Madrid Savings Bank. We can deduce from this that a seventh of the entire Spanish budget was created by Bankia on its own. This was, in other words, very much a self-inflicted “crisis” imposed by the scammers themselves.

I want to emphasize that 15MpaRato was not an action led by legal or financial experts. Our team consists of normal, ordinary people, not bankers, lawyers, economists or attorneys. 15MpaRato deliberately set up a device for everybody.

Specifically, 15MpaRato made an appeal for:

- Victims of the scam. We wanted ordinary people themselves to be the accusers, in order to file a lawsuit. 44 people who had been swindled by Bankia volunteered to prosecute Rodrigo Rato in their names.
- Evidence. Xnet launched an anonymous online service that people could contribute to: the Xnet Mailbox for Citizen Leaks.
- Money for judicial costs. We launched what became the first “political crowdfunding” campaign. Now they are quite common, but ours was the first. 130% of the campaign target was reached on the very first day: almost 20,000 euros.

And so the 15MpaRato action resulted in a civil lawsuit in Spain's Supreme Court, which set in motion what became known as the "Bankia Case". This campaign began as an action taken by normal, ordinary people, long before political parties jumped on the bandwagon. Later, the government and the press would lead people to believe that the Bankia Case was started by a public prosecutor, a judge, a minister, a political party, or the press. But no, it was always us. We remain the accusers in this lawsuit.

15MpaRato was never a personal vendetta against Mister Rato. The thinking of Xnet was rather that by bringing down first a well-known high-profile banker, the rest would follow. As it turned out, this thinking was sound: we started with charges against Rato and 33 other high-level bankers. Now, seven years later, almost 70 bankers and politicians have been sentenced or await trial, from the whole political spectrum – from the right to the extreme left.

Learning to tell our own story

In the course of this adventure, we (Xnet/15MpaRato) found out something unexpected: it is actually not that hard to file lawsuits against bankers and politicians. What is really hard is to convey the main lesson to the public, that all of this was done by normal, ordinary people. People must know that anyone can make such a thing happen.

We soon discovered the difficulty of getting the story right: Xnet started receiving first-hand information through the Xnetleaks mailbox and from the accusers in the trial at the Supreme Court. We thus noticed a discrepancy between this information and the information reaching the public through the media. It was totally different from the information reaching us. For every ten earnest journalists working with us, there were ten media outlets who simply ignored the truth.

A similar problem arose with the institutionalization of the politics of the Indignados. The nominally "new" party – Podemos – made it painfully clear to every genuinely citizen-led or popular representative group (and there are some in Spain like Partido X, Barcelona en Comú o Marea): "Either you join our ranks and display our brand, or we will wipe you off the map and remove you as our possible competitor".

Because of the media spin, and because of the monopolization of the voice of protest by Podemos, Xnet decided to tell the story of our fight against corruption directly, on the stage, in books, in the cinema.

We wrote these “art pieces” starting with one of the most important sources of evidence we uncovered.

This happened as we, Xnet, were working on this whole legal process. We began receiving anonymous messages in the mailbox for citizen leaks. One of many said: “I have a large amount of information that I think paints a very clear picture of institutional corruption in Spain.” This clear picture came through the “Blesa emails”, emails sent and received by Miguel Blesa, president of Caja Madrid Savings Bank before Rodrigo Rato took over and transformed it into Bankia.

These emails tell the story of how a “crisis” is manufactured. The Blesa emails gave us a view of our “crisis” from within the engine room.

We simply organized the release of this story to be available to many more viewers. In order to provide public access to the material, Xnet sifted through the original 8,000 emails and ended up with 460 (dating from 2000 to 2009), which contained information of public relevance, and released them on the website and to the press. <http://correosdeblesa.com>

The “Blesa emails” were published over the course of many days, revealing all kinds of unimagined and grotesque things. One example was the existence of “Black VISA” credit cards that allowed Caja Madrid Savings Bank executives to buy whatever they wanted outside the radar of the tax authorities.

With this evidence, the trial against almost a hundred Spanish politicians and bankers is now in its final phase. Our art pieces had found their scripts.

The story, revealed in reality and told on stage by the Xnet group and through the 15MpaRato action, was the story of how governing elites plundered a country.

But it is also the story of how citizens got together and illuminated the truth. And how normal ordinary people, joining forces, learning and explaining how things really happen, are changing the usual endings – despite the government, the political parties and the mass media.

Access to information: Transparency and privacy

We have learned an important lesson with this major leak and how the status quo tried to react to it. When something stops being an instrument for democracy and justice and becomes a 'value', a slogan or an end in and of itself, we have a new problem.

Laudable words like 'transparency' and 'privacy' have become projectile weapons used very selectively, for propaganda purposes. 'Transparency' can be used to trap people who, anonymously, leak useful and relevant information. Or it can be used against people who disobey unjust laws to effect change. Conversely, 'privacy' is often invoked to erase the crimes of bankers, politicians and large monopolies. On TV talk shows, activists are routinely criminalized, because "We don't know who they are", whilst the anonymity of institutional gangsters is defended because, "Politicians also have a right to privacy".

In the post-Snowden revelations era, when we are asked about a principled position, we digital rights activists must provide a clear and unambiguous response: "Transparency for the state. Privacy for all of us".

On the uneven playing field between the *establishment*, with all of their resources necessary for the perpetuation of abuse, and the rest of the population, we must stand up for radical transparency. We must demand accountability and accessibility from the government, political parties, institutions and those with large family fortunes. As a principle, both public and private structures, which have an impact on more than 10% of the population, should be scrutinized; and this includes all of their members while in power. They do not have the right to be overlooked.

At the same time we must preserve, in the same way, a radical respect for the privacy, anonymity or right to be seen without being recognized, for *all* of the people or independent citizen groups that come together to solve problems [1].

We must stop dead in its tracks the demagogy, expertly disguised as sentimental technophobia, which tells us that we should all be identified and identifiable online for our own good, and, of course, for our own

safety. If we allow this repressive breach of our virtual privacy, repression of privacy in the physical world will follow.

Crimes have been and must be prosecuted, of course, but at all times and in all places, without undermining fundamental rights [2].

No one in his or her right mind with even a rudimentary idea of history would demand that we leave our mail open to postal workers, so that they can take a peek at what we have written whenever they want and without any judicial order, just in case we happen to be terrorists or paedophiles, or we simply express disagreement with an existing law.

Transparency and participation

On the other hand, we do not want to transform the very real legal gains of transparency that we have defended for a long time – in a country like Spain where a law on the subject is just five years old – into an abstract moralistic value. Transparency should not be reduced to mere window dressing, something we are familiar with already. The standard-bearers of *transparency and participation* in this day and age like to announce collaborative programs, which may not actually be so, or are too few and poorly run. They can open lists that are not actually open, or are too open or too few; or open accounts that are nominally transparent, but in reality impossible to decipher. In the power struggle between propaganda and intelligent awareness the victor is the one who gets to write history.

‘Transparency’ and ‘participation’ are the new promises of Demagogy 3.0, at least in Spain. Transparency and participation become a post-modern “dictatorship of the proletariat”, slogans inaugurating the false new politics – a simple lie. Transparency and participation without a roadmap for co-responsibility, empowerment and leadership distributed equally in civil society are just playing to the gallery.

Instead, we want transparency to continue as an integral tool of action and transformation, thus effectively promoting real democracy.

For this reason, we need to ask ourselves not only how to build the frameworks for accessing and liberating information. We must also ask what to do with this information and who must do something with it.

While we fight to create new institutions that would solidly support such frameworks, we should not underestimate the importance of dismantling the excesses of the institutions we have inherited from our past. The value of citizen leaks in relation to the entire ecosystem of corruption that we have seen in Spain is incalculable [3].

The Monopoly of the Truth TM that has been in force until now is the trinity of the media, the government and the political parties. Amongst them, there is a tacit agreement to ignore anything outside the trinity that might have any significant and real effect on history. The 15MpaRato Device has made opposition from ordinary people manifest, weakening the iron character of the trinity.

Having said that, there are still hundreds of journalists who believe in the social role of their profession, who investigate and who know how important it is to cooperate with an active citizenry. With these people, we must draw up a new collaborative contract that will allow us to write history ourselves the way we are making it, together.

By cooperating, we can deconstruct the fairytale that tries to keep us passive. It is not only for dignity and historical memory; it is also to give wings to the new model, the one that is changing things. The more we know, the more we will grow, and the more we are, the more successful we will be.

This is why it is so important for us to **fight for the protection of sources** and to fight so that the press, governments, institutions and political parties recognize this protection.

Maintaining our privacy and being recognized are not mutually exclusive ideas. The Zapatistas explained it quite well when they said, "We hide our faces to be seen".

What is crucial is establishing an alliance between information professionals and citizens who have decided to bring to light necessary information. This alliance entails a mutual recognition of each other's efforts and common responsibilities, a shared intention of bringing down surveillance and censure laws, and a joint defense of leaks and whistleblowers. At the same time, they must provide each other with the means of protection against the controls and restrictions placed on the freedoms of expression and action.

In the fifth year of the era of the 15M/Indignados movement, we know that we are advancing, defending and making collective and implacable use of our right to know and to inform, to be seen and to be recognized without fear of persecution, and to defend these rights, we are becoming organized.

The goal is to become an empowered civil society that can freely access information and utilize this information to watch over our own institutions.

Some call this democracy.

Notes:

- [1] STOA - Document commissioned by the European Parliament, “At this point encryption is the only way to defend ourselves from mass surveillance”. [http://www.europarl.europa.eu/stoa/cms/cache/offonce/home/publications/studies;jsessionid=490A3E7E5D44BE-DAA600139DBB98DBAB?reference=EPRS_STU\(2015\)527409](http://www.europarl.europa.eu/stoa/cms/cache/offonce/home/publications/studies;jsessionid=490A3E7E5D44BE-DAA600139DBB98DBAB?reference=EPRS_STU(2015)527409)
- [2] The report of the UN High Commissioner for Human Rights, “Invasive surveillance, as well as the collection and storage of personal data derived from digital communication – if it is part of targeted or massive surveillance programs – not only may it violate the right to privacy, but also a range of other fundamental rights.” <https://www.fayerwayer.com/2014/07/onu-la-vigilancia-masiva-necesita-controles-que-respeten-dd-hh/>
- [3] <https://xnet-x.net/en/xnetleaks/>

EXTRA TRACK

Brief how-to-do-it for citizens fighting against corruption

ANALYSIS AND DEVELOPMENT

- 1. What should I report?** Considering what will be denounced requires an objective analysis of both the public impact and the legal aspects. As immoral as they may seem, not all acts are punishable by law, neither are they as simple to prove as they may seem. The goal of each action is to open a crack in the wall of impunity and for that we must concentrate all our forces on a single project.
Corruption naturally branches out. Each issue we investigate will lead us to further information. To investigate everything is highly tempting when you want to serve justice, but unproductive when you want to be effective. Let's focus on the roots and not climb the branches. Take a direct approach to tackle the plot of political-business collusion. This is how they will fall.
- 2. Where to leak the information?** Special precautions must be taken at this point. The vast majority of political parties and the media have no interest in investigating (it is expensive and complex), they are more interested in the news, even at the cost of obstructing the legal process. It is important to keep control over the information and your identity to be sure how both will be used. Sometimes the anonymous leaks-box of a truly independent NGO or media is the best option to reveal information. But sometimes we do better to keep it until we can open a court case. If we want to get to the root of the problem, we have to keep a clear focus and identify from a bird's eye view the most important issues we need to concentrate on. It is important not to get lost in information that moves us away from the underlying idea: to erase the sense of impunity of the corrupt. And above all, protection of sources is essential.
- 3. Develop the information obtained based on the issue denounced.** Our job as committed citizens does not end with being in possession of and filtering certain information. In most cases, the work

in itself of collecting evidence and monitoring the evolution of the information is essential. Bear in mind that groups of organized citizens may not always have the resources to cover all the work that filtration entails; the work performed by the sources themselves becomes all the more important.

PROTECT YOURSELF

4. **Preserve your own safety.** You need tools to ensure safety. For groups of organized citizens in particular, we consider such tools essential. This is not secrecy or conspiracy, it is absolutely necessary in many if not most countries. In countries like the US, Canada, Iceland, Denmark, South Africa or Ireland, there is a degree of specific protection legislation. The so-called “whistleblowers” are to a degree valued and lauded for their efforts. In other countries there is no such specific protection, such as China, Turkey and, to some extent, Spain. Tools ensuring that communication flows in an **entirely anonymous way, with all subsequent communications carried out in secure communication environments** (like the Tor network), are vital, and the only way to fully protect the source from retaliation so they remain free to continue their contribution.

ORGANIZE AND CO-OPERATE

5. **Get organized, but with caution.** As a group of citizens willing to unite their efforts and skills with others, organization is a key issue. Depending on the case denounced, finding the support that ends up shaping an organized group of citizens has to be carried out with caution in order to preserve your safety and that of others, as well as not to expose the information. Remember, it is not a question of just revealing the information but of how to reveal it. If it is not done at the right time, we risk tipping off those we want to implicate.
6. **Cooperation.** On many occasions the information gathered by sources may be beyond their area of expertise; this is where collaboration between citizens and journalists or NGOs acquires

special relevance. Citizen collaboration is not only the best mechanism for denouncing corruption, but also for data analysis.

7. **Power.** Once work is completed and the proof of the corrupt plot is published, it is time to be aware that this is only half of the work that needs to be done in order to achieve success. To believe that merely exposing the evidence will end political collusion and corruption is in itself a mistaken belief, not backed up by much evidence. The exposure needs power behind it, if it is not to fall into oblivion. The political, communicational or judicial goals of an exposure need to be backed up by two elements:

- **A networked campaign** that succeeds in spreading like wild-fire until everyone who was unpunished is hit. The good news is that the second part of an exposure is the most stimulating and empowering part of the work.
- **A legal action**, whenever possible.

The corrupt will not end corruption; only organized citizens can, and everybody can do it.

CHAPTER 7

A Long Way to Go for Whistleblowers

William Bourdon

Founding partner, Bourdon & Associés

Amélie Lefebvre

Partner, Bourdon & Associés

William Bourdon has defended whistleblowers in France and abroad for more than fifteen years, sometimes from very different perspectives and under very different circumstances. This has led him to draw many lessons that he has tried to share in the *Petit manuel de désobéissance civile* published in 2016 by Editions Lattès. In this text, Amélie Lefebvre and William Bourdon sum up some of the key battles. Some have proved to be extremely difficult, and demonstrate that the anxiety of whistleblowers and their protection are in many ways complex issues. Some notable cases ended in victory, although much remains before a full societal recognition of the democratic significance of whistleblowers is in place.

The recognition of whistleblowers is primarily a question of protection. Whether outsiders see them as courageous informers or not is secondary. If the status of being a whistleblower does not afford them protection, they will be vulnerable. Hence it is crucial to define and provide demarcation criteria for whistleblowers. They need access to a very specific regime. Their right to a modicum of irresponsibility towards special interests (oftentimes those of their own employers), and their protection

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against retaliations that never fail to arise, must be part and parcel of the recognition of the responsibility whistleblowers have accepted to protect the *general* interest.

Put simply, the whistleblower is a person who has identified a danger and reports it to others. This signal must mechanically trigger decision processes and actions to face this danger, annihilate it and protect the community. The problem is to clarify the notions of danger, of reporting, and of general interest. Such terms, needless to say, are not objects of a spontaneous and unanimous common understanding.

However much the terms can be disputed, it bears repetition: a whistleblower must be protected, because the protection of the general interest is at stake. This key argument is not always heard, even in the most (in)famous cases in the media.

To mention only a handful of them from the United States: Chelsea Manning, Edward Snowden and his predecessor, William Binney, or Daniel Ellsberg, the original whistleblower for the Pentagon papers in 1971, are all iconic examples of watchmen who have suffered sacrifices, but who have also exposed the need to elevate the status of whistleblower protection. Their revelations have created shockwaves beyond the public sphere, in the minds of millions of citizens throughout the world.

Notwithstanding their celebrity, to define and outline the concept of whistleblower within a legal framework has required arduous but necessary work. The experience one of the authors of this article has as a lawyer may help elucidate the nature of this work.

The first encounters with whistleblowers and their defense

The first whistleblowers came to William Bourdon's law firm in the 2000s. Back then, the expression "whistleblower" may have been used in different forums and by various researchers who had denounced some public health scandals, but it was definitively not popularized in France or anywhere else in the world as it is today.

We must bear in mind the vertiginous speed with which this term has not only imposed itself, but also how fast the perception has grown, year

after year, of whistleblowers as the avant-garde of a formidable global citizen movement, which no longer accepts that public and private actors multiply promises and ethical commitments while organizing irresponsibly, or refusing liability when questioned.

One of the first whistleblowers who met up with William Bourdon, was the commander Philippe Pichon. He was a brave French judicial police officer in charge of checking the regularity of the operation of the file called at the time “STIC” (the police’s file containing data sheets concerning thirty million French individuals). Disgusted by the apathy of police hierarchy, he believed that it was his duty to reveal the irregularities in this file.

He did this at a time when whistleblowers were very poorly protected. Pichon could scarcely have known the considerable risk he was taking. He was identified by the press as the person behind the disclosure of two data sheets of important personalities containing totally inaccurate remarks. Very quickly, the administrative machine was set in motion and crushed him. He was promptly sent into early retirement, which thus eradicated his ambitions for a great career in the national police. The judicial battle against him continues, even today.

He was prosecuted before the Criminal Court of Paris in particular for having breached professional confidentiality. Still, William Bourdon was able to obtain a relatively benevolent verdict which, for the first time, took into consideration what has become today the common protective shield for all whistleblowers: the recognition of an objective public interest. He provoked a public debate, having no other choice than to transgress the law.

Though Philippe Pichon has moved on in other directions in his personal life, the general lesson remains a tragic one: without full legal protection, or at least without very strong support from public opinion, the media, unions or specialised NGOs, the professional and social death of the whistleblower is certain.

An aggravating factor for Philippe Pichon at the time was the fact that he was a civil servant. In administrations around the world, something close to an omerta¹ always exists. This omerta often results from

¹ A rule or code that prohibits speaking or divulging information about certain activities, especially the activities of a criminal organization (The Free Dictionary).

manipulating the obligation of discretion, an otherwise laudable principle. Such manipulation often involves the intimidation of officials in order to dissuade them from revealing serious dysfunctions encountered in the course of their civic duties.

By the same token, it is the very commitment to civic duty, instilled in William Bourdon's practice as a lawyer, that has made the dialogue with whistleblowers so natural for one of the authors of this article. All the actions Bourdon has piloted come from this sense of commitment. As President of the Association SHERPA, founded in the 2000s and more recently PPLAAF, founded in 2017, he has tried to find cures for the new forms of impunity stemming from globalization, especially in the fight against corruption.

The case of Hervé Falciani

One whistleblower who came to Bourdon for help was a young computer scientist by the name of Hervé Falciani. He worked at HSBC in Geneva, and he revealed the conditions under which the bank had opened thousands of foreigners' accounts, not out of love for Switzerland, but to escape the scrutiny of their respective tax administrations.

Hervé Falciani's courageous revelations caused a huge scandal, which led to the opening of a criminal procedure in France against HSBC. The bank was charged, as well as its Swiss subsidiary and some of its top managers, with having knowingly, in a tax fraud laundering context, offered its clients services and means to organize the concealment of their assets from the tax authorities, and also for going further by having actively dissuaded some clients to regularize their tax situation, enabling them instead to reinforce the opacity of their assets and reduce the risk of being discovered by the tax administration. HSBC accepted a public interest court agreement to pay a fine of € 300,000,000. This type of agreement was only made possible in France in 2017.

Thus there will not be any public trial of HSBC. And if the size of the fine is exceptional according to French standards, it is a far cry from international standards, particularly those applied in the United States and Great Britain.

Overall, this agreement is a positive outcome in relation to the responsibility of the bank, but Switzerland still refuses to disclose the identities of French citizens holding accounts on its soil. The justification of this refusal is that the French administration has not proven that the localization of these accounts in Switzerland was motivated by morally or legally questionable reasons ...

Notwithstanding the legal steps in the right direction, we have a long way to go before countries like Switzerland and others offer effective and sincere cooperation in the fight against tax evasion.

Hervé Falciani certainly paid a high price for his action. He was arrested and detained in Spain on the basis of a Swiss arrest warrant. William Bourdon had the honor of defending him before the *Audiencia Nacional* in Madrid several years ago, and pleaded for the rejection of this extradition request. Besides strong legal reasons, the Prosecutor General also argued for the same rejection by stating, rightly so, that it would be paradoxical to extradite Hervé Falciani to Switzerland for prosecution and trial, given the immeasurable services he had rendered to European taxpayers ...

He was sentenced to five years' imprisonment by the Swiss court and is still subject to an international arrest warrant. He was arrested again in Spain as late as April 2018, and in a judicial merry-go-round was released again pending trial. It is likely that, again, the Spanish court system will refuse to uphold the senseless judicial harassment from the Swiss authorities.

The fate of Hervé Falciani was not, however, the unluckiest one. Other whistleblowers fell much further, because they were early visionaries who launched themselves without preparation and without anticipation, into a public battle that crushed them. We should not forget these anonymous and unsung heroes, because they were precursors of a dynamic that has today become visible on a global scale.

Antoine Deltour and the shockwaves of Lux Leaks

The stage was now set for Antoine Deltour, a formidable French and European citizen. His revelations dealt a blow to the mechanism of tax

rulings by which Luxembourg managed to siphon off billions of euros from public purses.

With these secret agreements, large multinational companies were invited to locate their headquarters in Luxembourg. In exchange, they got tax agreements with extremely low rates, thus unfairly depriving the multinationals' home countries from receiving public resources.

The revelations of Antoine Deltour were welcomed and his action praised by a large majority of European parliamentarians, officials of the European Commission and politicians of diverse stripes and colors. Thanks to whistleblowers, but also to the actions of civil society actors, public officials increasingly understand and measure the value of seizing upon such revelations. In recent years, due to the financial crisis throughout Europe, an effective fight against tax evasion can be turned into political capital.

The exasperation of citizens and the awareness of public officials have mutually reinforced the need to recover billions of lost euros. The unfair and immoral behavior associated with tax evasion is deemed unacceptable, perhaps because it erodes the trust that democracy needs to exist, and the trust citizens need to have towards their elected officials. It also, dangerously, feeds all manner of populism.

Without Antoine Deltour, the scandal of Lux Leaks would not have caused the shockwave that has led to the creation of parliamentary committees or the adoption of new European directives. Of particular importance, when we now return to the arduous work of securing legal protection for whistleblowers, is the role of regional courts, and in particular the European Court of Human Rights (ECHR).

ECHR: *"The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence."*

William Bourdon, with his Luxembourg colleague and friend Philippe Penning, was able to defend Antoine Deltour through a long judicial procedure. He has now been finally acquitted, in conformity with the European Court of Human Rights' jurisprudence.

According to the ECHR, the protection of whistleblowers is subject to several conditions. It is not sufficient that the object of the revelation be of general interest.

In its first judgment on this issue, *Guja v. Moldova* (ECHR, 12 February 2008, Req., No. 14277/04), the ECHR held that Moldova had violated Article 10 of the European Convention of Human Rights, which also applies to the professional sphere.

Following the dropping of criminal prosecution against policemen suspected of assaulting individuals in the course of an investigation, Jacob Guja, Director of the Press Service of the Moldovan General Prosecutor's Office, sent two letters of judicial origin to the press concerning the conduct of the Vice-President of the Parliament and the inaction of the General Prosecutor. He was dismissed on the grounds that the letters were covered by confidentiality.

The Court had considered "*The importance of the right to freedom of expression on matters of general interest; the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work; the duties and responsibilities of employees towards their employers; and the right of employers to manage their staff*," and ruled that "*The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence*".

From this case onwards, the now well-known six criteria for whistleblower protection were set out and defined (whether or not the applicant had other means of making the disclosure, the public interest in the information disclosed, the authenticity of the information, the harm caused to the entity involved in the disclosure, the good faith of the whistleblower, and the severity of the sanction).

The ECHR subsequently has gone even further, applying these criteria to the case of revelations of irregularities related to secret telephone tapings in the context of the prevention and repression of offenses affecting state security (*ECHR, 8 January 2013, Bucur & Toma v. Romania, application No. 40238/02*).

The ECHR also utilized these criteria in *Heinisch v. Germany* (ECHR, 21 July 2011, Req No. 28274/08) and in *Görmüs v. Turkey*, recalling that "*The disclosure of information in the hands of the state plays a vital role in a democratic society, since it allows civil society to control the activities of the government to which it has entrusted the protection of its interests*" (ECHR, 19 January 2016, Req. §48).

Thus, it emerges from this jurisprudence that the lawfulness or unlawfulness of the information disclosed is not a criterion for the application of the protective status of the whistleblower, nor is the respect or the violation by the whistleblower of his obligation of confidentiality a decisive factor.

In the case of Antoine Deltour, it is through such reasoning, broadly outlined here, that justification was granted to him as he fulfilled all the conditions: disinterestedness, dissemination of exact information, defence of the public interest, proof that it was impossible to act otherwise, and proof that the harm suffered by the civil party PricewaterhouseCoopers, was not equivalent to the benefits resulting from these revelations.

It must be recalled here that PricewaterhouseCoopers claimed it had suffered a loss limited to € 1, a symbolic amount. However, such a low amount was an implicit recognition by PricewaterhouseCoopers of its own turpitude since, as had been demonstrated during the trial, the company's profits had actually never been as high as they had since Antoine Deltour's revelations. This shows again, there is still a long way to go.

The glaring paradox is that Antoine Deltour received the European Citizen Medal and was at the same time unfairly criminalized, ultimately without success, but not without enduring a difficult and lengthy legal procedure.

This paradox speaks volumes in terms of the hybrid perception of whistleblowers. They are becoming saints and heroes to a large majority of the population, while simultaneously being seen as enemies and threats by parts of a worldwide oligarchy. Driven by greed, this oligarchy persists in maintaining its impunity by any means, and in taking many liberties with morality, if not the law. They can also thrive on the philosophical ambiguities of the term "general interest", to which we now turn.

Why whistleblowers need to be protected, a philosophical elaboration

The general interest is traditionally defined in its "utilitarian" conception as the sum of particular interests, and in its "voluntarist" conception as the expression of the general will.

Taken in its “utilitarian” conception, it prioritizes the concerns of an individual. The difficulty is to arbitrate between two individual interests. In its broader “voluntarist” conception, general interest offers the possibility of going beyond the differences between singular individuals to satisfy, in principle, the greatest number of people possible. The risk inherent in such a concept is that agency is placed into the hands of those who govern.

A mistake that is too often made is the attempt to balance the individual interest of the whistleblower against the interest of the company or administration where the revealed behavior has occurred. The equilibrium should rather be sought *outside of this relationship* and apart from any consideration related to the personal interest of the whistleblower. He or she should instead be seen as the mouthpiece of a societal warning, a warning that tends to serve and protect the general interest abused by the practice or situation described.

It is easy to pin down the meaning of the general interest in cases of crime against a person, property or against public confidence in an administration’s probity, such as crimes of corruption or tax fraud. It is also fairly straightforward when the revelation concerns the violation of an international commitment related to human rights, or the protection of the environment, for instance.

In France, the object of the warning is broadly understood. It covers all crimes and offenses without restriction, as well as the notions of “*serious and manifest violation of an international commitment*” and “*threat or harm to the general interest*”, which covers a large number of hypotheses and thus widens the scope of the warning.

Quite traditionally, the text excludes several types of information or documents from the whistleblower’s protection, such as those covered by national defence secrecy, medical secrecy or the confidentiality of relations between a lawyer and his client.

The understanding of the term general interest becomes more complex when it concerns not unlawful behavior that has already occurred, but the threat that it *could* occur. Furthermore, even behavior that is not illegal *stricto sensu*, meaning it is not specifically prohibited by the law, may still be harmful to the general interest, immoral or contrary to ethics – as was the case with the Lux Leaks scandal.

Blowing the whistle in such cases is not impossible. On the contrary, and perhaps more so than in clear-cut legal cases, it is necessary. But the burden then falls onto the whistleblower. He or she must assess whether revealing the immoral but not illegal behavior is in the general interest. He or she must decide what exactly should be revealed, while making sure he or she can claim protective status.

The complexity and burden of this assessment and its heavy potential consequences could and still can dissuade the whistleblower from speaking out.

The lessons learnt for the future: Know thy enemies

It can never be said often enough that even if there is a protective law in the country where the whistleblower wants to disclose his information, it is necessary to assess the civil strength of his or her supporters. When a citizen prepares to go from ordinary to extraordinary, it is decisive for him or her to consult with a technician such as a lawyer, in order to measure possible support from unions, associations or from the media.

Journalists can support those who are about to blow the whistle by invoking the right to protect their sources. But experience has shown that journalists can be under extremely strong pressure – or exert pressure on themselves – in ways that endanger the professional and social life of a whistleblower. Contacting journalists can in some cases run the risk of exposing whistleblowers to legal proceedings.

Since the outbreak of the first whistleblowers fifteen years ago, large movements of solidarity and support for whistleblowers have sprung up around the world. A “house for alerts” has been created in Paris and others are burgeoning throughout Europe. This movement is currently becoming universal, slowly and with some difficulty, but still moving in the right direction.

This new solidarity also requires new responsibilities that must not be underestimated. It is not enough to be indignant, to be competent, and to have the necessary expertise to anticipate political struggles, which are sometimes very complex to decipher and to thwart.

The underlying paradox is that the better the whistleblowers are protected by law, the less they will need to disobey ...

The new law issued in France on 15 September 2017, without being exemplary, offers reasonable protection to whistleblowers in France against their enemies.

There are two types of enemies of the “true” whistleblowers.

The first is obviously the “bad faith” whistleblower, the ones who use virtuous goals to actually conduct vendettas or enact personal revenge. French law will firmly punish such behavior as it is necessary to be extremely vigilant and rigorous, to avoid providing arguments for those who see in the emergence of whistleblowers a society of weasels and back-stabbers.

Good faith is “*the belief that one is exercising a right legitimately, under legal conditions.*” It is important, but not necessarily easy, to distinguish “good” muckrakers – pursuing a salutary goal, from bad ones – content with satisfying the curiosity of the public. The legitimate aim is, and can only be, the protection of the general interest.

This understanding corresponds to the factual reality of the situations whistleblowers encounter as they are rarely all completely “white”. The public alert is often given after several attempts at internal alerts. These may in turn have triggered retaliatory measures or pressures, against which the whistleblower has tried to protect himself with the means – often poor – at his disposal. Attempts to create a balance of power by the whistleblower may be neither prudent nor very effective, given his or her isolation and lack of the means to pursue a complaint, compared with those available to employers or administrations.

The need for protection rather than ill intention often explains the errors of individuals trying to sound the alarm internally. Such errors or missteps alone cannot suffice to obliterate the legitimacy of the goal pursued by the would-be whistleblower.

Anchoring the legitimacy of intention prompts new questions. Does this test require that the whistleblower, at the time of the revelation of the information, is motivated by the intention to act as whistleblower, and solely by this intention? Would any other motivation be acceptable?

In other words, is it possible to condition the protection of the whistleblower to the possibility of probing his soul and heart *a posteriori*, to discover his intentions at the precise moment of the revelation?

Without going as far as answering a definitive yes to these questions, experience shows that it is possible to use a series of external indicators, such as the use of a proportionate means to reveal the information in his possession, to identify whether the whistleblower was acting in good faith or at least, to verify that he was not motivated by bad faith.

In France, the law provides the whistleblower with the benefit of protection only if he has followed a defined procedure. The “alert” must go through various stages and channels of internal denunciation, then to the judicial authorities and finally, as a last resort, through the media.

Although this law has failed to simplify the process for whistleblowers in France, one must admit that it has set up a legal frame of protection that meets the best existing standards, like those applied in Great Britain or in other European countries. Only practice will show how effective this law is.

The judges will have their word to say and their role to play. The definitions of some of the terms in the law are broad and prone to various interpretations. Not everything rests in the hands of the legislator. It is also up to judges to strengthen this move in the right direction and make modern applications of these provisions.

The second enemy of whistleblowers, in the sense laid out in this chapter, is the one who only sees in a revelation an act of nature shedding light on his crime.

Even the best protective law in the world will never prevent major financial players from staying ahead of the game. New technologies, especially digital ones, offer new ways of hiding their activities. It is therefore from the depths of darkness at the heart of the activity of a bank, for instance, that a whistleblower’s action will be decisive.

These opponents of whistleblowers are mobilizing today in Brussels, Washington and elsewhere, as extremely active lobbyists. They are the ones who are behind the attempt, partly defeated, to get European authorities to criminalize the violation of trade secrets and business confidentiality.

Whistleblowers have, in effect, started a much longer battle.

What they have started is nothing less than trying to delay, limit and contain a terrible countdown to the explosive effects of the short-term logic that still feeds the strategy of major financial and economic actors around the world, whatever ethical commitments they espouse on the record.

In this battle, whistleblowers are the indispensable avant-garde of a global citizen movement that refuses to allow those in charge of making wealth and protecting the general interest to only pursue their own private interests.

CHAPTER 8

Whistleblowing on Luxembourg's Tax Practices

Antoine Deltour

Lux Leaks whistleblower

The Lux Leaks case is the name given by the International Consortium of Investigative Journalism (ICIJ) to the revelation, by dozens of media outlets around the world, of tax agreements, implemented by Luxembourg, with major audit firms on behalf of their clients. This case brought to light the extent of aggressive tax optimization at the heart of the European Union. Its media coverage has resulted in strong public outcry and therefore political pressure. The scandal has thus had several repercussions on legal and regulatory frameworks, in particular by speeding up the tax reform agenda in Europe. The case also resulted in legal proceedings in Luxembourg against the two whistleblowers and the journalist who initiated the revelations.

In this article, I will tell the story of this case by showing on the one hand how it questions the opacity of the tax practices of multinationals, and on the other hand by analyzing the conditions for citizens' access to information, which is absolutely necessary for the exercise of democratic control.

The Lux Leaks affair can be understood as a narrow problem, that of the issue, at a given time and by the Luxembourg tax administration, of advance tax agreements (or tax rulings) that are a little too permissive

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and a little too opaque. The case would boil down to the narrative of an administrative practice that has gradually developed under pressure from tax advisors, and with the complicity of policymakers. I will, of course, explain the problems posed by these tax agreements. However, it must be borne in mind that this Luxembourg system is only one illustration, among others, of what can be achieved in an international context that is unfortunately still relevant today.

In a globalized economy, each territory competes with others to attract investment. This competition also includes taxation, since each nation is sovereign in this matter. This leads to a race to the bottom in the name of fiscal attractiveness, and the Luxembourg “tax rulings” are only one manifestation of this. This context benefits mobile taxpayers, multinationals and high net worth individuals to the detriment of others, small businesses and the middle class. In addition to this blatant injustice, the limited capacity of the latter to take on additional burdens also leads to a de facto limitation of the possible scope of public policies.

This contextual reminder being made, we can return in more detail to the practice of tax rulings. This practice has a certain legitimacy because it gives the applicant company legal certainty as to how its often complex operations will be taxed in the future. The administration merely makes an agreement: “Yes, according to the way you present your transactions, we believe that you correctly interpret the tax legislation in force”. To this end, each tax ruling contains very rich and highly confidential information: it presents in detail all the tax optimization mechanisms used by the company. The problem with this arises when the interpretation of the regulatory framework results in a virtual absence of taxation, which is very common in Luxembourg. As an auditor, I worked for a client with an effective tax rate of about 3%. And journalists who surveyed the other documents calculated an effective rate of 0.0156 per cent, or zero.

Another problematic aspect of such rulings is the quasi-industrial scale of this practice. Luxembourg granted several dozen tax rulings per day, all validated by a single civil servant. Most multinationals operating in Europe therefore have a Luxembourg tax ruling. A company that agrees to pay 33% of its income taxes would be at a significant disadvantage compared to competitors who pay virtually nothing by exploiting

all the regulatory loopholes. In addition, a large number of tax-friendly jurisdictions are mentioned in the rulings. The systemic nature of this situation stems from the tax competition environment described above. If the ruling is not in Luxembourg, it is Dutch; if the holding company is not located in the Grand Duchy, it is in Malta or in Ireland, etc.

Finally, the third problem with advance tax rulings is their very high opacity. These documents interpret tax regulations in a creative way, which makes them potentially contentious. The European Commission has opened proceedings against the Luxembourg rulings for Fiat, Amazon, Engie and Mc Donald's. In order to limit litigation risks, the circulation of tax rulings is extremely restricted and regulated. The Lux Leaks trial revealed that PwC, the main audit firm involved in this case, was itself responsible for archiving the rulings, and refused to send a complete copy to the beneficiary clients. The auditors were also instructed not to cooperate with customs authorities in the event of checks being carried out while they were on the move. All these elements are likely to lead employees to question the legitimacy of their employer's activities.

This led me, when I resigned, to extract hundreds of advance tax agreements from my firm in the hope of starting a debate on these practices. A flaw in the firm's otherwise very strict computer procedures made these documents easy to access: I could simply copy/paste. However, the logging of everything that happens on the computer network allowed the company to find traces of my copying two years after the events. I then had to step out of anonymity and take my actions before the courts. The numerous lawsuits and appeals concluded with the recognition by the Luxembourg Supreme Court of the right to whistleblow according to the case law of the European Court of Human Rights. This is an undeniable victory for the right to information, but it is feared that the length of the legal battle may deter other potential whistleblowers, still employed and having scruples about their professional practices. Self-censorship is probably a more powerful barrier to information access than all technical barriers.

The Lux Leaks have had several political repercussions, including an early agreement by all EU member states to automatically exchange information on advance tax rulings. This is a step forward, but the

only tax rulings made public so far are those revealed by the ICIJ. Even the European Commission does not have access to the information exchanged, although it is the only institution that has launched proceedings against these tax practices. Moreover, the effectiveness of this relative transparency depends on the assumption of peer pressure: member states would refrain from undermining their partners' tax revenues too much, since they are informed of this. First, we can doubt the effectiveness of this pressure, since automatic exchange does not really prohibit any tax practice, and each state remains sovereign in tax matters. Second, the very existence of this peer pressure is questionable. Prior to the automatic exchange, the member states already had a fairly general knowledge of the tax practices of their European partners, and a certain hypocrisy can be suspected in their declared willingness to tackle the most damaging practices. The advantageous tax arrangements also benefit their national champions. For example, is Sweden really determined to end the tax systems beneficial to Ikea in the Netherlands, Belgium and Luxembourg?

Fortunately, the tax reform agenda has not yet been exhausted. Particularly worth mentioning is the Common Consolidated Corporate Tax Base. This provision could be effective in combating harmful tax practices in Europe, as it would make it possible to break out of the framework of tax competition between sovereign states. But that is precisely what makes some states still too reluctant. Moreover, such a measure could only be effective for increasing tax revenue if it is accompanied by a framework of tax rates. Here again, political agreement seems far away. In fact, the proposal was made to remove taxation from the unanimity rule, but in order to decide on it, we would need ... a unanimous agreement.

Concerning access to information, the protection granted to whistleblowers can play an important role. This is a very important democratic issue, because without information the people and their representatives cannot exercise their power properly. The protection offered by the European Court of Human Rights is only indirect. Retaliation and exhaustion of all national remedies are often the first steps before being able to gain access to this supranational court. A European directive is therefore needed to strengthen this protection.

In addition, ensuring public access to information would also avoid the risk of whistleblowers endangering themselves. An important measure for transparency, public country-by-country reporting continues to make progress. The text currently in force does not yet make it public, but the European Parliament, which unfortunately does not have the power of initiative, has expressed its support. This measure would make it possible to quickly identify companies and countries that do not play by the rules. However, this would require considerable resources to be able to process very large volumes of information. And it would only be a first step in highlighting the practices that should then be banned or regulated. Public reporting on a country-by-country basis could also have a favorable impact on reputation risk management. Some companies may adopt virtuous practices on their own for fear of scandal. But this is only true for those who have a brand image to preserve, i.e. mainly “B to C” companies that target consumers directly.

In conclusion, the succession of tax scandals involving whistleblowers and journalists has the great merit of fueling public debate and increasing the pressure on political and economic leaders. But there is also the danger of creating a feeling of weariness or even despair. The repetitive nature of the scandals shows that none of them have given rise to an adequate response. And this inertia to implement effective solutions can eventually turn into a misdirected revolt and, for example, into populist votes. The lack of ambition in the responses to Lux Leaks, the slowness of European reforms and the complexity of the OECD's plans, whose limits have been shown by the Paradise Papers, raise doubts that international cooperation is really putting an end to harmful tax practices. The fundamental problem is that of an inequitable scale: economic actors are global, but no political body is large enough to impose rules and limits. I interpret the Lux Leaks case as only one example of the threat that liberal globalization poses to democratic sovereignty. I believe that the best solution is to develop a more local economy, whose scale makes it possible to understand all the consequences, and which would also have the merit of being more resilient to future shocks.

CHAPTER 9

Being a Whistleblower

Raphaël Halet

Lux Leaks whistleblower

This is one of the biggest financial scandals Europe has ever known. A gigantic system of tax evasion was set up by powerful multinationals with the complicity of audit firms and the Luxembourg state. Hundreds of billions of euros have for years escaped the coffers of dozens of countries, including France.

The Lux Leaks affair broke out in 2012 thanks to a whistleblower who sent the French press the famous “tax rulings”, the tax agreements made between Luxembourg and giant companies like Apple, Amazon or Arce-
lor. But two years later, the scandal took on another dimension.

Thanks to new leaks, Lux Leaks are in the headlines of all major international media. Luxembourg is under intense pressure, and Jean-Claude Juncker, prime minister at the time of the agreements, is forced to justify himself. The eyes of the whole world are focused on the Grand Duchy. Because of the scale of the revelations, Europe goes as far as to introduce measures to reduce the tax avoidance techniques that some multinationals have until now benefited from.

Behind this rebound, a new whistleblower: my name is Raphaël Halet.

Unlike the first whistleblower, I have never made the headlines. Unlike him, I did not benefit from any support movement or any major financial assistance. And finally, unlike him, I received no public recognition, no

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citizen's prize for having sacrificed my personal welfare for the common good ...

Yet for two years I have lived a real thriller, a story worthy of a spy novel. It was the tale of a simple employee who chooses to stand up to his company, one of the most powerful in the world, despite threats and intimidation. The story of a father trapped in a hellish machinery, and who risks losing everything, his wife and two children, his job, his home ... I was a man alone, without means, faced with the errors and iniquities of French and Luxembourg justice. Fired by my employer, sentenced thrice despite my status as whistleblower, I today deliver my testimony: that of an ordinary citizen who, against all odds, has become "an extraordinary whistleblower", as one lawyer called me.

Initially, nothing predisposed me to become a symbol of the fight against tax evasion. As an adult, I made a living by doing odd jobs, until the day when luck finally seemed to smile. PwC, the world's leading consulting firm, a multinational company with more than 200,000 employees, well known to governments and major corporations, offered me an administrative position. The job was not really prestigious, but it carried an unlimited contract. Another world, a new life. I seized the opportunity and became a model employee. Although I only had a junior position, I worked in a strategic department where I could see all the tax documents established by PwC for their clients.

This is ultra-sensitive data that I will understand the scope of in May 2012, during a broadcast of the report "Cash Investigation" devoted to revelations. It's the day when everything changes. The documents presented as proof of tax evasion are the documents I handle every day. Now they are like fire in my hands. If I do nothing, I am complicit in this system of tax evasion; if I react, I put my future, and especially that of my family, at risk. I cannot continue without doing anything.

After a few months, they unmask me. Thus the nightmare begins. A bailiff, HRD and Price's legal director, a locksmith, an IT expert and policemen come to my home. The bailiff explains that they are there on the order of the French court to seize all my computer equipment. But how could Justice leave the audit firm, a private company acting as a public service? Why does she not protect me against my employer?

In studying the complaint against X filed by PwC, the French judge in charge of examining the file actually makes a serious mistake: she forgets to consider me a whistleblower. If she had done so, I could have benefited from the provisions of the Code of Criminal Procedure and the ECHR jurisprudence concerning the secrecy of sources and their protection. But without official recognition of this status, I am a mere employee who has stolen and made public confidential documents. This is an inexplicable mistake that will cost me a lot, because now I (and my family) am in the hands of my employer, alone before a foreign multinational willing to do anything to quash the scandal.

After several intimidation attempts, I must agree to sign a confidentiality agreement in exchange for the promise of not being sued. But if I breach this agreement, I will have to pay 10 million euros, give my house to PwC and be sued by PwC. From this day on, my wife and I must remain in complete silence.

Two years later, it is time for the trial before the Luxembourg courts. On the dock are the first whistleblower, as well as the journalist Edouard Perrin, and more surprising still, me. During the investigation a few months earlier, the other whistleblower had denounced me as the other employee of PwC who transmitted confidential documents to the press.

Though I had hoped to escape unscathed, I was finally summoned by the judges and indicted. However, everyone is still unaware that I am subject to a confidentiality agreement. If I speak, I lose everything. In order to escape, I will have to change my story. During the investigation, I did indeed tell the judges that it was actually Edouard Perrin who contacted me to try to extract confidential documents from me against my will. So, on the first day of the trial, the entire hearing depends on what some call “this very mysterious accused”.

That day, in front of the judges, in front the representatives of PwC who threatened me, in front of their lawyers and hundreds of journalists, I will change everything. And cause an earthquake without equivalent in the opaque universe of tax evasion.

I was sentenced in the first instance to a six-month suspended prison sentence and €1000 fine, then only €1000 on appeal, a verdict which the Luxembourg Court of Cassation has just confirmed. I am preparing an

appeal to the ECHR to sue Luxembourg. The support around me is essentially composed of anonymous citizens who made donations online and on www.luxleaks.fr to finance our legal fees.

I have had to sell my car and borrow a lot of money. Some NGOs helped me towards specific public interventions (debates, conferences, etc.). The vast majority of politicians, NGOs, political parties, etc. have not gone beyond statements of public support at the time of the trial, without ever taking concrete action. In short, I am almost alone in this fight.

In its judgment, the Court of Appeal writes: “The tax returns submitted by Raphaël Halet only confirm the result of the journalistic investigation conducted by the team of Edouard Perrin. They were certainly useful to the journalist, but they do not provide any cardinal information previously unknown to revive or feed the debate on tax evasion.” In a peremptory manner, the judges minimized the value of the information transmitted during the second investigation. In their view, the public debate was launched and the information and documents submitted were not relevant for the continuation of this debate. Nevertheless, the ECHR and the European Commission affirmed the contrary: it was absolutely necessary ...

Thanks to my revelations, the European Commission found that Luxembourg gave illegal tax benefits to Amazon worth around €250 million. Apple (€13 billion), Ikea (€1billion) and dozens of companies are also being sued by Margrethe Vestager. Pressure from public opinion on European politicians is also still there as people do not understand their austerity politics despite the mountains of money tax-exempted by multinationals. There remains much needed information that is still not available, for example other tax rulings granted to multinationals by Luxembourg and other European countries.

From now on information is exchanged between national tax administrations but not made public. States must take responsibility and tackle the black holes in global finance, which are tax havens. For this, nothing is more effective than a blacklist: provided it is credible, on the one hand, and accompanied by really dissuasive sanctions, on the other. The first condition can only be met by establishing objective and relevant criteria, such as proposing ridiculously low effective tax rates or providing

tax benefits to non-residents. A share of foreign capital disproportionate to the size of the national economy must also be a determining factor. In addition, it is essential that the country's assessment process is fully transparent – otherwise suspicion of political-diplomatic arrangements cannot be ruled out. Finally, all countries must be evaluated in the same way, including the member states of the European Union.

The current blacklist of the EU, including only nine countries, without Luxembourg or Ireland or any of the notorious tax havens like Qatar or Singapore, is a joke. The second condition requires effective and common sanctions at the European level. Tax havens have been stealing our public finances for too long already. Possible sanctions include the prohibition for banks to operate in these jurisdictions, the suspension of any program of aid or subsidy to these countries, or the prohibition for companies operating there to access public markets. Let us also take the necessary steps to tax the profits that escape. Greater transparency and better exchange of information are essential.

Intermediaries such as banks or law firms must be forced to disclose to the authorities the tax arrangements they establish on behalf of their clients. We must adopt “country-by-country public reporting”, obliging the multinationals to publish the taxes they pay in each of the countries in which they operate – a proposal unfortunately blocked by the European governments. This is essential to facilitate prosecution and increase the resources dedicated to the fight against this scourge. The decline in specialized police and legal staffing is inexplicable.

Becoming a whistleblower disrupts your life: your family, your professional life, your finances, your health. The fight is long and difficult. The early supporters move away over time, the media moves on. Only suffering and daily difficulties remain. When we launch an alert we must first prepare for what will follow next, hence the need for long-term national or official European support. Finally, it is necessary for the courts, the French government and European public opinion to recognize that an ordinary citizen like me has become, despite myself, an “extraordinary whistleblower”.

CHAPTER 10

What Tools Can States Use When Faced with Systematic Tax Avoidance?

Frian Aarsnes

State Authorized Public Accountant, Norway

The time has come

The tools are there – it is only a question of starting to use them

Tax avoidance arises where national tax law meets multinational companies. National tax law is designed for national companies. For that very reason, and for a long time, national states have seemed unable to handle the issues arising from the behavior of multinational companies. Today, however, the time for excuses has come to an end. This chapter presents some of the key tools, informed by research, that can be used unilaterally by states to reduce tax avoidance to a minimum. Put simply, if states individually or collectively use the toolbox, they can handle almost all the issues in international taxation identified today.

The corporate veil

The corporate veil is a legal expression for the concept that a shareholder cannot be held accountable for what a corporation does. The shareholder

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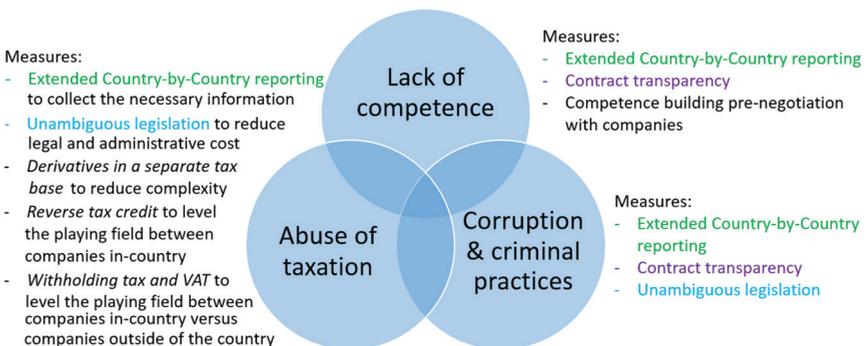
cannot see through that veil, and hence cannot be held responsible for the actions of the corporation. This has penetrated legal thinking to such a degree that the actions of subsidiaries are in most cases viewed as separate from their parent affiliation, which is taking the corporate veil into the absurd. This would compare to viewing the actions of an octopus arm as separate from the octopus itself. When Company A is shareholder in Company B, and the management of Company A has done something to, in or through Company B, it is the management of Company A and Company A itself that needs to accept the consequences of what was done to, in or through Company B.

The undertaking

My own research on the tools that states can use to unveil tax avoidance and capital flight started in 2007, was formalized in 2011 and completed in 2018. The findings suggest that more than 95% of the loss of tax base that countries experience is covered by 6 areas of tax abuse, 2 areas of criminal activity, and 1 area of lack of competence. The results are summarized graphically below.

The results

The 6+2+1 areas can be split into 3 segments with overlapping measures:



Source: Frian Aarsnes, 2018.

The 6+2+1 areas can, as I will show in my subsequent explanation of the results, be seen as the main causes of capital flight. The take home message from the reports summarizing my research is that it is actually fairly easy to fix most of the problems, *if states only use the tools they have at their disposal*. But heavy lobbying deliberately confuses the matter, by redirecting the focus of governments in the direction of mechanisms that are obviously difficult, obviously unfair or obviously demand collective actions by a large number of countries. The goal of the lobbying is equally obvious – to keep attention away from the easy fixes that work as long as lobbying does not succeed in destroying them. Somebody is bound to want to dull the tools in the toolbox for fighting the battle against capital flight.

The results explained: Lack of competence

Lack of competence is a major cause of capital flight. As an example, many of the largest natural resources are found early in the opening up and early exploration phase in a region. This is the period when countries are most vulnerable. Officials negotiating deals with the extractive industry companies often lack information and competence relating to the resources in question, in the early stages. Most of the relevant legislation is missing or is massively inadequate. The outcome is almost always that the country in question does not get its fair share, the contracts are non-renegotiable and the normal control mechanisms with respect to the right of the government to control physical production and conduct tax audits, environmental audits and human rights audits are not in place. In a negotiation, which can be compared to a fight between a heavyweight and a lightweight, industry often “wins” over government and the result is, by default, very weak contracts.

Three measures can greatly enhance countries’ ability to turn the odds in their favor:

- Extended country-by-country reporting, i.e. reporting of taxes in their natural context of revenues, cost, employees and other key numbers, will give governments the necessary information about the companies they are about to engage in negotiations.

- Contract transparency will mean that governments will have insight into similar contracts which will greatly help the government avoid bad deals.
- Increasing the knowledge and the competence of the negotiation team pre-negotiation is vital, including hiring experienced external negotiators and legal and economic resources as part of the negotiation team, either directly or as back office.

The results explained: Corruption and criminal practices

Corruption and criminal practices is another major cause of capital flight. In addition to the obvious laws against these criminal activities, it is also necessary to limit the ability to engage in corruption and criminal practices. Information in the public domain is key here.

Three measures would greatly enhance the work against corruption and criminal practices, two of them overlap with measures against lack of competence and two of them overlap with measures against tax abuse:

- Extended country-by-country reporting allows insight into how revenues, costs and taxes are distributed across countries within multinational corporations, and thus provides the necessary information as to whether companies are desirable partners in opening up new extractive sectors in a country.
- Contract transparency pre-signature would make it much more difficult to corrupt members of the negotiation team, members of ministerial decision processes and key public and political figures.
- Many of the corruption and criminal practices are opportunity-driven, i.e. circumstances allow these actions to be done with little probability of being caught, often in areas where the law is unclear. Unambiguous legislation is – in addition to transparency – therefore a must in order to limit the opportunity for corruption and criminal practices. Many companies and people say that they have followed the letter of the law. This often means that they have interpreted the laws in their favor. Reducing the room for interpretation by creating

clear and unambiguous laws would greatly limit the opportunity and willingness to circumvent the legislation of a country.

There are of course many other actions that can and should be taken against corruption and criminal practices, but it is important to emphasize that the three measures suggested above will work as part of a complete system that limits the opportunity for embarking upon such practices.

The results explained: Abuse of taxation

Abuse of taxation is the third major cause of capital flight. Whether one is talking about illegal tax evasion or supposedly legal tax avoidance is mostly academic. The point is that tax laws are made with national companies in mind, while the multinational companies operate in a room where several sets of legislation meet. Hence, we have large, unregulated areas, areas which overlap and fixes that do not solve the underlying problem of a complete, fully orchestrated and optimally calibrated taxation of multinational companies on a par with national companies, so that the competition among companies is as much as possible unaffected by the taxes in any particular country.

Here too information, through extended country-by-country reporting, is a sine qua non in order to see what is going on within each multinational company. Without knowing what is going on, it is also difficult to see whether measures introduced effectively change the capital flight picture or not. This is also important in order to avoid taxation of multinational companies over and beyond taxation of national companies.

While unambiguity is a must in any law, it is absolutely critical in tax law. Without unambiguous legislation the tax field is wide open to interpretation, complicated tax cases and unequal treatment of companies.

In addition, along with transparency and unambiguous legislation, there are three measures that are very important to curb the capital flight resulting from tax abuse:

- It is absolutely critical to move derivatives and derivative elements into a separate tax base in order to reduce the complexity of taxation.

Moving derivatives into a separate tax base will allow companies to do hedging, as the economic expectation of hedging is zero or slightly positive over longer periods of time, but it will not be possible to utilize a country's tax system for speculative use of derivatives where losses are placed in a country in order to create tax deductions while revenues are placed in low- or no-tax jurisdictions.

- In order to ensure that national companies and subsidiaries of multinational companies are competitive on the same level, i.e. unaffected by any differences in taxation between countries, it is important to negate the effect multinational companies have by organizing part of their activities in low- or no-tax jurisdictions. This can be done by utilizing the same principle that is used to avoid double taxation – tax credits. By reversing the tax credit principle, the deductibility of internal cross-border cost transactions can be reduced, so that the taxation of the subsidiary of the multinational company is returned to what it would have been if it were a national company. This mechanism follows the OECD's suggestion of regulating cost deductions in the internal law of each country.
- Last but not least, it is important to make sure that companies organized so that revenues are collected in another country than where the buyer is (including digital business models), do not gain a competitive advantage in comparison with the taxation of profits of national companies and subsidiaries of multinational companies (when reverse credit is used on the subsidiary's internal cross-border cost transactions). It is therefore necessary to tax cross-border revenue transactions on a par with the taxation that companies would have had if they had a sales operation inside the country in question. Because the main taxation of the national company and the multinational subsidiary is the VAT towards end-user and profit taxes, it is important that the taxation emulates this taxation. With VAT it is easy; you only have to put VAT on the cross-border revenue transaction. The easiest way to emulate the profit taxes is to put withholding tax on the cross-border revenue transaction. These two taxes are very precise as they are only put on the actual transactions, instead of trying to tax the

corporation. The organization of the collection of these taxes is that it is the end-user/buyer in Norway that pays both of these tax elements; if the buyer is an end-user, he or she pays both the withholding tax and the VAT, if the buyer is a company there is no VAT as that would have been deductible anyway so the payment is only the withholding tax. This can in today's digital society easily be regulated by having the bank or credit card company deduct from the account or credit card the withholding tax and the VAT when a payment goes abroad.

As almost all capital flight is connected to derivatives, cross-border cost transactions or cross-border revenue transactions, it is expected that these measures – extended country-by-country reporting, unambiguous legislation and the outlined tax measures – will capture and tax 95% or more of the capital flight. It will also ensure that today's negative spiral of tax competition between countries will effectively end, and countries will be able to reduce taxes due to a broader tax base.

How the measures work in combination

There is no single silver bullet to kill capital flight. An orchestrated and coordinated effort is needed in order to achieve any desired goals in restricting capital flight and protecting the tax base of each country.

The background for identifying the measures, or policy recommendations, is a careful weighing of existing fiscal mechanisms up against each other in order to see which mechanisms will likely result in the greatest reduction in untaxed capital flight (once the capital flight is taxed, it is not capital flight anymore, but rather the equivalent of moving taxed funds cross-border between affiliated entities).

Weighing up the evidence, the analysis identified the following measures against untaxed capital flight on top:

- (1) transparency,
- (2) competence building,
- (3) unambiguous legislation and

- (4) three simple, but extremely efficient fiscal mechanisms: i. separate the taxation of derivatives from the regular tax base of businesses in order to reduce complexity; ii. utilize reverse tax credit against cost transactions across borders (into the country); and iii. utilize withholding tax and VAT against revenue transactions across borders (out of the country) in order to level the playing field between national and multinational companies.

Again, it is important to emphasize that the policy measures recommended create an orchestrated system, which should be introduced as a comprehensive package in order to avoid loopholes that can be utilized to keep the untaxed capital flights from flowing.

Transparency: Extended country-by-country reporting (ECBCR)

Extended country-by-country reporting should report key financial numbers in addition to the publishing of taxes paid country-by-country. It is fully possible to demand more, but reporting less than the key financial numbers below for all countries will result in some sort of information failure (depending on which key financial number(s) is/are not reported):

Employees should be reported in order to measure the human capital going into the operations in a country, in addition to the financial capital employed. Employees should be reported as FTE's (full time employee conversion) in order to secure parity among all countries, and that the cumulative number of employees should match the employees reported for the group in FTE's.

Investments are the financial capital employed for the operations. Together with the human capital, they represent a measure of the effort put into the country. The investments should be reported, as all key financial numbers, in the company's functional currency, so that it can be aggregated immediately across the reported countries and compared to the investments reported in the financial statements.

Production is a key number by which it is possible to greatly improve global production and origin statistics. Production should be reported for each bulk

commodity produced. By bulk commodity we understand every commodity that is sold based on volumetric standards only (tons, barrels, cubic meters, cubic feet, kilos, ounces, grams, etc.). A unified standard should be agreed upon, so that companies always report the same commodity in the same units.

Revenues and *costs* are vital in order to know the economic outcome of yearly operations. Without *both* these numbers it is difficult to assess the operations in conjunction with employees, investments and production. It is very important that all key financial numbers (investments, revenues, costs) are reported pre-elimination, i.e. as the numbers are for each country. Eliminations should be reported as a separate “country” in order to be able to arrive at the reported financial numbers when aggregating the country-by-country numbers.

Accrued taxes in the profit and loss statement and *payable taxes 1.1 and 31.12* in the balance sheet show the connection between the financial statement numbers and the *taxes paid* reported under the country-by-country reporting of taxes: payable taxes 1.1. + accrued taxes for the year – payable taxes 31.12 = taxes paid.

It is possible that companies will have to combine several accounts to arrive at accrued taxes in the profit and loss statement and likewise to arrive at payable taxes 1.1 and 31.12. The important thing is to show how financial numbers agree with paid taxes.

Transparency: Contract transparency

Contract confidentiality only benefits the companies, which have the most information to begin with. Contract transparency will transfer a lot of knowledge from companies to governments, thus ensuring that governments start negotiations with less of a disadvantage. Furthermore, it is important that each country in a negotiation with an extractive company or a large multinational company engage competent personnel, particularly when it comes to negotiating skills, legal and economic skills. Without such support, and being at an information disadvantage vis-a-vis the company, the likely outcome may be another bad deal.

Competence building

Countries with non-renewable or renewable resources need to ensure that they have the necessary skill sets to engage in broad scale petroleum or mining activities. Such activities nowadays are high-tech and capital intensive. It is very important that the country is able to match the companies with enough technical and economic resources, and in advance of developing new sectors one should seek to initiate education programs at the universities(y) of the countries(y) in question.

Unambiguous legislation

It is not only tax law that needs to be unambiguous; the same is the case with competition law, accounting law, business law, bank laws, etc. If one discovers that the country's legislative system may not be up to the task of handling extractive industries, the whole judicial framework should be reassessed.

Taxation: Derivatives in a separate tax base

Many companies have internal contracts similar to derivative contracts or which at least include derivative elements. These elements should be seen as a separate business with its own contract clauses, its own accountants and its own decision-making processes, and it is thus important to treat them distinctly from the rest of the business. This is because derivatives can be combined with any other type of transaction or other derivative to create virtually anything. Segregating them into a separate tax base ensures that the company only engages in healthy derivative activities. If not, the desire to use derivatives to "save" taxes may become irresistible.

Taxation: Reverse tax credit

The reverse tax credit method can be enacted unilaterally in a country's tax system, the same way as the tax credit method is enacted in a country's tax system, or agreed upon in a tax treaty. The reverse tax credit method does not need to be included in tax treaties, though, and does not

affect existing tax treaties as it only applies to the deductibility of costs according to the internal tax code in a country. The method also applies on globally available information, and is thus not dependent on lifting the corporate veil.

The reverse tax credit method is a method which unilaterally takes care of adjusting the effects of a cost base that is disproportionate to the revenue base in a country. The reverse tax credit method is an alternative to adjusting the revenue up to match actual sales to the market in-country. However, adjusting the revenue would be in potential conflict with tax treaties on the taxation of revenues between countries. Today tax authorities have very little information about what goes on in the various parts of multinational companies. Most of the information that tax authorities collect or are given through automatic information exchange agreements is about individual citizens, not multinational companies. The reverse tax credit method allows tax authorities to perform a theoretically correct taxation of a multinational company/subsidiary without having to speculate on what is happening in low-tax or no-tax jurisdictions. The multinational company/subsidiary is given the benefit of the average tax rate that the multinational company already has. A company that is thus more aggressive in their approach to reducing taxes, is then simultaneously and automatically reducing the tax rate applied to cross-border cost transactions and non-transactional cash flows. The reverse tax credit principle would utilize an auditor approved, globally consolidated financial statement, but in case of the lack of such, it is possible to set the tax as low as zero until the corporation provides the necessary documentation needed to secure the correct tax deduction for internal cross-border cost transactions.

Taxation: Withholding taxes and VAT

It is important that the withholding tax is set at a level which creates equal competitive conditions between national companies/subsidiaries of international companies and companies that have their entire business outside the borders of the country in question. The reason for this is that the withholding tax level is not set for purely tax purposes as is the case

for internal tax law, but rather to secure level competition between all companies. This is thus a method by which transactions cross-border are made on a par with transactions in-country. It is thus important that the withholding tax and VAT are paid by the buyer in-country, and are not deducted from the amount paid to the seller outside the country. This ensures that the withholding tax and VAT do not introduce price distortions between countries and helps promote equal competition in-country.

Calibration of taxes

It is important to calibrate the taxes in a tax system to avoid situations with taxes too high for a company when conditions are challenging for the company, or situations which produce less than intended taxes when conditions are favorable for the company.

It is of particular importance to ensure that one chooses the correct withholding tax mechanism and that it is graded to ensure equal treatment of companies depending on the taxation in the opposite country.

Just do it!

Countries need to know that mechanisms to curb capital flight and erosion of the tax base exist. The good thing is that none of these mechanisms need agreement among a large group of nations in order to be implemented. All of them can be implemented unilaterally, and if implemented by all countries, the result would be almost equal to unitary taxation, only more precise as both the reverse tax credit and the withholding tax/VAT approach to taxation of cross-border transactions are surgically correct as they *only* address the transactions that cross the national border.

References and Reading Guide

The background for identifying the problem areas of capital flight comes from nearly 30 years of experience in auditing, extractive industries, as well as international consulting.

The background for identifying the measures, or policy recommendations, is a careful weighing of existing fiscal mechanisms up against each other in order to see which mechanisms would result in the greatest reduction of capital flight.

The policy recommendations and the reasoning behind these are summarized in the following reports published on the webpages of Publish What You Pay Norway (<http://www.publishwhatyoupay.no/nb/publications>). The interested reader will also find all the references to the relevant literature underpinning this article:

TRANSPARENCY:

- o Murphy, R. (2013, November). *An extended country-by-country reporting standard. A policy proposal to the EU. Volume 2*, F. Aarsnes (Ed.), Publish What You Pay Norway.

The report explains the full reasoning behind why country-by-country reporting of paid taxes alone is not enough. Paid taxes need to be reported together with key financial numbers – employees, investments, production, revenues, costs, accrued taxes and payable taxes 1.1 and 31.12 – that put the paid taxes into the correct context.

- o Aarsnes, F. (2014, December). *Transparency agreement: A tool for multinational transactions*. Publish What You Pay Norway.

The report gives a clear picture of the 4 main transparency mechanisms for the 3 main levels needed:

Level 1: Industry vs. government → EITI and contract transparency

Level 2: Company vs. investor and society → extended CBCR and contract transparency

Level 3: Company vs. tax authority → transparency agreement

TAXATION:

- o Aarsnes, F. (2011, December). *Protection from derivative abuse*. Publish What You Pay Norway.

The report shows how important it is to split derivatives and similar transactions into a separate tax base, separate from ordinary business profits. The report discusses the separation method (simple) versus the substitution method (complex).

- o Aarsnes, F. (2017, May). *Taking away the tax effect of tax havens. Cross-border taxation methods and reverse tax credit*. Publish What You Pay Norway.

The report gives the main reasoning behind both reverse tax credit for use on cost transactions cross-border (into the country) and the use of withholding tax and VAT on revenue transactions cross-border (out of the country).

- o Aarsnes, F. (2017, December). *The roller-coaster mechanism in the world economy. Mark-to-Market and transactions outside the market*. Publish What You Pay Norway.

The report, particularly chapter 5, explains why one needs different taxation models for the following situations:

- Fully national companies
- Partly national companies – subsidiaries of multinational companies
- Only employees nationally
- No national elements
- Special attention: derivative contracts

The report also describes how making fair value adjustments under IFRS part of a segregated part of the equity, which cannot be used for dividends, would protect companies against future financial crises in the world economy.

- o Aarsnes, F. (2013, November). *A guide to optimal resource taxation. The case for windfall taxes*. Publish What You Pay Norway.

The report introduces the Quadrant-Cross, an instrument that can be used to analyze the efficiency and optimal calibration of taxation systems, particularly in extractive industries. However, many of the principles can also be fruitfully used in analyzing other production industries.

Part II: Peer-Reviewed Chapters

CHAPTER 11

Combating Corruption: Investigative Journalists on the Frontlines

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Abstract: Around the world, journalists uncover corruption, abuse of power, and financial misdealing – often at the risk of serious consequences or under financial constraints. These are also important issues in economic research. Economists address similar problems from a different perspective, and offer logical explanations for the factors that enable a risk of corruption, its harmful impact on society, and why governments fail to enforce their anti-corruption laws. Below we discuss some of the problems of corruption and how investigative journalism contributes to controlling it. We are interested in what the disciplines of journalism and economics can learn from each other. The more authoritarian leaders weaken integrity standards in governance, the more financial secrecy providers facilitate grand scale crime; and the more barriers there are for journalists who seek to disclose misdealing, the more important it is to join forces across countries and across disciplines.

Keywords: corruption, economics, law enforcement, democracy

Introduction

While one indicator of a country's democratic performance is how it treats its media and journalists, one indicator of the quality of the media and journalists is their ability to investigate and reveal wrongdoing and

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its consequences for society. In this chapter, we address the role and impact of journalism in exposing and curbing cases of corruption, abuse of power and financial misdealing, and discuss what journalists and economists can learn from each other.

Journalists are on the frontlines of combating corruption. Although acting against corruption and fraud does not always require public exposure of the misconduct, it often does: cases must be discovered, and facts must be brought out in the open. People involved in corruption must be induced to tell what they know – and what they know can then be used to induce others to provide further information. The investigative methods of journalists, and their ability to publicize the findings of an ongoing investigation, are well suited to this task.

When other integrity mechanisms fail, journalists can often bring to light misconduct rooted in greed and political deceit. Sometimes their investigations uncover fraud in places where it is not expected – as when journalist Siri Gedde-Dahl and her colleagues documented systematic fraud in the Water Administration of Ringerike outside Oslo in low-corruption Norway. In other cases, journalists investigate wrongdoing in places where it might be expected, but where it is considered difficult or dangerous to probe too deeply – for example, because powerful players profit from misdealing and protect corrupt practices by all available means. For instance, it is a well-established fact that corruption is rampant in some resource-rich and conflict-ridden countries. To hold perpetrators accountable, however, we need more than general patterns of corruption and allegations that are probably true. We need the facts – about who is involved, how they commit crime, and who condones the practice – to enable and encourage stakeholders on the national and international levels to act.

Tom Burgis, a former Africa correspondent for the *Financial Times*, has done exactly that, exploring how corrupt elites together with powerful international corporations – from the biggest mining company, BHP Billiton, to one of the largest oil companies, Royal Dutch Shell – exploit resource-rich countries throughout the African continent. His 2016 book, *The Looting Machine*, shows that legitimate businesses cannot thrive when political elites are corrupt, and likewise that honest elites cannot

thrive when international corporations are willing to pay bribes.¹ Corrupt politicians and corporations, which are willing to be part of the schemes, crowd out the accountable and honest ones, with grave consequences for the great majority of citizens.

Misconduct is also rampant in conflict-ridden countries such as Colombia. To hold wrongdoers accountable, somebody has to tell the truth about the many-sided confrontations that involve governments, landowners, urban elites, leftist guerillas, and rightist paramilitaries. Whom do you trust when politicians and governments are so corrupt that they even corrupt drug deals? To whom can you report corruption when the media are dominated by the interests of the urban elites and become part of the conflict? A few independent investigative journalists in Colombia have been almost alone in providing impartial reporting that seeks to make sense of the chaos of violence, kidnappings, drugs, and corruption. Among them is Juanita León, who was a reporter for the *Wall Street Journal* before returning to her native Colombia in 1998. Much of her work is summed up in the book *Country of Bullets: Chronicles of War*,² which spares no one in its coverage of misdeeds by the paramilitaries, the government, and the guerrillas. It shows how the drug trade, illegal mining and kidnappings financed the civil war in Colombia, and describes the consequences for ordinary citizens who are victims of brute violence, and who nevertheless contribute to civic resistance against the brutality.

Investigative journalism has also played a key role in disclosing rampant corruption in the global arms trade. In fact, while trade in weapons constitutes only one-half of one percent of the total value of international trade, there are reasons to believe that a much larger share of corrupt transactions takes place in this sector.³ Therefore, the need to document the “who and how” of corruption in the arms trade is particularly pressing. Such work is complicated by the secrecy surrounding many deals in the defense sector – they are exempt from laws on access to

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- 1 Burgis (2016). Shaxson (2007) also documents grave cases of corruption and power abuse in the international oil sector.
 - 2 León (2009). First published in Spanish in 2005, translated to English in 2009.
 - 3 Joe Roeber (2005) suggests that 40 percent of corruption in international trade stems from the arms trade. Such estimates are of course highly uncertain.

information – and by mixtures of politics and commercial interests that blur the line between the legal and the illegal or unethical. Andrew Feinstein shows in his book *The Shadow World: Inside the Global Arms Trade* that this kind of research is nevertheless possible.⁴ The book documents many corrupt deals in the international arms business and explains who is involved – including, for example, Europe’s largest defense sector corporation, BAE Systems, and the United Kingdom’s former prime minister, Tony Blair.

These stories are noteworthy because they cannot be taken for granted, a fact highlighted by Dean Starkman’s book from 2014 *The Watchdog That Didn’t Bark*. The title refers to the recent shortcomings of the business press in the United States – and perhaps everywhere – in critically covering the fraud that caused the financial crisis. Starkman explains how the number of investigative journalists in finance was in free fall prior to the crisis, and how business journalists were driven by misplaced emphasis “tilted toward personality-driven stories, not deconstructing balance sheets or figuring out risks. Stocks were the focus, when problems were brewing in derivatives” (p. 251).

When journalists do carry out critical investigations, however, they exercise what we might call *obstructive power* aimed at power abuse and crime. Detecting fraud through journalistic research is one part of this power, and shaping public opinion by exposing the wrongdoing is another. Journalists play a key role in generating the moral shame associated with involvement in corruption and wrongdoing. Hence, present campaigns by some public officials against the press in the United States and other countries, casting aspersions such as “fake news,” are intended in part to undermine the media’s role in exposing wrongdoing, and to curb the pressure for political accountability.

In this chapter, we consider investigative journalism through the lens of our own discipline – economics. We highlight the complementarity of the two. From our perspective, investigative journalism has a healthy priority of case-based presentation. Economic research in academia, by contrast, seeks to identify patterns across cases, trying to make causal

4 Feinstein (2011).

inferences based on theory and statistical evidence. Both fields might be strengthened by learning from each other.

We focus the chapter on the problem of corruption, which we define as the misuse of power for personal gain. Corruption deserves special attention because it implies collusion among the powerful at the expense of society – and often it is the root cause of fraud, income inequality, violence and even war. Many cases uncovered by journalists have involved decision makers in government or other sectors who take bribes; yet journalists have also investigated higher level and complex forms of collusion that go far beyond simple definitions of bribery. Coverage of such cases is more than the documentation of rule violation: in many cases, it means the exposure of structural challenges that allow power abuse and threaten democratic institutions.

Corruption is important because of its consequences, not because of legal definitions or because famous individuals are involved. Economics offers logical explanations for the factors that enable a risk of corruption, its harmful impact on society, and why governments fail to enforce their anti-corruption laws. While cases presented by journalists inspire and enrich economic research, we also believe that learning across disciplines might strengthen journalists' coverage of structural and other complex challenges, and make these accounts appealing regardless of the names and drama that are normally believed to attract readers.

In their daily work, many journalists face serious constraints, including attempts to intimidate or silence reporters and their sources, as well as the effects of economic pressure on the news media industry. As various forms of authoritarian government take hold around the globe and curtail freedom of the press, promoting and protecting journalists' ability to investigate corruption and publish their findings becomes ever more important and in need of support.

The risk and consequences of corruption

In 1996, in a landmark speech, World Bank President James Wolfensohn referred to the “cancer of corruption” and the threat it poses to society

and development.⁵ Is this a reasonable metaphor? Why is corruption a cancer, when favors for friends, aggressive marketing or lobbying seem acceptable in most cases? What factors affect the risk of corruption, and why are anti-corruption laws, regulations, and institutions not sufficient to eliminate corrupt practices?

Corruption is important because of its consequences

Many of those who write about corruption do so without much discussion of the consequences, as if they were obvious. In reality, the consequences are far from straightforward. Different forms of corruption have different effects on society, and the effects depend on the context in complex ways.⁶ Nevertheless, some general mechanisms are quite clear.

Citizens who are forced to pay bribes bear extra costs. Markets where companies win contracts through bribery fail to promote value for money. Productive companies that lose contracts because competitors pay bribes may leave the market or start offering bribes themselves. Bribing diverts resources away from innovation and improvements. Where corruption is rampant, some of the best and honest companies lose out in domestic and international competition.

Similarly, in government, corrupt decision makers may misallocate funding to areas where politicians and bureaucrats can grab personal rents rather than to areas that meet social needs. For instance, when bribe revenue trumps value for money, we can get “corruption-driven construction”: politicians and bureaucrats allocate revenues to infrastructure and defense at the expense of health and education, areas where there is typically less scope for rent-seeking. Even with large allocations to infrastructure, the quality of buildings, roads, and utility provision suffers, and there may be numerous instances in which services are contracted and paid for but not delivered. Projects are planned and described as if

⁵ Mallaby (2005).

⁶ For a review of the literature on the consequences of corruption, see OECD (2015).

they were genuine, while in reality they are tools for stealing state revenues or creating opportunities for bribery.

Construction projects that have been started for no purpose other than corruption often end up as useless “white elephants.” In Zambia in the 1990s, with political considerations driving decisions by the country’s industrial development corporation, “multi-million dollar brick factories were set up under an official directive in the rural areas of Kalalushi and Nega Nega, but transporting the bricks long distances to the construction sites raised their costs to uneconomic levels, with the result that the construction industry increasingly switched to the use of concrete blocks.”⁸ In such cases, one must ask whether the project is just the result of bad planning and incompetence or whether there is some corrupt purpose – such as creating opportunities for rent-seeking, or to divert money to a specific area to cement the loyalty of local voters to the incumbent regime. In their article “White Elephants,” James Robinson and Ragnar Torvik argue that such inefficient and unproductive projects may in fact have large political payoffs, in essence buying votes for incumbent politicians and helping them remain in power.⁹

Corruption in electoral politics affects the selection of office holders, a topic beyond the scope of this essay. Once in power, corrupt leaders frequently enrich themselves while blocking social and economic change, as in Angola, Cambodia, Colombia, Venezuela, and Zimbabwe – to mention a few.

Corruption also harms development through the venal practices of lower-level civil servants and functionaries, such as health workers, customs officials, police officers, or teachers. When bribes are the stimuli for service provision, the public sector allocates benefits unfairly and inefficiently. Those in need have to wait longer for services than those who pay bribes, and honest citizens may turn to expensive private markets to buy what they were supposed to get for free. Bribing distorts critical information when those who pay bribes receive unduly favorable assessments of

7 Estache (2004).

8 Tangri (1999).

9 Robinson and Torvik (2009).

their performance. Law enforcement suffers when law-breakers can pay bribes to go free.

Where bribery of civil servants is common, citizens lose trust in public institutions. Why should they obey society's rules if those who are supposed to enforce the rules break them consistently? With benefits allocated unfairly and private sector profits skewed towards corrupt actors, income differences increase between dishonest insiders and honest outsiders.

Petty corruption, bribery for contracts, crony capitalism, and grand corruption will not have equally harmful consequences. Some forms of corruption are more damaging than others. While it makes sense to expect more serious consequences when the crime happens higher up in government and politics, there is no obvious way to predict the severity of effects. Low-level corruption could in some cases have more damaging consequences than high-level corruption: for example, a low-ranking customs official might take bribes to allow terrorists to smuggle weapons, while a high-ranking politician who takes a bribe might end up having less influence on decision making than the bribers expect.

Various factors affect corruption risk

A useful starting point for considering the expected risk of corruption – if we define risk as “probability X consequence” – is to think of corruption as *a trade in decisions* that should not be for sale.¹⁰ Through this perspective, the element of a deal becomes immediately clear. Without someone willing to pay, there will be no deal. The more values are controlled by the decision maker, the higher the payment. The consequences obviously depend on the counterfactual, that is, on what would have happened had the deal *not* been made.

Important in this connection is the allocation of bargaining powers. A very asymmetric allocation of bargaining powers implies that the briber is, in fact, subject to extortion – like the regulator who demands a bribe to provide a business license, or the police officer who stops drivers and

¹⁰ Søreide (2016).

falsely claims they have been speeding and owe a fine. A bribe might be paid, but the briber dislikes it and may well report the incident afterwards. By contrast, when both players have similar bargaining positions, as in cases of crony capitalism, both of them may have an interest in the deal and in keeping the crime hidden.

The risk of corruption depends not only on the willingness to pay a bribe, but also on public officials' authority to control values that bribers are willing to pay for. This authority depends primarily on two factors: the *degree of scarcity* of the desired public benefit and the *extent of discretion* in the allocation of benefits.¹¹ When public benefits are available to all, it is hard for officials to demand bribes. When decisions are steered by rules and monitored in detail, there is little room for deviation. Thus, building permits and procurement contracts, for example, are associated with far more corruption risk than is the provision of electricity, since in the latter case public officials have too little authority and too low bargaining power to demand large bribes. Normally, the risk of corruption is higher when higher values are at stake, as is the case with defense contracts, construction projects, and so on.

Democracy, which in theory allows corrupt leaders to be voted out, can be a factor but provides no easy way out of the problems. Voters typically have insufficient information, or misleading information, about hidden forms of corruption, and in any case, they have many concerns and priorities beyond anti-corruption to consider when they go to the polls. The charisma and populist appeal of even the most corrupt politicians may charm voters.¹² Other factors that may add to the risk of corruption under democratic rule include the importance of securing revenues for political campaigns and the share of lame duck politicians (politicians who cannot be reelected may be tempted to grab opportunities for self-enrichment while they exist).

Democracy may, however, be an important means to curb corruption, especially in contexts where political competition is strong. Political corruption thrives with impunity when the incumbent is either certain

¹¹ Rose-Ackerman and Palifka (2016).

¹² Søreide (2013).

to remain in power no matter what, or, alternatively, has no chance of remaining in power through reelection. But when incumbents believe they have a good chance but no assurance of being returned to office – let us say, a fifty-fifty chance of being reelected – they may be more careful.¹³ Under such circumstances, even minor fraud or a small scandal may lead to a politician’s downfall or even a change of government, and the incumbents’ incentives to take a long view on their political prospects are stronger.

The letter of the law is an insufficient indicator of harm to society

Corruption as *trade in decisions* regarding the allocation of public benefits may skew decisions to serve the interests of those involved, regardless of how government formulates its rules about corruption. As mentioned, corruption is a problem because of its consequences, not because criminal law defines it as a crime.

Politicians in a position to influence the definition of crime and the enforcement of the law might also misuse their authority to secure personal benefits. By keeping legal loopholes open, preventing investigations, and exerting pressure on courts for biased verdicts, they help to secure a soft regime for the corrupt – and possibly impunity.¹⁴ Even honest legislators will not be able to write laws that cover all contingencies in a complex financial or international market. Clever lawyers can quickly identify loopholes that exist for tax avoidance, bribery, market concentration, exemption from public procurement rules, and more. If no regulatory agency objects, market players may well adhere to the *letter* of the law while totally ignoring the *spirit* of the law.¹⁵

For these reasons, journalistic research that focuses only on those who violate the letter of the law, and on accusations likely to hold up in court, may fail to uncover misconduct with potentially damaging

¹³ Rose-Ackerman (1999).

¹⁴ See Søreide 2016, Chapter 3 for examples from OECD countries.

¹⁵ Pollack and Allern (2018) point out this concern with reference to the telecom sector. For cases of financial secrecy, see Shaxson (2011), and Schjelderup (2016).

consequences. In all societies, there are elements of collusion between private interests and public sector decision makers, no matter what formal definitions are applied. The most effective journalists research and document such cases regardless of the letter of the law – or the expected outcome of a possible court case.¹⁶ They avoid making false allegations by documenting their facts and by using broad terminology to describe existing practices that resemble corruption, even if the legality or illegality of specific actions is in doubt.¹⁷ Unclear legal classification of practices should not prevent journalists from covering cases of collusion, grabbing, and exploitation, and explaining their harmful consequences to society.

Governments fail to enforce their anti-corruption legislation

Most societies have laws, regulations, and institutions of some kind that promote integrity in governance and fair competition in markets. This is in part the result of impressive international collaboration for better and more harmonized legislation, more efficient oversight institutions, and improved legal assistance across borders. In practice, however, these laws and institutions vary in their rigor, and enforcement also varies widely across countries and cases. In particular, governments often fail to enforce their laws on economic crime when the alleged offenders are large corporate actors that operate internationally.¹⁸

Broadly speaking, there are at least two reasons why presumably legitimate governments fail to enforce the intention of the law.¹⁹ First, the form of regulation most common today, namely criminal law, developed for the regulation of individuals guilty of crimes, is ill suited for the regulation of *corporate* or *institutional* misconduct, where it may appear impossible to single out a few guilty individuals.²⁰ Not only do corporate

16 Ron (2016) explains how the challenges play out in Ecuador.

17 For relevant terminology, see Søreide (2015, pp. 2–3).

18 Garrett (2014) and Feinstein (2011).

19 Søreide (2019).

20 Søreide and Rose-Ackerman (2018).

offenders navigate around the risk of detection and enforcement actions, as mentioned above, but the prosecutors' burden of proof is too high for crimes committed within organizations. Cases of suspected crime often end with some negotiated settlement at the pre-trial stage – or no charge at all.²¹

Second, in many countries, the rules and agencies responsible for market oversight have evolved with a mandate that is too narrow to embrace complex forms of economic crime. The tax authority can accuse a player of tax evasion only, even though the case might very well involve several forms of crime. Competition authorities address violations of competition law, with few incentives to investigate whether corruption facilitated the practice. Complex forms of market-related crime and corruption require consistent regulations and the facilitation of an exchange of information among regulatory agencies, on national and international levels. Across European countries, such regulations and exchanges are rarely in place.²²

The role of investigative journalists in controlling corruption

Misuse of authority for personal benefit is often difficult to detect. Collusion between powerful players happens in secret. They hide bribes and other illicit monies in trusts and tax havens, and make use of apparently legitimate transactions across corporate structures. The more authority officials have, the more discretion they normally exert for personal judgment. The more factors office holders are expected to consider in making decisions – from employment to national security to the environment – the harder it is to accuse them of biased decision making. Fortunately for society, these sorts of difficulties motivate many journalists to deploy their investigative skills.

21 OECD (2014); Arlen and Kahan (2017); Makinwa and Søreide (2018).

22 Auriol, Hjelmeng and Søreide (2017).

Journalists uncover hidden wrongdoing, but audience response is mixed

Investigative journalists can carry out detective work that describes fraud or other malfeasance in action. Who is involved? How much did they loot? How did they do it? Is it continuing? *Washington Post* reporters Bob Woodward and Carl Bernstein, who uncovered the Watergate scandal in the Nixon White House, spent almost two years developing leads and sources, including the mysterious Deep Throat. More recently, the International Consortium of Investigative Journalists (ICIJ) worked with journalists around the world to analyze a huge cache of leaked financial documents, known as the Panama Papers, that revealed international financial scandals entangling many prominent government officials and other public figures. Less widely known, but just as important, are the many local journalists who have investigated corruption on the local or national level, producing findings that gained scant international attention but that were consequential in the societies concerned. The German journalist Günter Wallraff went undercover in various guises to reveal profit-motivated abuse of power and exploitation of the less influential segments of society in Germany. British journalist Michela Wrong provided a penetrating account of corruption in Kenya, linking it both to their colonial heritage and to post-independence politicians. There are countless other examples – including stories presented in other chapters of this book.²³

Investigative journalism is similar to other types of research in that only a minor fraction of it turns out to be important at the end of the day. No one knows, however, which part of the total amount of investigative activity will yield significant findings, and this is especially hard to predict when it comes to investigations of corruption and fraud, where it is so difficult to document suspected wrongdoing. The total sum of investigative

23 On the Watergate scandal, see Emery (1995) and “The Watergate Story” on the *Washington Post* website, <http://www.washingtonpost.com/wp-srv/politics/special/watergate/part1.html>. On the Panama Papers, see “Leaders, Criminals, Celebrities” on the ICIJ website, <https://www.icij.org/investigations/panama-papers/>. See Wallraff (1986) and Wrong (2009) for examples of their work.

journalistic activity is therefore important even if a given inquiry fails to produce useful evidence and thus may appear to be wasted effort.

In countries all over the world, journalists uncover abuse of power, fraud and corruption that might otherwise be left to continue. They follow threads that lead them to crime; they are approached by whistleblowers who find it unsafe to contact public authorities; and they are contacted by employees of regulatory agencies who are frustrated with their own agency's shortcomings. Most journalists work for news media outlets, but some operate independently or are employed by nongovernmental organizations (NGOs).²⁴

The lower the trust in public institutions and politics, the more a society will depend on journalists to uncover wrongdoing for the sake of holding perpetrators to account through media attention – if nothing else. Even powerful individuals often fear negative front-page coverage of their misconduct. Owners worry about how share prices may drop when profit-motivated crime is uncovered.

The reaction of society is difficult to predict, however, and costly news coverage will not necessarily receive the attention it deserves. Readers want identified individual victims rather than broad social patterns. The demand for revelations of collusion and corruption is also limited. The demand itself is hard to meet: identify serious corruption, find a dramatic twist, and write in a way that piques the public interest.

Investigative journalism can help deter corrupt actors

Journalists' coverage of collusion and corruption may be more than after-the-fact reporting: it can help prevent corruption or affect the trajectory of corruption as it unfolds, since corruption corrupts or, more generally, wrongdoing is contagious.²⁵

24 OECD (2018). Some excellent investigative reporting, especially of transnational corruption schemes, has been sponsored by NGOs – for example, Global Witness. See <https://www.theguardian.com/sustainable-business/2015/aug/21/global-witness-media-dependent-on-ngo-to-investigate-corruption>.

25 Andvig and Moene (1990).

Consider a potentially corruptible public official – say, the manager of an agency with regulatory oversight. A multinational corporation wants to establish a branch in her country. Our manager is in a position to provide exactly the licenses or connections needed, and the company has offered a bribe to secure successful entry into the market. Should our manager accept the bribe and offer the illegal benefit? Of course not. In order to understand corruption, however, we must consider whether, and under what conditions, the expected personal benefit of the corrupt act might outweigh the costs. Awareness of the circumstances under which such an individual is inclined to take (or offer) a bribe makes it easier to understand the problem at an aggregate level.

If our public official rejects the offer of a bribe, she declines extra revenue. However, she keeps her job and her prestigious position in society. If she accepts the offer, there is more uncertainty: if she gets away with it, she keeps the bribe revenue and her job (including future possibilities of bribe taking), yet she has to live with the uncertainty that the case may be disclosed at some later stage. If her offense is detected, the outcome depends in part on who detects it. If a dishonest supervisor uncovers the bribe, the manager might bribe her way out of the situation, but if an honest detector is involved – and particularly if the matter is aired publicly – the incident may lead to investigation and possibly criminal law action. In this scenario, the manager may lose her job, her future salary, and her future opportunity to take bribes.

In addition, the manager may face moral costs, insofar as she considers it a personal burden to violate official rules or norms. Some individuals would never be tempted, whatever the potential benefits of the bribe, while others have no scruples. The higher the moral costs, the higher the bribe must be to compensate for the burden of violating her principles. The prospect of facing public shame and reputational damage if her deeds are uncovered and publicized – for example, by journalists – may weigh heavily in her thinking.

The personal net benefit of corruption thus depends on the probability of being caught, as well as on the size of costs and benefits. Considering the determinants of these variables, we find that each of them depends on the individual's perception of the magnitude of corruption already

present in the society.²⁶ The likelihood of a bribery attempt depends in part on the briber's expectation that he or she will be dealing with a corrupt (or corruptible) and therefore "trustworthy" counterpart. The briber will be careful not to propose a corrupt deal to someone who might report the incident to a law enforcement agency. In a society with pervasive corruption, the estimated risk of being detected by an honest, non-bribeable colleague is lower than in a society where corruption is not widespread. Moreover, the moral cost of corruption will be higher in a society where few are corrupt. Hence, the temptation to accept a bribe depends on the perceived extent of corruption, among other factors. These perceptions may matter more than the rigor of the laws or the law enforcement system.²⁷

If the extent of corruption in society grows or shrinks along with the assumed extent of the problem, societies with similar rules and enforcement systems may develop in very different ways, depending on how domestic and foreign players perceive the extent of corruption. In some societies, the factors that steer bribery decisions all seem to motivate corruption. When corruption is systemic, a society may find itself in a *high-corruption equilibrium* from which it is difficult to escape.

Other countries may experience low levels of corruption. With little effort, it seems, they manage to keep the problem under control. Citizens and firms do not usually consider bribery an option. A low level of corruption makes monitoring and supervision more effective, and honesty more valuable. Both aspects demotivate bribery. Such countries enjoy a *low-corruption equilibrium* that effectively deters some individuals from becoming corrupt.

Somewhere between the low-corruption equilibrium and the high-corruption equilibrium, there must be a critical threshold, a tipping point. As long as corruption does not exceed this threshold, the country remains in the low-corruption state. But once the threshold is crossed from below, corruption approaches the level associated with a high-corruption equilibrium. What might trigger a development toward more or less

²⁶ Andvig and Moene (1990).

²⁷ Moene and Søreide (2016).

corruption – or shake a society to bring it out of an otherwise sustainable equilibrium situation – could be a scandal or a huge rise in bribes paid by multinationals. A comprehensive government anti-corruption strategy initiated by a new government might trigger movement toward lower levels of corruption.

If these arguments about how corruption corrupts are correct, then it matters what various players believe about the extent of corruption in a society and the extent to which the society condemns it and enforces laws against it. Journalists and the media in general can play a key role in this, not only by uncovering corruption, but also through the impact of their coverage in shaping public perceptions.

Disclosures in the press may raise the public's awareness of wrongdoing and thus the moral cost of being corrupt. Cases in the news bring shame on those allegedly involved. In addition, investigative journalism provides information about corrupt deals to honest actors within the state apparatus, who may lead enforcement agencies to act. Foreign journalists are important, too, if their coverage of bribery abroad curbs multinationals' inclination to offer bribes. However, there are also circumstances in which journalists' coverage could make things worse. More coverage of fraud and corruption in a society might lead the public to think that corruption is so pervasive as to be inevitable. Transparency International ranks countries according to their perceived levels of corruption. With more stories about wrongdoing in the news, the perceived extent of corruption will increase, and this may trigger the spiral effects discussed above. Hence, a poor ranking may not just reflect but also encourage bad behavior.²⁸

Investigative journalists face many constraints

A recent report by the Organisation for Economic Co-operation and Development (OECD) details some of the obstacles to reporting corruption, ranging from limits on freedom of the press, to punitive lawsuits,

28 This is why, for many governments, it is most important to improve factors that strengthen the ranking regardless of the underlying challenges (Høyland et al., 2012).

to violence or threats of violence against journalists and their sources.²⁹ These are set against a backdrop of economic contraction in the news industry that has affected its ability to fund complex investigations.

Authoritarian politics – often sold to voters by means of populist arguments around immigration or nationalism – serves to secure power for incumbent leaders and their allies while undermining opposition in non-democratic and often unconstitutional ways.³⁰ Authoritarian leaders may attack journalists who criticize their performance, attacks that are meticulously tracked by Reporters Without Borders.³¹ This leads to a weakening of accountability mechanisms that in turn allows leaders to misuse authority for personal benefit with little risk of facing consequences. Journalists who work under authoritarian regimes contribute to the fight against corruption if they make citizens and voters aware of the blurred connections between populism and corruption.³² Their circumstances highlight the importance of international journalistic networks in supporting journalists working in countries where freedom of the press is curtailed.³³

Particularly in developing countries, it is often hard for journalistic coverage to trigger a process leading to more integrity. This is in part because the value of bribes relative to other sources of income might be higher in poor countries than in wealthier ones, and thus it takes more to change the behavior of those involved in such lucrative dealings. In addition, the more corruption there is in governance, the more challenges and dangers journalists may face in doing their jobs. Many of the journalists who carry out investigations of the powerful do so under conditions of low security and frequent violations of human rights. Pressures are brought to bear on reporters and news executives and on their sources, especially where whistleblower protections are absent or not enforced.³⁴

29 OECD (2018).

30 Snyder (2018).

31 Reporters Without Borders 2018: <https://rsf.org/en/ranking#>.

32 Snyder (2017).

33 In this respect, UNESCO and the Safety of Journalists project plays a pivotal role internationally. <https://en.unesco.org/themes/safety-journalists>. Another arena for establishing networks is the annual Safety of Journalists Conference at OsloMet: <https://blogg.hioa.no/mekk/>.

34 For legal discussion of the Lux Leaks case, see Swanke (2016).

These pressures may include “threatened or actual legal action in the form of civil suits for libel, or criminal prosecution for defamation or publishing classified information.”³⁵

Violence and threats of violence have had a chilling effect on journalistic coverage of corruption in countries around the world. A notable example is Mexico, which, according to Reporters Without Borders, “continues to be one of the western hemisphere’s deadliest countries for the media. When journalists cover subjects linked to organized crime or political corruption (especially on the local level), they are the targets of intimidation and physical violence and are often executed in cold blood. Many simply disappear. Others are forced to flee the country in order to survive. Impunity, which is the result of Mexico’s pervasive corruption, has reached record levels and feeds the vicious cycle of violence.”³⁶ Article 19, a civil society organization working for the protection of free speech, has documented security threats against journalists in a number of countries, including Uganda, Venezuela and Bangladesh, among others.³⁷

As noted by the OECD, limitations on the access to information constitute a formidable bar to reporting corruption, particularly in countries without effective freedom of information (FOI) laws. “Journalists considered inadequate FOI legislation to be one of the two main obstacles to investigating and reporting on corruption cases, the other one being confidentiality of law enforcement proceedings.”³⁸ The OECD has stressed the importance of open data frameworks in countering these problems.

The news media at times may be subject to the very problems that journalists seek to disclose and combat in other arenas – ownership concentration, to be sure, but also corruption, fraud, and tax evasion in some instances. News organizations control scarce benefits insofar as they can decide how to portray people and firms. Around the world, there are numerous examples of journalists who have taken bribes or subtler benefits in exchange for favorable coverage, for coverage aimed at harming others, or for no coverage at all. However, since decisions about what

35 OECD (2018).

36 Reporters Without Borders 2018: <https://rsf.org/en/mexico>.

37 Article 19: <https://www.article19.org/>.

38 OECD (2018).

stories to cover are generally made (or at least approved) on the higher levels of a news organization, it is especially useful to look at the forces that come into play on those levels.

Crony capitalism among owners of media companies and their financial, political, and/or social ties to government figures may lead to pressure on reporters and news executives to skew stories toward a favorable presentation of the incumbents.³⁹ As a result, society may receive half-true stories or silence when scandals deserve attention. In exchange for such favorable coverage, governments may allow cooperative media companies unfair market advantages, while the advice from competition authorities – such as warnings against acquisitions or mergers – is effectively ignored.

Nonetheless, the relationship between market concentration and news coverage is far from obvious. On the one hand, concentration in the news media industry could make it easier for powerful players to succeed in their attempt to exert pressure or offer bribes for the sake of controlling the presentation of a case. With fewer market players to control, it may be easier to exert control. With fewer individuals to bribe, the lower the total bribe expenses. On the other hand, one could argue that with concentration of media ownership, individual media titans become more powerful and thus more able to withstand political pressure if they choose to do so. Moreover, simple bribery is not necessarily the way that governments or powerful figures exert pressure on news executives. The incumbent regime or a large corporation can also withhold its advertising from media outlets to starve them of revenues and force them out of business.

In the digital age, economic forces are devastating the news media industry, especially newspapers, as consumers turn to the internet to get information for free. Advertising and subscription revenues have fallen precipitously, shuttering some media outlets and forcing others to curtail their operations. In this environment, generally speaking, only the largest and most financially stable news organizations remain able and

39 Dean Starkman (2014) argues that in many cases US investigative journalists' silence regarding the financial crisis in 2008–2010 was linked to their media companies' market and ownership situation. Noam Chomsky (2002) suggests that there are subtle forms of collusion between media company owners and decision-makers in government, which affect the presentation of news.

willing to fund expensive and sometimes risky investigative journalism. Nevertheless, even as their industry is buffeted by market forces, many dedicated journalists in countries around the world continue to do their jobs and produce high-quality investigative coverage.

Economic approaches and learning across disciplines

While investigative journalists uncover and deter wrongdoing often under severe constraints, economists interested in similar problems try to explore patterns of wrongdoing, normally under less severe constraints. Economists explore the mechanisms at play, often derived from mathematical models of rather complicated interactions between the actors involved. Next, they seek to test inferred actions and behaviors empirically in order to see whether data support the theoretical results with general validity. At this stage, ambitions go beyond attempts of merely demonstrating correlations. The gold standard of empirical research is to make *causal* inferences between two variables, in the sense that a factor A causes another factor B. In studies of corruption, for example, A could be the entry of foreign players into an emerging market economy, while B could be the extent of corruption. The economic analysis of how foreign players affect corruption in emerging markets might have general relevance, and can also add context and the recognition of what sort of problem it really is when a Norwegian multinational company, such as Yara, pays bribes when entering new markets, such as Libya or India.⁴⁰

Or, we could turn it around, and let A be political corruption while B is productive investments. The ensuing economic analysis of how political corruption attracts foreign bribers or deters honest foreign firms would

40 The newspaper *Dagens Næringsliv* played an important role in uncovering the Norwegian multinational fertilizer producer Yara's involvement in corruption in India and Libya (for a summary in English that confirms this fact, see *News in English*, 18 January 2017: "Yara's nightmare draws to an end". (<http://www.newsinenglish.no/2017/01/18/yaras-nightmare-draws-to-an-end/>). Eriksen and Søreide (2017) confirm journalists' role in uncovering foreign bribery cases more generally.

make it easier to understand and explain why, for example, the corruption in South Africa has been so damaging to the economy.⁴¹

For the researchers involved, causal inferences with general validity are difficult to establish. They test a range of possible hypotheses and search for variations in the data that might support their assumptions. At each step of the process, information from investigative journalism could feed into their work. Cases in the press inspire new ideas of ‘how and what’ and provide examples that justify abstract assumptions. Over the last two decades, economic research has become more oriented toward empirical testing and results,⁴² and thus, directly or indirectly, the discipline relies more on empirical information, including what journalists produce and uncover.

There is also a danger of relying too much on journalists’ case-based coverage of the problem. A case presented in the media is just one case, and given the lack of information about the problem, it may inspire assumptions about the problem’s general features, which might be false. The lack of facts about the true extent of corruption tempts researchers to develop theories based on too little empirical information. And while researchers depend on survey information about the phenomenon, the survey respondents’ perceptions are easily colored by what they learn from a few media cases (where else do they get their ‘knowledge’ about hidden forms of crime?), and their ‘learning’ shapes what they feed into the data available to researchers, such as corruption perception indices.⁴³ One may wonder, for instance, why Kenya is ranked as more corrupt than Tanzania on Transparency International’s index. Is it simply because the press is freer in Kenya?

The very press coverage needed to highlight corruption problems thus distorts the data sources of corruption most commonly used in research. Of course, the resulting distortion of arguments and conclusions is not the journalists’ fault. It just reflects the difficulty of collecting information about the extent of corruption. For journalists it is important to be

41 Although as is often the case, Craig McKune explains in chapter 1 of this volume the hazards for those who seek to explain corruption in South Africa.

42 The trend is confirmed by the American Economic Association, see Chart of the Week (June 26 2017). “An empirical turn in economics research” (<https://www.aeaweb.org/research/charts/an-empirical-turn-in-economics-research>).

43 Andersson and Heywood (2009).

aware of this problem when they read and cite research-based evidence for corruption. With more cross-disciplinary discussions journalists will become better trained to distinguish reliable results from the less reliable.

With more exchange across the disciplines, journalists would also become better equipped to report the consequences of corruption and its structural causal factors, thereby increasing the value of their stories vis-à-vis the sort of readers they strive to attract. Based on our personal experiences, however, we think journalists could build important stories by bringing economists or other researchers into their work at an early stage, for the sake of understanding a problem, rather than later, when they appear to seek primarily a citation that supports their angle. In this respect, we agree with Richard Sambrook's conclusion in his 2018 edited volume about collaboration in investigative journalism – on page 95 – when he says: journalists “should stop thinking they can always ‘go it alone’. International accountability is an issue for lawyers, economists, politicians and lobbyists, scientists, health care professionals, academics, accountancy, business and finance professionals, and more. In a modern approach to accountability journalism, newsrooms should seek to partner and collaborate outside their profession as widely as possible, being open to the expertise of others.”

As for economists, if they have the courage, there might be much to gain in presenting their hypotheses as well as their results to experienced journalists.

Conclusion: Investigative journalism needs society's support

Investigative journalism can be a bulwark against corruption, uncovering hidden wrongdoing and exposing it in a public forum where it can no longer be ignored. From petty bribery to grand larceny to corporate collusion on the highest levels, malfeasance and misconduct of all sorts have been exposed by courageous journalists, often resulting in actions to curb the wrongdoing and hold the perpetrators accountable.⁴⁴

44 Hamilton (2016).

For journalists and owners of media companies, however, investigative journalism represents a risky, costly, long-term investment. It takes time and money to build up journalistic expertise on corruption issues, and a network of sources who are able and willing to provide information. Uncovering venal practices is difficult and time consuming, with no certainty that enough evidence will be found in any given case to publish a story. Wrongdoing can stay hidden, in tax havens or behind complex corporate transactions; or the alleged misconduct may fall into a gray zone, leaving journalists and sources exposed to repercussions while the perpetrators remain unscathed. Given threats to journalists around the world, journalists and media owners must walk a fine line in deciding how boldly to pursue their inquiries and how much to risk.

Journalists can count themselves successful when their stories become too important for governments to ignore, so that citizens, regulatory institutions, and officials are attentive to their reporting and respond by taking action to curb unethical practices. Toward this end, investigative journalists need society's support – and in some cases international support, especially for journalists operating in risky environments. Journalists need to have their access to information and their rights to report and publish respected and protected by law. They and their sources need physical security, including effective whistleblower protections. With the rise of authoritarianism around the world, these ideals must be safeguarded more than ever.

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Investigative Journalism on Oil, Gas and Mining: Has Donor-Driven Use of Digital Technology Made a Difference?

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Abstract: Journalists around the world now use big data and data visualization to report and write powerful stories about the effects of resource extraction. They use mobile and social media platforms to disseminate their work. Much of this coverage was driven by foundations and Google who believed in data journalism and funded training and tools to promote it. It's not clear, however, whether the journalism has an impact and if it can develop an enthusiastic audience and help generate revenue for the outlets that report and publish data-driven journalism.

Keywords: African media, global muckraking journalism, investigative journalism, extractives, data journalism, sustainability, donors, foundations

Journalists all over the world are taking risks to expose corruption and wrongdoing by powerful companies and governments who were thought to be untouchable. Thanks in part to social media, big data and an array of online tools, investigative reporting on oil, mining and tax avoidance is thriving.

Over the years we have examined coverage of the extractive sector in order to see whether our initial optimistic forecasts about the powerful

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role of digital technology had come true. We hoped that the internet would help solve the problem of power and information asymmetries inherent in extractive sector reporting, and help level the playing field between journalists and powerful companies and governments.

We predicted that digital technology would foster cross-border collaboration and give isolated journalists in under-resourced newsrooms a way to find new sources and new data, and disseminate their work. We hoped that once and for all, journalists and non-governmental organizations (NGOs) would be able to collaborate and make information more transparent, expose the misdoings of oil and mining companies, and help keep governments accountable.

This chapter has given us a chance to survey the field and assess whether our original forecasts were too optimistic. The use of digital tools and data-driven reporting has helped journalists do a better job of holding governments and corporations to account. Of course, not all that we had hoped for has happened, but around the world we have seen more in-depth reporting and powerful investigative journalism on the extractives. Journalists are using big data and data visualization to report and write powerful stories, and then use mobile and social media platforms to disseminate their work. Such examples can now be found in Africa, Latin America and Asia, as well as in the traditional strongholds of the US and Europe. This reporting does not necessarily have an impact – and it certainly does not address the perennial problem of financial sustainability – but it is there and the quality is better than ever. For this chapter we interviewed many of the funders and people who taught journalists how to use data and digital technology in their reporting. We also include case studies from around the world in order to provide a taste of what is being done.

People who teach data reporting believe in it and say there is no turning back. “Everyone knows that using data is how you get a real story that cuts through the crap. It’s a battle you don’t have to fight anymore. It doesn’t mean the story is always useful and that we’ve won the battle of moving away from anecdotal and societal investigation. It’s always tempting to go for the low hanging fruit of going to a community and interviewing five people, but it’s understood that data is an important mindset to have as well,” said Will Fitzgibbon, a reporter with the International Consortium

of Investigative Journalists who has worked with teams of journalists to produce the Panama Papers, Paradise Papers and Fatal Extraction series.

Digital tools help data gathering, presentation and dissemination

When we refer to digital we mean the use of online tools and platforms that help journalists gather information, present it and disseminate it. Online tools allow journalists to work collaboratively across newsrooms or borders to produce series like Fatal Extraction, the Panama Papers and the West Africa Leaks.

Tools are often case specific and range from communication methods and visualization to easy document analysis and data liberation. For example, the Panama Papers leak developed Global I-Hub, a communications platform derived from the open-source software Oxwall, that enables communication and file sharing with two-step authentication. For cross-border projects documents must be readable and so journalists use tools like Tabula,¹ which allow users to copy and paste data out of PDFs into Excel. Further, tools like Tableau Public and Flourish Studio enable journalists to make attractive and compelling videos and maps, as well as charts, from complicated data in order to tell public interest stories. Other visualization software helpful for collaborative investigative journalism projects include Linkurious² and Piktochart.

Journalists also take advantage of journalism-specific online networks and open forums. In 2018 the collaborative digital platform Hostwriter, an online network of hosts and tools for professional advice for freelance journalists engaging in cross-border reporting, was injected with EUR 500,000 from a Google Impact Challenge Award³.

After the work is done, social platforms help journalists and citizen journalists spread their work quickly around the world. Bloggers and

1 Tabula, <https://tabula.technology/>.

2 Linkurious, <https://linkurio.us/>.

3 Smolentceva, Natalia (2018). For journalists interested in cross-border collaborations, Hostwriter offers opportunities and resources. *International Center for Journalists*. <https://ijnet.org/en/blog/journalists-interested-cross-border-collaborations-hostwriter-offers-opportunities-and>.

journalists in many countries, including Ghana, Kenya and Tanzania, depend on social media to disseminate their work. Especially in Africa, news and comments are growing amongst the internet-connected, through blog conversations and SMSs that reflect, and reflect upon, mainstream news (Paterson, 2013). These forms of digital engagement help audiences express themselves and circulate public opinion (Moyo, 2009).

“Social media demonstrate an unprecedented ability for the politically engaged both to bypass and influence traditional information flows, but social media use faces unique challenges throughout much of Africa, due to underdeveloped telecommunications infrastructure, limited (though rapidly increasing) extra-urban mobile access, and bandwidth limitations in many areas” (Paterson, 2013).

Trends in digital news consumption vary within regions. “Tanzanians are increasingly becoming voracious social media consumers. With nearly half a million monthly users on Instagram and 10 million users on WhatsApp, the audience is moving online. To put that in perspective ... Tanzanian YouTube viewers often outnumbered Nigerians, despite the latter being a larger population with – on the whole – better internet access,”⁴ writer Mwegelo Kpinga said in a 2017 *Medium* post.

Incorporating data into journalism products has also been transformed by the digital era. As Alexander Howard, of the Tow Center for Digital Journalism says, “Data journalism is telling stories with numbers, or finding stories in them. It’s treating data as a source to complement human witnesses, officials, and experts. Data journalism combines: (1) the treatment of data as a source to be gathered and validated; (2) the application of statistics to interrogate it; and (3) visualizations to present it, as in a comparison of batting averages or prices” (Howard, 2014). For example, statistics can be portrayed more clearly through visualizations such as mapping tools. In some cases, journalists also benefit from access to information and easy-to-use data analysis tools online.

4 Mwegelo Kapinga, “How journalists can use social media to build an audience”. *Medium*, August 17, 2017. Accessed: <https://medium.com/hacks-hackers-africa/how-journalists-can-use-social-media-to-build-an-audience-69bcc4f3ff80>.

Foundation funding spreads digital tools and data journalism

The spread of digital tools and data journalism among journalists covering extractives and/or doing investigative journalism during the last ten years is a case study of donor-driven innovation. Foundations like the Gates Foundation and the Omidyar Network deliberately decided to develop and spread these tools, and worked with the World Bank, which was pushing data transparency as a solution in developing countries. They funded fellowships and training around the world. In Africa alone, training in data reporting has been supported by Code for Africa, Oxfam, the Natural Resource Governance Institute, the West African Media Initiative, and the Thomson Reuters Institute. Internews was also heavily involved. As the foundations and media development organizations pushed data journalism and digital tools they became more invested by doing so.

Funding was given by the Bill & Melinda Gates Foundation, the Omidyar Network and the World Bank to the International Center for Journalists for its Knight Fellowships Program and to Code for Africa, led by South African data journalist Justin Arenstein. They organized capacity building, mentorships and conferences. “[W]e employ a variety of measures to help journalists, media managers, entrepreneurs and executives embrace new forms of reporting and storytelling, audience engagement and business development. This includes building new teams at news organizations, introducing new models of collaboration that improved workflows across newsrooms, launching contests to fund experiments, developing digital tools designed around the needs of local newsrooms, helping newsroom leaders identify new hires and roles that would make their editorial teams more innovative and working with them to find new ways to generate revenue to support quality journalism,” said Ben Colmery director of the ICFJ’s Knight Fellowships Program.

Knight and Code for Africa also funded product development and trained journalists in the use of a range of tools including Document Cloud (Knight Foundation), WaziMap in South Africa (Code for South Africa now known as OpenUp), and OpenAfrica (Code for Africa).

For Colmery who, as director of the ICFJ's Knight Fellowships Program, made a huge effort to promote digital tools in Latin American newsrooms, the purpose of the program was not just to change the newsrooms where they worked but to spread innovation regionally.

"What we want is to instill a culture of innovation in the newsroom and break down barriers so people can try new things in new ways and overcome cultures of bureaucracy, stagnation, lack of training and lack of internal resources. We try to make a dent in how journalism is done in a country or a region and change the landscape. The best way to do that is to work with a few newsrooms and make a change there, and then you see it cropping up in other newsrooms," Colmery said.

According to an analysis of the Knight News Challenge, successful projects imbued modes of participation and distributed knowledge on such phenomena as crowdsourcing, alongside innovative features not typically practiced by journalists, such as engineering and software development (Lewis, 2011).

It's not clear how much funding has been used on developing digital tools for journalists and promoting innovations (including data journalism), but we estimate it is approximately twenty million dollars over the past 10 years. For instance, Code for Africa⁵, via the International Center for Journalists (ICFJ), received a donation⁶ of \$4.7 million from the Bill & Melinda Gates Foundation in 2015, and in 2017 the Omidyar Network and Open Society Foundation provided⁷ \$4 million to the South Africa Media Innovation Program. The website of the Omidyar Network claims it has committed \$220 million over the last ten years on a "Governance & Citizen Engagement initiative to drive accountability and transparency of government", but did not provide data for Africa or for data journalism. Ory Okolloh did confirm in an email that the Network supports Code for Africa, Publish

5 Code for Africa, a civic technology and data journalism initiative that develops dozens of digital media tools (including openAFRICA), <https://codeforafrica.org/>.

6 Arenstein, Justin (2015). \$4.7 million data journalism initiative launched in Africa, *Medium*. <https://medium.com/code-for-africa/4-7-million-data-journalism-initiative-launched-in-africa-189856fa68d4>.

7 Omidyar Network (2017). South Africa Media Innovation Program (SAMIP) launched by Open Society Foundation of South Africa (OSF-SA), Omidyar Network and Media Development Investment Fund. <https://www.omidyar.com/news/south-africa-media-innovation-program-samip-launched-open-society-foundation-south-africa-osf>.

What You Pay and the Natural Resource Governance Institute, as well as “funding for innovation/experimentation – Code for Africa, SAMIP”.

This donor-driven intervention had a huge effect. It spread ideas around the conference circuit, and Knight Fellows embedded in newsrooms provided follow-up. In the process there was plenty of good publicity for Google, which helped fund many of the efforts and sent emissaries to journalism conferences all over the world. Some started to feel that data journalism was the way of the future and that the possibilities were limitless.

“In the last five-ten years there has been a buzz around data journalism. Any journalist who has gone to an international conference or had a training or is connected to an international Fellow knows about it now,” said Will Fitzgibbon, a reporter with the International Center for Investigative Journalism, who has worked with many journalists on how to use tech, “There is always that moment at a training session when the jaws in the room drop as journalists see what is possible with documents they have at their disposal but hadn’t known how to use.”

No evidence that tech helps newsrooms generate revenues

However despite all the funding and the buzz it is not clear that using digital tools to gather and disseminate information will address what has always been the major problem of journalists in Africa and other low-income countries: lack of revenue and the difficulties in becoming financially self-sustainable. Nor is it clear that funding multiple startups will help the media ecosystem as a whole become financially self-sustainable. In fact, the different outlets may start to compete for audiences and advertising revenue in places where these are limited.

Prue Clarke has been working with *New Narratives* in Liberia for the past ten years, helping media houses and reporters there break news and win awards. She thinks donors should focus their support, in each market, on one or a few outlets that have shown themselves to be free of political interests and serious about developing an independent business model. By helping it become a standard setter for the whole media ecosystem, they show what is possible, attract readers, advertisers and the best journalists,

and raise the bar for everyone in an ethical direction. “Training individual journalists is just creating a stepping stone for a brain drain directly to a job in government or the World Bank or the aid world.”

The best pedagogical practices, knowing which individuals to target for training, capacity building and education continue to be unresolved questions. The standard problems of development are also present in media development. It may be a misallocation of scarce resources to do massive training in advanced digital tools. However, until many people have been exposed, it is not clear who will embrace and use the new technology.

“Success often hinges on one really talented person who loves data, gets data and stays up till 2 am and makes a genius discovery. It’s less clear to me that newsroom-wide investment in basic data training where you encourage everyone to learn pivot tables, for example, helps produce strong investigations – at least in the short term. Data journalism is a lot about ‘use it or lose it.’ And I’ve seen lots of training events where it is quickly evident that few reporters will have the opportunity to use skills they have just spent hours or even days learning,” says Will Fitzgibbon.

Critics of the donor push for data journalism argue that it in fact has not really spread organically or been embedded in newsrooms. While the training is fun and interesting, reporters go back to the newsroom and are unable to continue the work on their own.

Indeed, newsroom training is usually a push effort. Editors identify the skill gaps in a particular team, an outside trainer prescribes a curriculum, and human resources makes it mandatory to attend. The structure is very much like a class, with a few exercises and maybe even a graded test at the end.

Embedding innovation in larger media houses may be more effective than training at conferences with many journalists, as large media houses can use their money and clout to take risks and pursue stories and agendas that small, budget-conscious media outlets are unable to do (Schiffrin et al., 2015, p. 20). For example, Eyewitness News in South Africa says it was the first media house in the country to use WhatsApp to communicate with its audience (ibid., p. 21). The *Star* in Kenya is another example of a large outlet where management and editors sought to mainstream data-driven reporting.

NGOs provide non-financial support to journalists too

Apart from funding, there are other ways that NGOs support transparency and public interest journalism. Believing that accountability and investigative journalism are public goods, many NGOs try to provide information and how-to guides to journalists that they cannot get on their own. NGOs can also support data availability. They use their expertise to prepare and present data in ways that are easy for time-strapped journalists to plug into their own reporting. Indeed, given that many journalists lack the skills to handle complex data-sets, it is a time-honored tradition for NGOs to do some of the research for them.

Some NGOs also have journalism-specific initiatives to promote investigations, and assist reporters by developing data portals or dashboards to provide easily accessible information. Open contracting and open government campaigns have unearthed a host of data and document resources for journalists to triangulate their stories, while drone technology has enabled new visuals and access to new angles and resources. However, tools (data dashboards and web applications) do not solve the problem of cultivating good quality data journalism alone. Training also needs to reflect the country's reality. Observed good media development practice means working with newsrooms as a whole for extended periods of time – up to two years – to develop data journalism and technical skills. This has the added value of being sustainable, in cases where newsroom cultures adapt to these new practices. Such media development initiatives are often unconnected to initiatives that build tools and make data usable/available.

Below, we present and analyze some examples of data and digital tech initiatives as examples of innovative journalism projects in the extractive sector.

Broken links, data dumps, out-of-date information

There are now a number of topic-specific repositories, databases, annotated document archives and toolkits that can help journalists investigate good governance concerns pertaining to extractive industries, such as

illicit finance and tax avoidance. One problem is that many do not provide much data and the data becomes obsolete very quickly. A cursory search online finds a number of sites that, in principle, sound useful but in fact are full of broken links and out-of-date information.

Another revenue management problem that could be helped by having good data and an informed citizenry, is that caused by countries with large resource projects that take resource-backed loans without a guarantee of realizing these projects. Economists Jim Cust and David Mihalyi identified this trend in their research on the “Presource Curse”. “The oil discovery and the financial windfall it promised appeared to usher in an era of economic imprudence: heavy borrowing, profligate spending, and exposure of the economy to the oil price crash of 2014” (Cust & Mihalyi, 2017). In the case of Ghana, this led to borrowing over \$4.5 billion in international markets (ibid.).

Data initiatives are one way to provide tools to oversight actors like journalists, and to set standards for open data. “Resource Projects” was created in 2017 by the Natural Resource Governance Institute (NRGI) (disclosure: with which the authors are affiliated). This project provides easily visualized and exported financial figures divulged from stock exchanges in Canada and the EU to the public around the world. To help societies discuss the cost and benefits of oil, gas and mining projects, this web application uses data released as a result of “disclosures mandated by recent regulations to provide data on project and government entity level payments. This data is intended to allow governments, citizens and civil society actors to better model resource revenues and forecast budgets.”⁸ Journalists can use data from the portal to corroborate other sources in their stories. For example, if portions of contract information are unavailable through traditional disclosures such as the relevant ministries in each country, this data set provides granular data points for journalists to then be able to flesh out how much money is paid by extractive sector companies to different government entities around the world. The extent to which this has been or will be used by journalists is unclear.

Some data initiatives are region-specific. SourceAFRICA uses the technology developed by DocumentCloud to provide annotations and easy

8 Resource Projects, Natural Resource Governance Institute, <https://resourceprojects.org/about>.

access to different documents relevant to investigations on the continent. SourceAFRICA is a service provided by the African Network of Centers for Investigative Reporting with funding from Code for Africa. The platform is Africa's largest repository of leaked/investigative documents⁹. The platform leverages different online tools to collate and annotate documents for journalists to access and add sources of information to their stories. OpenAFRICA is the companion open data portal currently used by 48 organizations like Quartz¹⁰ for building charts, GotToVote!¹¹ to help citizens register to vote, government agencies such as the Department of Justice and Constitutional Development¹² in South Africa, and the fact-checking initiative PesaCheck in East Africa.¹³

Tools and data are not everything. We do not yet have information on how these projects have affected journalism. Supporting media innovations in response to the demands of local audiences and newsrooms seems the most effective method. Making data available may complement these processes. Still, there are challenges to traditional media development practices in newsrooms. NGOs must carefully consider the role of journalism in target countries (Do they function as a public service watchdog?), and be aware that technical training in data-use may seem irrelevant and intimidating for a media house to commit to¹⁴.

Using innovation to cover the extractives sector

Below are some examples of noteworthy coverage of the extractive sector. Some involved innovative data collection, storytelling and dissemination and/or found new ways to bring different groups of reporters together. Others benefited from diverse forms of mentorship and journalist capacity-building

9 SourceAFRICA, <https://sourceafrica.net/>.

10 Quartz Atlas for Africa, <https://blog.qz.com/tagged/atlas-for-africa>.

11 GotToVote!, <https://gottovote.cc/>.

12 Department of Justice and Constitutional Development, Republic of South Africa, <http://www.justice.gov.za/master/trust.html>.

13 PesaCheck, <https://pesacheck.org/>.

14 Constantaras, Eva (2016). OpenGov voices: Why data journalism tries, and fails, to go global, *Sunlight Foundation*. <https://sunlightfoundation.com/2016/02/10/opengov-voices-why-data-journalism-tries-and-fails-to-go-global/>.

which helped expand the network of reporters. They used diverse revenue streams and audience outreach strategies including regional competitions, exhibitions and events, direct philanthropy and aid, and tried to bridge traditional and experimental forms of storytelling to target relevant audiences.

1. *#minealert – helping track mining licenses in Southern Africa*

One initiative highlighting extractive sector abuses is Oxpeckers' #minealert mine-tracking mobile website and app. Oxpeckers¹⁵ is a South Africa-based small investigative media outlet that covers environmental issues, especially developments in the extractive sector, with data mapping tools. Oxpeckers was begun through the African News Innovation Challenge (ANIC) and later received support from Code for Africa, and is able to innovate quickly because of its modest size (ibid., p. 99).

Oxpeckers established #minealert, a tool for tracking and sharing mining applications and licensing processes. This shows how niche models like Oxpeckers leverage big headings for diverse products. #minealert supported investigations into the social, economic and climactic legacy of coal mining in South Africa using long-term data investigation¹⁶, the environmental costs of phosphate mining¹⁷, and balanced appraisals of ongoing mining prospecting¹⁸.

2. *The Gecko Project – an NGO uses multimedia to expose the dark side of palm oil in Indonesia*

“Indonesia for Sale” is a series of three gorgeously produced multimedia reports unearthing corruption and environmental devastation in Indonesia's palm oil industry. The package was reported and published by the Gecko Project, an investigative reporting site founded in 2017 by

15 Oxpeckers, <https://oxpeckers.org/>.

16 Olalde, Mark (2017). Coal mines leave a legacy of ruin, *Oxpeckers*, <https://oxpeckers.org/2017/04/coal-mines-legacy/>.

17 Olalde, Mark (2016). Seabed prospecting undermines blue economy, *Oxpeckers*, <https://oxpeckers.org/2016/11/3345/>.

18 Thomas, Julia (2018). Is Mabola open for mining? *Oxpeckers*, <https://oxpeckers.org/2018/05/is-mabola-open-for-mining/>.

U.K.-based environmental NGO Earthsight and based in London. The series was produced and published in collaboration with the environmental news website Mongabay. The Gecko Project was the brainchild of journalist Tom Johnson, who had previously worked for the Environmental Investigation Agency in London. Johnson wanted to bring together advocacy, investigative journalism and multimedia into one big package of reporting, in the hope that investigative journalism and high-quality multimedia would make a difference.

“Digital has been vital in our ability to get the outputs in front of an Indonesian audience. Facebook penetration is high, and Indonesians are really engaged on Facebook. Using targeted promotions, we’ve been able to drill stories right back into the districts that are the subject of the stories. These are remote places that barely have any form of reporting on the issues that are affecting them deeply, and why. A second aspect relates to our reporting methods. We relied extensively on Facebook to track down individuals, to make connections between them and sometimes to contact them. We’ve also used LinkedIn to expose companies that are using their employees as proxies, to disguise their ownership of their subsidiaries – what are effectively shadow companies. That said, once we’ve made such connections, it’s back to gumshoe reporting. The internet has allowed us to find out things we simply couldn’t without it, but it only takes us so far, and then it’s back to knocking on doors,” said Johnson.

The lengthy series tells it all: sordid land-grabs, a web of corruption that spread from powerful local families to the political elites of Jakarta and abroad, shell companies and environmental destruction. The written text alone is more than 40,000 words – including explainers and analysis – and is accompanied by powerful images and videos. Dozens of people were interviewed for the project including fixers, middlemen, environmental activists, villagers who were affected, politicians, corporate lawyers and employees of plantation firms.

“I was inspired by the AP series on fishing and the emergence of single issue campaigning journalism organizations like the Marshall project and dedicated investigative outlets like ProPublica, which married together a lot of the things I wanted to do. I thought about what

would be the stories I would want to read,” Johnson said about the project, which began early in 2017 and involved two full-time reporters as well as freelancers and freelance filmmakers and photographers.

Launched in October 2017, the project has led to a growing recognition of the role of multinational and Indonesian plantation firms in undermining Indonesia’s democracy. The Corruption Eradication Commission, Indonesia’s anti-graft agency, has used the findings to inform its work, their investigators and senior officers have said. In total the project cost about \$150,000 to do, and was funded by the Waterloo Foundation and a major US foundation that asked to remain anonymous for fear of antagonizing the Indonesian government.

The reports have been published on the California environmental-based news site Mongabay as well as its sister site in Indonesia and distributed on social media platforms. They have also been co-published with *Tempo*, Indonesia’s leading investigative magazine, and syndicated by numerous other sites and blogs under a Creative Commons license. Low-tech means were used too: photocopies were made and distributed by motorbike messengers on the island of Sulawesi. An estimated 500,000 people have seen the stories on Mongabay and the Gecko Project sites, Johnson said, and 10% have finished reading them. The completion percentage is higher in Indonesia where the story resonates locally. The final investigation in the series was published as the cover-story in *Tempo* magazine in November 2018, reaching more than one million readers.

“It’s probably too long but to tell the story properly, it needed to be that long. It really tells the story of modern Indonesia from autocracy to democracy,” Johnson said, adding that the videos on Facebook have attracted close to one million views, boosted engagement and sent people to read the reporting. “We’re confident that the stories will have an impact, and this is only the start of the project,” said Johnson. “We’re at the start of exploring a very rich and deep vein of corruption, and the further we go the greater the chances there will be some form of meaningful response – from government, enforcement agencies, or galvanising civil society to address the specifics of the problem in a more effective way.”

3. *#WestAfricaLeaks – coordinated reporting on corruption in West Africa*

#WestAfricaLeaks (published in May 2018) was the first time journalists across West Africa collaborated on a series of incisive investigative journalism unearthing corruption. Supported by Cenozo and ICIJ, *#WestAfricaLeaks* coordinated 13 journalists from 11 West African countries to use the data and resources available from bigger leaks for targeted reporting in West Africa.

The initiative responded to the dearth of investigations in the region inspired by cross-border investigations like the Panama Papers and Paradise Papers. “*#WestAfricaLeaks* was meant to be explosive. Panama Papers didn’t go viral in Africa. \$700 million was retrieved in the United States and Europe, and a Pakistani politician will go to jail for ten years, but nothing happened in African countries,” according to participating journalist Emmanuel Dogbevi from Ghana.

Dogbevi’s piece unveiled violations of the Vienna Convention by the then Ambassador of Ghana to the United States. The ambassador held a 3.5 percent stake in an offshore oil block in Ghana and sold his stake while in office, without declaring his political affiliation, making \$350 million on the sale.

An Al Jazeera documentary raised the important question of how much impact the investigative journalism series achieved. “One of the group of journalists’ greatest challenges was getting their readers, their governments, and in some cases even the media outlets they work for, to care ... What set *#WestAfricaLeaks* apart is the media landscape. The conditions in which journalists work.”¹⁹

4. *Chai Khana – cross-border reporting in the South Caucasus*

“ChaiKhanaiswhatyoureadafterthenews:adocumentarythatyousitand watch,thatdivesintothecharacters.ChaiKhanashadowsadifferentcross-border topic every two months” in the South Caucasus. “It focuses on underrepresented individuals. Most people are publishing news

19 <https://www.aljazeera.com/programmes/listeningpost/2018/07/making-breaking-west-africa-leaks-180707085021334.html>.

and analysis, but we want to highlight these issues through character-driven stories,” according to founder Caroline Sutcliffe.

The outlet is funded by the British Embassy’s Conflict Stability and Security Fund. In a region that is traditionally conflict-ridden and with a young culture for investigative journalism, the outlet surmounts challenges by developing the reporting community through capacity building and mentorship, and emphasizing locally-rooted stories. They have around 200 freelancers across the region often reporting stories they pitch individually, said Sutcliffe.

The outlet’s audience is diverse, reaching rural, affected communities as well as individuals throughout the region. To reach their target audiences, Chai Khana experiments with different forms of storytelling. “80 percent of our audience is between 18 and 35 years old,” said Sutcliffe. These storytelling forms include an emphasis on visuals in the form of animations and documentaries, with current experiments employing drones and virtual reality. To engage rural audiences, they publish and advertise content via Facebook. To engage different audiences and build the site’s reputation, they employ unique outreach strategies. These includes community engagement activities in the form of exhibitions, and film screenings specific to their published content.

In its first year, Chai Khana published investigations on environmental degradation and pollution caused by copper mining in Armenia. A recent cross-border multimedia piece, “Shared Waters”, covers the effects of overusing and contaminating the Kura River that passes through Turkey, Georgia, Azerbaijan, Armenia and Iran through personal narratives and visuals, thus illuminating a shared regional resource in an area prone to cross-border conflict.

5. *100Reporters – seasoned reporters train journalists on extractive sector investigations*

Impact through hard-hitting investigations by local reporters is priority number one for 100Reporters. This non-profit news outfit and set of mentors seeks to promote transparency and good governance through investigative journalism. 100Reporters publishes stories on its outlet

and in cooperation with the likes of *Salon* and *Foreign Affairs*. The journalists they support target the deleterious sides of opaque industries, like corruption and attributed deaths in mining sites, with freshness and precision.

“Journalists are getting training, but where do they publish and who’s working to bridge this gap? We bring guidance into the system to get reporters on the ground to better understand and identify reporting partners.” According to its executive editor and co-founder Diana Schemo, 100Reporters “works with reporters on the ground, to then help them fill in the outlines of the story”.

They deliberately avoid large training environments, preferring to build teams and support them by running through drafts, discussing digital and physical security, and where to look for documents.

Journalists they work with have uncovered a host of hard-hitting extractive sector stories. Recently in Cameroon, “a two-year investigation by 100Reporters has found that the project, though managed by President Biya, has failed to pay royalties, training fees and taxes to the Cameroonian treasury, even as it made payments to investors totaling millions of dollars.”²⁰ In 2016, 100Reporters published a story by Estacio Valoi in Mozambique investigating the mislabeling of blood diamonds by officials in charge of verification.²¹

Is there any impact? Does tech and data reporting help financial sustainability?

The replication of innovations is a sign of success for donor-funded projects in the media (Robinson et al., 2015, p. 14), but it is not clear whether any of the innovations discussed in this chapter help solve the main

20 Locka, Christian (2018). Cameroon: Gas project brings royalties for shareholders, but few benefits for locals or national coffers, *100Reporters* (February). Accessed: <https://100r.org/2018/02/cursed/>.

21 Valoi, Estacio (2016). The blood rubies of Montepuez: Troubling pattern of violence and death for responsibly sourced gems, *100Reporters* (May). Accessed: <https://100r.org/2016/05/the-blood-rubies-of-montepuez/>.

problem journalism faces globally: lack of funding. Nor is it clear what sort of impact the stories have had.

Even the funders of data journalism admit that measuring impact is hard. Tracking the effects of capacity-building is hard. It can also be difficult to follow the reporting of the journalists who have had the training, since many of them do not write much afterwards, or their work is not available online, while others leave the profession. Once investigative articles are published it is difficult to know whether it is exposure journalism or other factors that lead to changes in government policies or corporate behavior. For example, if street protests follow media coverage of a corruption scandal in Nigeria, it is difficult to know what exactly caused the protests.

“It’s very hard to demonstrate attribution or even articulate how journalism’s contribution to change has happened,” says Miguel Castro from the Gates Foundation. “In a complex ecosystem like African media for example, we can’t tell beyond the anecdotal what was the result of the work of Code for Africa and other partners of the challenge funds created over the last few years, or Omidyar’s and others’ work. But definitely there has been a significant contribution to growth in newsroom understanding of digital and data storytelling.”

Proponents of data journalism and innovation argue that the resulting reporting will attract audiences, boost engagement and help media outlets carve out a niche for themselves, as well as help raise the outlets’ profile in a crowded media market. They also argue that journalists need to develop an entrepreneurial spirit, and that embracing innovation can help.

Indeed the Media Development Investment Fund, which has spent years trying to nurture new business models for media outlets around the world, provides “funding for new approaches such as app-based news providers or mobile-targeted content, regional expansion efforts for companies with a proven business model, as well as traditional distribution mechanisms in markets where they are still relevant.”

Innovation diffusion may also occur through a large media house that is able to support and incubate new ideas. Or it can occur through entrepreneurs who decide to try something new (Robinson et al., 2015, p. 169).

Others, such as *Animal Politico* in Mexico, focus strictly on web content and audience outreach through social media. This model allows *Animal Politico* both to engage with digitally-based and young audiences, and to avoid a dependence on government advertising²².

Supporters say tech training helps develop local entrepreneurs

Craig Hammer, who is secretary of the World Bank's Development Data Council and leads the World Bank's Global Media Development program, noted that capacity building and the development of new skills has helped local journalists get extra work as data editors and graphic designers, and so it has supported local entrepreneurship. Or as he put it, "As robust data analysis in news media becomes ever more mainstream across regions, so, too, are new models for organizing the work of data journalism taking root, including a growing subcontracting, or entrepreneurship, approach. Data journalism training is helping to contribute to the growing pool of technical professionals who may avail themselves of associated new opportunities."

Data may contribute to how media outlets distinguish themselves and thus help their position in the media market. However, a direct relationship between profitability and the use of technology and data reporting is hard to pinpoint.

Hammer points to an uptick in public consumption of data-driven news content in Kenya, which is a result of capacity-building support in the country by a few key organizations. One example is Internews' support for *The Nation Newsplex*²³, the public interest data team of the *Daily Nation*, which disseminates data-driven analyses both through the *Daily Nation* – the largest circulation daily newspaper in Kenya – and through NTV, which is one of the country's largest television stations.

22 *Animal Politico*, *Nieman Journalism Lab*, last updated: June 12, 2014, <http://www.niemanlab.org/encyclo/animal-politico/>.

23 *The Nation Newsplex*, www.nation.co.ke/newsplex/.

Critics say tech/data reporting is not helping profitability

In designing their tech/data push, funders had hoped that a “build it and they will come” approach would work. They did not try to first look at whether the innovations would be effective or make any money or what other impact the journalism would have. The consensus now is that the impact has not been proven and that benefits have not yet appeared on the bottom line.

“We believe we need to develop even further a business case for data journalism and digital storytelling. The assumption that ‘if you build it they will come’ is not working, as newsrooms are under so much pressure that they have not prioritized data journalism with its relatively high costs and substantial skills required,” says Castro, from the Gates Foundation. “In donors’ excitement to embrace the open government and open data movement, they have pumped lots of money into the quickest, cheapest and flashiest path to data journalism: boot camps, hackathons and conferences. Yet these approaches boil down the barrier to data journalism into one simple problem: technology. These boot camps are designed to provide technology solutions, with the tacit assumption that the rest will follow, but they have misdiagnosed the essential root problem. It’s not the tools, at least not primarily.”²⁴

Will funders turn away from funding data journalism and its tools? The supporters of these innovations hope not. “There is a groundswell of data journalism but I do get concerned that funders aren’t willing to give it enough time for it to take hold. There is something fundamentally important about getting these stories out there because they are not getting told otherwise,” said Ben Colmery, former director of the International Center for Journalists’ Knight Fellowships Program.

At a time when the limits to naming and shaming are all too clear, it is simply not certain whether the reporting described above will have a clear impact on government policy or corporate behavior. Even so,

24 Constantaras, Eva (2016). OpenGov voices: Why data journalism tries, and fails, to go global, *Sunlight Foundation*. <https://sunlightfoundation.com/2016/02/10/opengov-voices-why-data-journalism-tries-and-fails-to-go-global/>.

the new tools and new methods of data and digital reporting are now better understood and used more frequently than they were before. Indeed, looking back at ten years of donor-driven attempts to promote tech and data reporting in newsrooms of the global South, it is clear that the tools are being used and that some elegant and sophisticated reporting has been the result. What has not been proved is whether these kinds of data-driven stories create more impact than any other kind of investigative reporting, produce lasting audience interest or engagement, or will help with the biggest problem of all: funding for quality reporting.

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CHAPTER 13

Beneficial Ownership: Filling the Gap in Transparency and Accountability in the Extractive Industries and Improving Governance

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Abstract: Transparency through disclosure of beneficial ownership and the resulting accountability have the potential to transform governance structures in the extractive industries, particularly in natural resource rich developing countries. Benefits from the disclosure of beneficial ownership accrue to the public sector, since increased transparency allows the state to reduce various points of natural resource revenue leakages, and thereby retain more precious financial resources required to invest in education, healthcare, and infrastructure, as well as other public priorities. The private corporate sector too benefits from such disclosures, as this helps minimize legal and reputational risks that might arise through association with business partners or suppliers having opaque ownership structures. In addition the ensuing transparency helps foster competition, reduce corruption and promote fair business practices.

Keywords: transparency, beneficial ownership, disclosure, natural resources, accountability, natural resources management, governance, fair business practices, anti-corruption, competition

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Introduction

Legal practitioners often encounter the repercussions of ignoring or failing to procure beneficial ownership information on companies involved in oil, gas and mining industries in resource rich countries. Beneficial ownership information entails the disclosure of real or ultimate owners of a company, namely the natural persons who own or control such a company, no matter how many intervening layers of other companies and/or legal entities may exist in between such a company and its natural person owners.

As such, when beneficial ownership of oil, gas or mining companies is opaque, transfer of both information and profits to companies registered in so-called “tax havens” such as the British Virgin Islands and Mauritius,¹ which do not yet require ownership registration or beneficial ownership disclosure, likely leads to loss of natural resource revenue for resource rich countries (“host countries”), located mainly in the developing world. Often host countries are offered relatively small amounts of taxes and other compensation for the operation of an oil, gas or mining project, with further profits invariably distributed to unknown or hidden persons, many of whom are highly placed public officials or other politically compromised or exposed persons in their own government, through companies with opaque ownership structures. How extensive this problem is has been exposed through the now infamous Panama Papers and Paradise Papers leaks,² although the actual amounts of the huge sums involved are at best educated guesses.³

Disclosure of beneficial ownership is a necessary and integral part of the efforts to promote and institutionalize transparency in the extractive

1 Over, Marco Chown. British Virgin Islands growing rich as a global tax haven, *The STAR*, (2016, April 4); Doward, Jamie. Deloitte promotes Mauritius as tax haven to avoid big payouts to poor African nations, *The Guardian*, (2013, November 3). Accessed on August 20, 2018, and at <https://www.theguardian.com/business/2013/nov/03/deloittes-tax-savings-investments-in-poor-countries>.

2 International Consortium of Investigative Journalists, Leaders (ICIJ), Criminal celebrities. Retrieved from <https://www.icij.org/investigations/panama-papers/> ICIJ, ICIJ releases Paradise Papers data from Appleby, (2017, November 17) at <https://www.icij.org/investigations/paradise-papers/icij-releases-paradise-papers-data-appleby/>.

3 Henry, James. S. The price of offshore revisited: New estimates for missing global private wealth, income inequality and lost taxes, (2012, July) at http://taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf.

industries, and also to enable a more equitable amount of the sums earned in natural resource rich countries to actually be retained by them. Transparency as such is the sine qua non for governance reform in the extractive industry not only promoting accountability, but also fostering linkages to wider governance reforms in the industry, thus providing for a more equitable distribution or sharing of the profits of natural resource exploitation. From the perspective of private sector companies, minimizing the risk of association with undesirable business partners or questionable suppliers and dodgy entities or individuals posing political risk, is imperative in order to avoid any violation of laws regulating corruption and financial crimes, including money laundering and financing of terrorism.⁴ Transparent beneficial ownership disclosures would presumably lead to the exposure of organizations linked with or owned by individuals posing a high political and legal risk to companies.

From the public sector perspective, natural resources such as oil, gas and minerals are by law held in trust by the government of a country, for the benefit of the people of that country. Public policy would thus dictate that the people should have accurate and complete knowledge of the management of their natural wealth. Transparency in the extractive industry fosters public trust and informs and engages the public on crucial matters relevant to the governance and use of their natural resources, thus also benefiting the private sector as it engenders the process of obtaining and maintaining the social license to operate from the communities. Some advocates⁵ of maintaining the status quo of not disclosing

4 Kelly, E. John, McBride, Thaddeus R., Richardson, Eli J. & Palmeri, Cheryl A. Proposed legislation would combat terrorist financing, money laundering. Accessed on June 8, 2017, available at <https://www.lexology.com/library/detail.aspx?g=790a6c30-f647-46e0-a653-c792d9317309>. See also Woods, Martin. Is beneficial ownership really so difficult? *Thomson Reuters*, (2015, January 19).

5 Kenney, Martin. Open company UBO registers are not the panacea to financial crime, *The FCPA Blog*, (2018, May 7). Accessed on August 20, 2018, available at <http://www.fcpcbog.com/blog/2018/5/7/martin-kenney-open-company-ubo-registers-are-not-the-panacea.html>. [Martin states, "Why should a businessperson conducting perfectly legitimate business be denied the right to privacy in order to do so? The argument that 'if it's legitimate then why try and keep it confidential?' doesn't fly. We are all entitled to the protection of private data unless we are doing something wrong. Privacy is closely aligned to human dignity. The legitimate right to privacy is analogous to the privacy of a bank account and other financial data (expected, but not unqualified) and medical records."].

identities of beneficial owners, point out issues of privacy (including protection from kidnapping and extortion if it becomes known that a person has considerable assets); protection of legitimate business interests,⁶ such as the decision to acquire or merge companies; protection of intellectual property; or the quiet pursuit of a new creative venture. Recently, some of these advocates have started to realize that tax authorities and other public regulators should have the right to examine, for specific purposes, officially maintained registers in which the identities of beneficial owners are disclosed. While, as briefly noted above, there can be valid business and personal reasons for the confidentiality of beneficial ownership information, it is questionable whether any of these reasons should, or do, apply to the natural resources sector in host countries of the developing world. Here, because of public ownership of such resources, states issue licenses or enter into agreements with operating companies to develop the resources. In such instances, the state is usually a partner in the project, and as such has a commercial interest in knowing with whom it is entering into a partnership, particularly when politically exposed or compromised individuals from its own government enrich themselves through opaque ownerships⁷ in the very companies partnering with the state.

Transparency, accountability and trust are important features of a robust governance framework for the extractive industry, ranging from the allocation of licenses to the collection and management of revenues. Revenues from the extractive industry are an essential source of income for many developing countries, without which they cannot help fund their most critical institutions, their schools and their infrastructure. On the other hand, transparency helps foster competition, reduces cronyism and corruption, promotes fair business practices, and reduces reputational risks for the private sector. This results in an improved, reliable and friendly business/investment environment for private sector investors, and encourages them to enter emerging markets. The benefits of

6 See Stiglitz, Joseph & Pieth, Mark. Overcoming the shadow economy, *Friedrich-Ebert-Stiftung*, (2016, November 11), page 6, for discussion on potential, legitimate reasons for the use of tax havens.

7 ICJ, How family that runs Azerbaijan built an empire of hidden wealth. Retrieved from <https://www.icij.org/investigations/panama-papers/20160404-azerbaijan-hidden-wealth/>, April 4, 2016.

transparency in the extractive industry are numerous and accrue to a diverse set of stakeholders, including the state/government, citizens, the private sector, and civil society. Ironically, it appears from the authors' experience as advisors to governments and state-owned entities in emerging nations, that the advantages of transparency are still not fully understood by the extractive industry, probably due in part to a failure to appreciate the risks of non-transparency and the repercussions these companies can suffer from the failure of beneficial ownership disclosure. In fact, governments do not fully appreciate that transparency has the benefit of creating a more secure and reliable investment climate and facilitating better governance,⁸ which, from the authors' experience, can become a virtuous circle. As such one of the goals of the recommendations made herein, is to help further the discourse on the benefits of disclosing ownership, including advancing the creation of such a circle in emerging nations rich in natural resources.

Disclosure of beneficial ownership eliminates opaque ownership structures

The obvious benefit of disclosure of beneficial ownership for host countries and their people relates to the elimination of opaque ownership structures, which allow companies to hide improper relationships with politically exposed or compromised individuals – in short it is a powerful tool in minimizing corruption, which has spawned civil unrest and decades-long conflicts around the globe. There have been repeated cases of countries (specifically emerging economies) losing millions on account of sham companies or politically connected companies. For instance, the Democratic Republic of Congo (DRC) lost approximately \$1.36 billion in mining revenues, about twice the amount of the annual budget for health and education, between 2012 and 2013, because of the sale of undervalued mining assets to offshore companies with questionable ownership

8 Johnston, Michael. Good governance: Rule of law, transparency, and accountability, at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpano10193.pdf>.

structures.⁹ Loss of valuable natural resource revenues impacts both the public and the private sector. As countries and governments lose potential revenue from the exploration and exploitation of natural resources, they lose the capacity to develop and improve their economy sustainably. Subsequently investors, particularly foreign investors, are hesitant to invest in the extractive industries since the country is unable to invest in infrastructure and other non-resource sector industries, which may attract direct foreign investment in potential projects, attractive to prospective investors. For instance poor or absent infrastructure hinders development,¹⁰ and oil, gas or mining investors might be hesitant if access to assets and the facilitation of project operations require the investor to develop basic infrastructure like roads, which ideally should have already been in place. Further, loss of revenue fosters a cycle of corruption in developing nations, diluting all efforts made by the international community, and the developing nations themselves, to make the extractive industry as transparent as possible.¹¹

Information on who ultimately owns and benefits from the activities of a corporation will eliminate the phenomenon of hidden owners and beneficiaries, revealing politically exposed or compromised individuals, who often use shell companies and/or tax haven jurisdictions to hide their ownership in oil, gas or mining assets, thus evading payment of taxes on the income derived from such assets, and avoiding the liability¹² associated with the operation and use of such assets.¹³ Benefits from

9 Africa Progress Report 2013: Equity in extractives Africa: Stewarding Africa's natural resources, *Africa Progress Report*, p. 56.

10 DW, Poor infrastructure is key obstacle to development in Africa, (2011, July 26).

11 Votava, Cari. Extractives sector corruption: What we have learned, *Extractive Industry Transparency Initiative (EITI)*, (2018, January 18).

12 If the ultimate owners of a company are not known, it is difficult to hold them liable for the simple reason that their identity is unknown. If the identity of ultimate owners is made transparent to government authorities, there are still legal hurdles to overcome, particularly because shareholders/stockholders of a company are by law not liable for the obligations of a company, although, in some jurisdictions, liability for environmental damage is now being extended to controlling shareholders. Knowledge of beneficial owners of a company provides the opportunity to issue an operating license with the condition that all significant shareholders of that company must execute a guarantee for the obligations and liabilities incurred by the company, especially for any liability for environmental damages.

13 Panama Papers reveal wide use of shell companies by African officials, (2016, July 25). *New York Times*.

the transparency of ownership structures are not only restricted to host countries. Profit shifting through innovative corporate structures can also result in tax evasion or avoidance in the countries in which the oil, gas and mining companies are incorporated (home countries). In fact, the Extractive Industries Transparency Initiative (EITI), the “global standard to promote the open and accountable management of oil, gas and mineral resources,”¹⁴ is supported by some home countries,¹⁵ and global international oil companies such as Chevron, BP, Exxon Mobil and Hess.¹⁶

The EITI has, as of 2016, included the disclosure of beneficial ownership within the EITI Standards reporting requirements, calling upon members states to keep a “publicly available register of the beneficial owners of the corporate entity(ies) that bid for, operate or invest in extractive assets, including the identity(ies) of their beneficial owner(s), the level of ownership and details about how ownership or control is exerted”. In addition where possible, information on beneficial ownership should be incorporated in “existing filings by companies to corporate regulators, stock exchanges or agencies regulating extractive industry licensing.”¹⁷ Furthermore by 2020, all member states “have to ensure that all oil, gas and mining companies that bid for, operate or invest in extractive projects in their countries disclose their real owners,” identifying the name, nationality and country of residence of the owners.¹⁸ The European Union too issued a directive in June of 2015, the 4th Anti-Money Laundering Directive (EU) No. 2015/849 (4th AMLD), requiring all member states to enact national laws on disclosure requirements for “beneficial ownership information for corporate and legal entities.”¹⁹ Such information, as per the directive, requires “adequate, accurate and current information on beneficial owners” of companies, including the “name, date of birth, place

14 EITI, About us. Accessed August 12, 2018, available at <https://eiti.org/about/who-we-are>.

15 EITI, Supporting countries. Accessed August 12, 2018, available at <https://eiti.org/supporters/countries>.

16 EITI, Companies. Accessed August 12, 2018, available at <https://eiti.org/supporters/companies>.

17 EITI, EITI Standards 2016. Accessed on July 16, 2018, available at <https://eiti.org/node/4922#r2-5>.

18 EITI, EITI beneficial ownership requirements. Accessed on July 16, 2018, available at <https://eiti.org/beneficial-ownership>.

19 Association of Certified Anti-Money Laundering Specialists (ACAMS), Ultimate beneficial ownership, (2017, December). Retrieved from <https://www.acamstoday.org/ultimate-beneficial-ownership/>.

of residence, and nature and extent of such beneficial ownership,” which are eventually to be placed on national registries accessible to regulators, entities that might need to undertake customer due diligence, and individuals who can prove a “legitimate interest” in requiring access to such information.²⁰ Recent amendments to the directive further cover the disclosure of beneficial ownership of trusts²¹ in a private register available to tax regulators, law enforcement authorities and businesses subject to anti-money laundering rules.²²

The directive covers natural person(s) who ultimately own or control the company through “direct or indirect ownership of more than 25 percent”²³ of the shares or voting rights or ownership interest, or through “control via other means”; or hold(s) the position of “senior managing official,” in the event that no other natural person is “identified (having exhausted all possible means and provided there are no grounds for suspicion) or if there is any doubt that the person so identified is the beneficial owner.”²⁴

In the United States, in 2016 the Financial Crimes Enforcement Network (FinCEN), created the “fifth pillar” of the Anti-Money Laundering/Bank Secrecy Act compliance, for customer due diligence programs, which incorporates new features requiring “covered financial institutions,” such as banks, credit unions, brokers or dealers in securities, mutual funds, futures, commission merchants and commodities brokers²⁵ to collect and maintain data on beneficial owners, commencing in May 2018. Beneficial owner(s) are defined as “[e]ach individual, if

20 Mardle, David & Cloake, Debbie. (2017, June 30) Navigating the new European regime for disclosure of beneficial ownership. Retrieved from <https://www.lexology.com/library/detail.aspx?g=ef7a3a89-91c6-48c6-bf27-880dcd8f1016>.

21 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance).

22 Lochner, Eric. Public registers expand EU third-party compliance risks, *FCPA blog*, (2018, April 4).

23 The 25% standard will most likely not be effective in disclosing ownership by politically compromised individuals or those attempting to evade taxes for the simple reason that 25% can still obviously hide significant ownership positions.

24 FCPA Blog.

25 Federal Register / Vol. 82, No. 187, September 28, 2017, available at https://www.fincen.gov/sites/default/files/federal_register_notices/2017-09-29/CDD_Technical_Amendment_17-20777.pdf.

any, who owns, directly or indirectly, 25 percent or more of the equity interests of the legal entity customer (e.g., each natural person owning 25 percent²⁶ or more of the shares of a corporation); and “[a]n individual with significant responsibility for managing the legal entity customer (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer).”²⁷

Additionally, the United States Senate held hearings in February 2018 for a bill on beneficial ownership disclosures, which would direct states that receive funding under the Edward Byrne Memorial Justice Assistance Grant program to enact laws requiring entities that form corporations or limited liability companies to disclose their beneficial owners, the definition of which includes all natural persons who “directly or indirectly exercise substantial control over a corporation or LLC (limited liability company), through ownership interests, voting rights or agreements,” or “have substantial interest in or receive substantial economic benefits from assets” of such a corporation or limited liability company.²⁸

The case for disclosure

Information on beneficial ownership results in an efficient and optimum allocation of licenses/concessions

Disclosure of beneficial ownership will help governments ascertain the financial capacity and technical expertise of oil, gas or mining companies prior to granting licenses/concessions, and will require parent companies of such companies to guarantee the financial and technical obligations

26 The 25% standard will most likely not be effective in disclosing ownership by politically compromised individuals or those attempting to evade taxes.

27 Federal Register, September 2017. See also FinCen’s long-awaited final rule on collection of beneficial ownership information and customer due diligence, *Provititi*. Accessed on June 24, 2016, available at <https://www.provititi.com/US-en/insights/fincen-final-rule-collection-beneficial-ownership-information-and-customer-due-diligence>.

28 <https://www.congress.gov/bill/115th-congress/senate-bill/1454/text>.

of oil, gas or mining companies under such licenses/concessions. The need to ensure adequate technical expertise and financial capacity cannot be stressed enough, especially where the applicant company, in many cases, is a subsidiary or affiliate company with no independent financial and technical wherewithal. For instance, license allocation on the basis of inadequate information to an extractive company with insufficient funds or technical knowledge can lead to situations where communities and the environment are significantly compromised, particularly when the license holder does not have the financial resources or the technical capacity to avoid and/or mitigate adverse impacts on the environment, and undertake rehabilitation measures and compensate communities for such adverse impacts.²⁹ As such, beneficial ownership disclosure can inform the government about the financial and technical capabilities of the applicant for a license and its beneficial owners, and given this information, the government can require the beneficial owner to guarantee the technical and financial abilities of the applicant for the life of the project, and during and after closure, as appropriate, especially in respect to environmental damage.³⁰

Information on beneficial ownership can ensure accountability

Often developing countries in the nascent stages of establishing their natural resource industries and the regulations governing such

29 Time, Gray. (2017, July 14). Who cleans up the mess when oil and mining companies go bankrupt? *The Globe and Mail*.

30 In the absence of a guarantee, the applicant company could easily become a shell company, namely a company without any assets, other than the right to exploit or develop a natural resource, as the profits of that company are regularly and normally distributed as dividends to the shareholders registered on the books of the company, with the consequence that that company does not have adequate or sufficient financial resources to meet its obligations. This is particularly and often the case at the end of the life of a project, at which time the resource is almost depleted and the accumulated profits have all been distributed (and spent). Consequently, it is prudent for a state to require a guarantee from the owners of a company for such liabilities, especially for covering the cost of restoration of the exploited area to its original condition and ensuring that there are no lingering environmental costs.

industries, are handicapped by weak institutions.³¹ Due to lack of proper training, civil servants often lack the requisite skills, tools and experience, to protect the country and its people from natural resource revenue leakages. An asymmetry of information³² emerges, where companies with access to resources can equip themselves with an abundance of valuable information in order to negotiate complicated energy deals, while governments, and particularly government officials, are unable to effectively counter-negotiate due to lack of access to such information.

In addition, as mentioned earlier, extractive industries are associated with negative externalities, such as costs and damages arising from adverse impacts to the environment and surrounding communities, etc. Moreover, abandonment of extractive assets and/or inadequate implementation of mine closure activities by the license holder are not uncommon,³³ with the consequence that the state bears the costs of cleanup and rehabilitation.³⁴ For example, submissions made by a civil society group to the relevant government ministry in Ontario, Canada noted that the taxpayers of Ontario bore the burden of clean-up costs of many active and abandoned mines, for which the financial assurances were inadequate.³⁵ In other instances, governments have undertaken mitigation and/or rehabilitation measures, spending taxpayers' money on clean-up activities, due to the absence of specific obligations on the extractive companies, as in the case of the government of South Africa, which had to

31 Totaro, Paola. (2017, June 28). Few resource-rich countries properly manage their natural resources: report. *Reuters*.

32 Stiglitz, Joseph. E. (2000). The contributions of the economics of information to twentieth century economics, *The Quarterly Journal of Economics*, 115(4).

33 Ashton, S., Bausch, K., Bulman, A.M., Cunha, I.P., Liu, D., Pathmanathan, J., Pham, L., Ravichandran, N., Srikrishnan, M., Tecson, C., Ueda, K., & Yi, R. (2015). Supervised by Radon, J. Mining in Peru: Benefiting from natural resources and preventing the resource curse, Capstone Workshop, Columbia University.

34 Superfunds in the United States were created pursuant to legislation in 1980 that allows the United States Environmental Protection Agency (EPA) to use public funds to clean up contaminated sites, such as abandoned or unmanaged mining sites. See EPA, "What is a superfund?" Accessed on August 11, 2018, available at <https://www.epa.gov/superfund/what-superfund>.

35 See Ontarians for a Just Accountable Mineral Strategy (OJAMS), Submission to the Ontario Ministry of Northern Development and Mines, May 2015, <http://www.ojams.ca/wp-content/uploads/2015/10/ojams-may2015-submission.pdf>.

spend at least \$6.6 billion on mine closures and associated clean-up activities for abandoned mines.³⁶

Knowledge of beneficial ownership better equips government officials with the tools needed to leverage their position in negotiating agreements governing natural resources. Carefully and well drafted contractual frameworks can require license holders to provide security, financial guarantees or fully bonded rehabilitation programs to cover environmental costs. However, license holders are invariably a subsidiary or an affiliate company of another company, and as such have a limited financial and technical capacity to perform such contractual obligations, if such obligations are in fact negotiated. In these circumstances, knowledge of beneficial ownership of oil, gas and mining companies can give governments the opportunity to protect themselves and the public, by requiring that the beneficial owners provide guarantees to cover the costs of adverse impacts on the environment and communities, mine closure, decommissioning and abandonment, rehabilitation and/or clean-up costs of extractive industry sites.

Disclosure of beneficial ownership informs communities and facilitates the social license to operate

In addition to acquiring the legal license to operate, extractive companies are finding it increasingly difficult to sustain their investments and their projects without obtaining a social license to operate – i.e., the ongoing responsibility of a business or company to “ensure its activities respect the rights of all those in any community” in which it operates.³⁷ Obtaining the social license to operate in the impacted/affected communities and communal buy-ins for an extractive project is crucial in order to operate the project sustainably. Ernst & Young, a global professional services firm, in 2015 identified the failure to secure a social license to operate as

36 Vecchiato, Paul (2015, August 19). South Africa cost for cleaning up old mines almost \$6.6 billion, *Bloomberg*.

37 Morrison, John, (2014, September 29). Business and society: Defining the ‘social licence’, *The Guardian*.

the third most prevailing business risk faced by mining companies today, moving it up from fourth place in its previous assessment for the year 2013–2014.³⁸

Increasingly in this regard, stakeholders, including communities, lenders, governments, civil society, and activist shareholders alike expect companies to adhere to the highest transparency standards, thus fostering trust between the communities, governments and the company. Disclosure of beneficial ownership would therefore inform the local communities and other stakeholders of the real owners of the extractive company, and facilitate the process of acquiring and maintaining the social license to operate.

Disclosure of beneficial ownership also serves the interests of other constituencies

Beneficial ownership information not only serves the interests of a government or the public, but also companies, as such information can help identify questionable business partners and entities on the supply and value chain. Multinational companies understand the benefits of beneficial ownership disclosures in terms of: reducing pressure points for corruption and unsound business relationships with domestic companies, and goods and service suppliers that create risk; upholding the principles of competition by creating a fair and transparent process of granting project licenses; and creating transparency in terms of complete and accurate market information.³⁹ Furthermore, private sector actors are increasingly aware and concerned about their association and partnership with questionable entities and politically exposed individuals, in relation to both legal and reputational risk. As such, beneficial ownership disclosure can only improve their due diligence efforts to reduce the risk of partnering with such entities and individuals.

38 Ernst & Young. Business risks facing mining and metals 2014–2015. Available at [http://www.ey.com/Publication/vwLUAssets/EY-Business-risks-facing-mining-and-metals-2014%E2%80%932015/\\$FILE/EY-Business-risks-facing-mining-and-metals-2014%E2%80%932015.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Business-risks-facing-mining-and-metals-2014%E2%80%932015/$FILE/EY-Business-risks-facing-mining-and-metals-2014%E2%80%932015.pdf).

39 The B Team. (2015, January 15). Ending anonymous companies: Tackling corruption and promoting stability through beneficial ownership transparency – the business case.

Recommendations

The issues discussed above are only some of the concerns that can be addressed and resolved by beneficial ownership disclosures. The benefits can also be noticed in other circumstances, such as fund structures where knowledge of sponsors/beneficial owners can help alleviate the concerns of limited fund life, etc. At its core, disclosure of beneficial ownership provides information and permits better assessment of potential partners.

Mismanagement and corruption resulting from a lack of transparency have many manifestations, and can result in dire consequences for governments and citizens of resource rich countries.⁴⁰ Transparency through disclosure of beneficial ownership and the resulting accountability have the potential to transform governance structures in the extractive industries. As discussed above, countries can significantly benefit from disclosure of beneficial ownership, as increased transparency can help plug natural resource revenue leakages, and retain precious resources needed to invest in education, healthcare and infrastructure. A shift in focus away from the issues relating to disclosure of beneficial ownership will, therefore, have particularly far-reaching impact on these countries.

The outrage over the circumstances arising from lack of information on beneficial ownership has been growing, strengthening the demand for a viable solution to the problem, from various sectors.⁴¹ In the United States, for instance, the Secretary of State of Delaware has publicly given his support to the end of anonymous shell company formation in his state,⁴² pursuant to the Counter Terrorism and Illicit Finance Act which has been introduced in the United States Congress. Even the Treasury Secretary of the United States, recently announced that legislative initiatives need to be made to “deter money laundering and financing of

⁴⁰ Reuters (2017).

⁴¹ Fuller, Clay. (2018, July 30). It's long past time for Congress and the Treasury to step up their global anti-corruption efforts, *American Enterprise Institute*.

⁴² Secretary of State of Delaware. June 8, 2018, available at <https://thefactcoalition.org/wp-content/uploads/2018/06/DE-June-2018-Letter-to-HFSC-on-BOT.pdf>; Rubenfeld, Samuel (2018, June 25). Delaware backs overhaul of shell company rules, *Wall Street Journal*.

terrorism through the use of shell companies” by finding an “efficient and prudent way” to access beneficial ownership information”.⁴³

The case for less ambiguous definitions of beneficial ownership disclosures

Beneficial ownership definitions should broadly consist of the following:

- All natural persons who, directly or indirectly, ultimately own or control the license holder/extractive company.
- Details on name, nationality, location/address, personal identification number, and other identifying markers and information for the abovementioned beneficial owners.
- Currently different formulations of what constitutes “beneficial ownership” exist with the shareholding thresholds set at 25 percent and above, which is worrying as a 25 percent shareholding threshold allows companies attempting to hide questionable owners to circumvent the disclosure requirement by simply adopting structures that would keep the shareholding below this threshold. While the urge to simplify the definition for ease of compliance cannot be denied, it is important to ensure that we do not succumb to the trap of oversimplification. The definition of ‘beneficial ownership’ should achieve its ultimate aim at all times: procuring information on all natural person(s) who ultimately own or control the extractive company.
- Different standards should be applicable to private and publicly listed companies:
 - o **With respect to private companies:** All natural persons that own or control (either directly or indirectly) any share or equity interest in the extractive company should be disclosed as beneficial owners. Given that a private company by nature will have

43 Rubenfeld, Samuel. (2018, July 12). Mnuchin seeks shell company changes within six months, *Wall Street Journal*.

limited shareholders, disclosing information on all its shareholders is not an onerous requirement.

- o **With respect to publicly listed companies whose shares are listed on recognized international stock exchanges, and domestic companies that are listed on domestic stock exchanges (that are not internationally recognized):** All natural persons that own or control, either directly or indirectly, 5 percent⁴⁴ or more of the shares or equity interest in the extractive company should be disclosed as beneficial owners.
 - Ownership can be through shares or equity interest or in any other number of diverse manners, including contractual rights, voting arrangements, convertible stock, proxies, etc.
 - Ownership and control can be exercised individually or together with any corporate or other legal entity(ies) and/or natural person(s) who act in consort.
 - “Control” triggers for disclosure include:
 - o The right (directly or indirectly) to:
 - Appoint a majority of the directors of any of the companies in the entire corporate chain that have a relationship to the license holder, and/or
 - Control the management or policy decisions of any of the companies in the entire corporate chain that have a relationship to the license holder.
 - o De facto and de jure control.

The case for public registries

Efforts are being made to develop and institute national beneficial ownership registries. According to a publication by the Law Library of the United States Congress, information on corporate registration and

44 In the United States, when “a person or group of persons acquires beneficial ownership of more than 5% of a voting class of a company’s equity securities, registered under Section 12 of the Securities Exchange Act of 1934,” such person or group of persons are required to file a Schedule 13D with the SEC. See U.S. Securities and Exchange Commission, Fast Answers, accessed August 14, 2018, available at <https://www.sec.gov/fast-answers/answerssched13htm.html>.

beneficial owners is collected by business registrars in countries such as Afghanistan, Argentina, India, Sweden, and the United Kingdom;⁴⁵ national tax authorities in Brazil; securities regulators in Australia and Pakistan; securities exchanges such as in South Africa; central banks as in Armenia and Costa Rica;⁴⁶ or as required by the new amendment to the EU directive, a designated publicly available central registry in EU member states.⁴⁷ Moreover, recently there has been discussion of a worldwide registry⁴⁸ to facilitate efficient and swift access to information on beneficial owners, specifically in regard to criminal investigations by tax and enforcement agencies in different jurisdictions. In fact the private sector and its advisors are currently trying to address the issue of collecting necessary information to identify beneficial owners. For instance, financial institutions face the challenge of not having the knowledge and know-how to investigate layered and complicated shareholding structures across various jurisdictions, to identify questionable legal entities and exposed political individuals.⁴⁹ Worldwide registries would help both private sector actors and governments alike to access information that could help the former comply with beneficial ownership disclosure requirements, and the latter with investigating potential financial crimes such as money laundering, corruption and tax evasion.

45 As of May 1, 2018, the parliament of the United Kingdom “voted to accept an amendment to the sanctions and anti-money laundering bill” that requires the United Kingdom’s overseas territories, which include Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat and the Turks and Caicos Islands, “to publish public registers of company ownership by the end of 2020.” See EITI, UK’s overseas territories to have beneficial ownership registers. Accessed on August 14, 2018, available at <https://eiti.org/news/uks-overseas-territories-to-have-beneficial-ownership-registers>.

46 The Law Library of Congress, *Global Legal Research Center*, Disclosure of beneficial ownership in selected countries, (2017, July).

47 Lochner, Eric (2018, April 4). Public registers expand EU third-party compliance risks, *FCPA blog*.

48 Stiglitz & Pieth. (2016).

49 Chrusciel, Grzegorz (2016). Identifying the ultimate beneficial owner (UBO): The challenge of finding the needle in the haystack, *Thomson Reuters*.

The case for reformed policy on service providers

The disclosures of 214,000 shell companies through the infamous Panama Papers illuminated the growing concern over the role of service providers in creating shell companies as part of complex ownership structures, to help many questionable beneficial owners hold assets without much regulatory tax oversight.⁵⁰ Service providers, such as the law firm of Mossack Fonseca, were exposed as the facilitators of lost natural resource revenues, bringing to light their decades long offshore financial services business in the off-shore center of Panama, for example the “externalization of billions of dollars”⁵¹ of mining revenue from the DRC. As such, regulations overseeing all service providers to the extractive industries should require that such providers are independent, and certify the correctness of the identification of all the true owners and the absence of all conflicts of interest. Further, such service providers should submit to the jurisdiction in which their services to their client have an impact. For instance, if non-U.S. service providers provide services that have an impact in the United States, resulting in tax evasion or money laundering, which can be a conduit for the financing of terrorism, then these service providers must subject themselves to the jurisdiction of the United States. Such jurisdiction can be established through bilateral agreements, such as double taxation treaties and investment agreements that countries enter into.⁵²

The case for creating an environment of transparency and fair business practices

Governments, particularly those of developing countries rich in natural resources, must realize that transparency and accountability is a two-way

50 Koren, Marina (2016, April 3). What are the Panama Papers? *The Atlantic*. Retrieved from <http://www.theatlantic.com/international/archive/2016/04/what-are-the-panama-papers/476658/>. See also Stiglitz, Joseph E. & Pieth, Mark (2016, September 29). The real scandal behind the Panama Papers, *Vanity Fair*. Retrieved from <http://www.vanityfair.com/news/2016/09/the-real-scandal-behind-the-panama-papers>.

51 Panama Papers unravel DRC mining concession deals, *ANCIR*. Retrieved from <https://panama-papers.investigativecenters.org/drc-copper-mining>.

52 This article focuses on ownership structures of companies, but trusts, by the nature of their legal characteristics, can create opportunities for politically exposed and compromised individuals, and as such the beneficial ownership disclosure of trusts needs to be handled separately and distinctly.

street. If governments wish to curb the loss of natural resource revenues by requiring and using beneficial ownership disclosures to vet dubious applicant companies, then they must also inspire confidence amongst private sector companies and their lenders that governments are committed to transparency and fair business practices. Companies and foreign investors too are concerned about their reputation and their relationship with dubious and politically connected companies, locally in host countries where they operate. Often companies will enter joint ventures with local companies or enter contracts with local service providers (such as contractors and sub-contractors) due to cost efficiency, convenience or local content/service procurement requirements in host country regulations or contractual obligations. As such while investing companies are responsible for conducting due diligence on local partners, third-party vendors or service providers, it is equally imperative that governments of developing countries rich in natural resources take all steps possible to curb the formation of sham companies with dubious ownership structures operating within their jurisdictions. This requires host governments not only to prosecute politically connected individuals from within their ranks, who hide their ownership of sham companies with the intent to evade or avoid taxes, launder money or finance terrorism, but also to provide certification of the true ownership of local companies that investors in the oil, gas and mining industries might partner or enter into contracts with. Showing a strong commitment to allowing only the incorporation of legitimate companies, creates a better environment for business and attracts investors, since they will have greater confidence that their reputational and even legal risks decrease once they invest in the country.

Conclusion

Transparency through disclosure of beneficial ownership and the resulting accountability have the potential to transform governance structures in the extractive industries. As discussed above, countries can significantly benefit from disclosure of beneficial ownership, as increased transparency can help plug natural resource revenue leakages, and retain

precious resources required to invest in education, healthcare and infrastructure. Mismanagement and corruption resulting from lack of transparency have many consequences, most costly of which are loss of natural resource revenue, and damage to the environment and communities. Beneficial ownership disclosure is one of the easiest and most efficient ways of preventing loss of natural resource revenue, as companies can easily ascertain and disclose their owners, and allow governments and government officials to accurately map the potential money trail of natural resource revenue.

Admittedly, dedicated government officials of emerging nations are often reluctant to impose conditions on natural resource companies, and which industry considers burdensome, non-competitive or adverse to their interests. This leads to officials fearing that industry will simply not invest, especially if other nations do not have similar requirements. At the same time, government officials are also hesitant to impose beneficial ownership disclosure rules because of the fear of highly placed corrupt officials, who stand to enrich themselves personally through opaque ownership structures in companies involved in the natural resource sector, leading to natural resource revenue loss for their own country.

The natural resource industry functions like the real estate industry, where location carries a premium and is the prime factor in corporate decision making. Natural resource development follows the simple rule of real estate development, which is location, location, location. If a state has an exploitable and profitable quantity of natural resources, especially if there are low security risks in that state, companies will come. As such a state can require disclosure of beneficial ownership information, since the existence of the natural resource will remain the magnet that attracts the industry.⁵³ On the other hand, the private sector should not fear disclosure as it also benefits industry. Transparency promotes fair business practices, and alerts companies to dubious business parties that might want to partner with them. Additionally, financial institutions needing to comply with regulations on beneficial ownership of account holders, can

53 Radon, Jenik & Ravichandran, Nandini. The 'business' of extractives: My resources, my rules, *Namibian*. Retrieved July 8, 2015 at <https://www.namibian.com.na/index.php?id=139106&page=archive-read>.

be further assisted by the increasing effort of the international community to set up platforms for disclosing information in publicly available registries. Furthermore, lenders who are concerned about the types of companies they provide with project financing or project loans, will also benefit from beneficial ownership disclosure.

Given that both the public and the private sector benefit from the transparency that ensues through beneficial ownership disclosure, it is prudent that it gains the much-needed traction necessary to make it a common feature of natural resource projects, instead of merely a voluntary exercise in disclosure. Disclosure of beneficial ownership promises to be a win-win for all.

CHAPTER 14

It's All in the Game: Journalism, Whistleblowing and Democracy Under the Rules of the Global Economy

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Attac Norway

Abstract: An increasingly opaque global economy demands new forms of collaboration for journalists and civil society actors protecting democracy and the rule of law. Countries and jurisdictions have developed a deeply intertwined network of financial services and a social, political and physical infrastructure enabling regulatory evasion, tax avoidance, and eradicating accountability in business operations. Whistleblowers have in recent years made a solid impact on new discussions of the role of the tax haven complex in the global economy. Collaboration with whistleblowers is a strategy that journalists and civil society have utilized to overcome the challenges of investigating big players in the economy. This collaboration calls upon parliaments to update their legislation affecting collaborative investigative journalism. This article examines discussions on whistleblower protection in both the EU and Norway in light of the Lux Leaks whistleblower-journalist collaboration, and the internal whistleblower in the Telenor/VimpelCom corruption case. Attention is also drawn to the increase in international collaboration among investigative journalists.

Keywords: investigative journalism, tax havens, regulatory evasion, whistleblowing, whistleblower protection

Introduction

Quality journalism can amplify popular opinion, improve the depth and range of political decision-making and discipline abuse of power. These are among the positive externalities of high-grade journalism (Møen,

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cited in Allern & Pollack, 2018). On the other hand, Allern and Pollack emphasize the fact that the lack of investigative journalism and the success of superficial, sensationalized journalism make it easier to cover up malpractice and crime in economic and political life (Allern & Pollack, 2018, p. 3). In economic terms, Hamilton argues that one dollar invested in an investigative story can generate hundreds of dollars in social benefits (Hamilton, 2016a).

Collaborative investigation into the black boxes of the global economy is now more relevant than ever in light of the string of recent tax haven revelations (ICIJ, 2014; ICIJ, 2015; ICIJ, 2016; ICIJ, 2017; ICIJ, 2018). This article analyzes two such cases to demonstrate the challenges faced by journalists and civil society actors who investigate the global economy. I will argue that these case analyses highlight the development of an opaque global economy thus demanding new forms of collaboration, which in turn calls for parliaments to update legislation affecting collaborative investigative journalism. An examination of the background, boundaries and the possible effects of current legislation on whistleblower protections is presented in the second part of this article.

The first case is the so-called Lux Leaks case. It revealed how consultancy firms negotiated tax avoidance agreements with the Luxembourg authorities on behalf of transnational corporations. The second case is the Telenor/VimpelCom corruption scandal. It revealed how complex company structures make it nearly impossible to impose accountability on a state-owned company when corruption connected to a major investment is taking place.

First, both cases offer valuable insights on the different types of collaboration needed to reveal the workings of the global economy. Second, both cases showcase the potential value of whistleblowers, when taken into consideration. Finally, both cases shed light on the ongoing debate on blowing the whistle inside an organization or to the authorities versus whistleblowing to journalists or civil society actors.

As we will see, increasingly complex ownership structures, regulatory evasion, use of secrecy jurisdictions and a global division of labor in the finance industry are main components of the global economy.

Investigating within this context is a fastidious task, and new forms of collaboration are needed.

The analyses in this article set out to answer two questions important to anyone wanting to understand investigative journalism within the global economy. What kind of cooperation can be used as a response to tax haven development in the global economy? Given the value to democracy of high-quality investigative journalism, how can parliaments facilitate the safe environment needed for collaboration among investigative journalists?

As shown later in this article, the infrastructure and financial innovations of the global economy create an opaqueness different from old time secrecy. While transparency is often put forward as the ultimate goal of any policy attempting to strengthen the rules of the global economy and “ending the era of tax secrecy”, as UK Prime Minister David Cameron said three years before being exposed in the Panama Papers (Gov.uk, 2013; Boot, Whatt & Pegg, 2016), I will argue that transparency is not always sufficient. If the ownership structures and financial instruments introduced below were available in a register, which journalists would have the capacity, knowledge and time to understand them?

Before analyzing the specific cases and answering the questions concerning journalist collaboration and whistleblower protection, a review of the work being done in corporate law, organizational management, economics and civil society research is needed to understand the issues. This will help break down the main features of the global economy and reveal the forces in play. Knowledge about the infrastructure and the actors serves as a background, delineating an important component of the reality to which journalists, civil society and lawmakers must be connected.

Litterature review

The tax haven complex

Jurisdictions and states defined as tax havens have established structures and regulations enabling corporations, organizations and individuals to hide the traces of both legal and criminal activity. Once a company is

registered in a tax haven, illegal amenities become more available. The structure of tax havens is a *driver of corruption*, as Moene and Søreide say. Opaque corporate structures make it lucrative for owners to make use of well-functioning capital markets, and at the same time hide illegal activity or activity that is damaging to the corporation's name (Moene & Søreide, 2015).

The classification of a country as a tax haven or not a tax haven is rarely fruitful. Countries falling within a definition of tax havens, as well as those that do not, may offer a whole array of financial services that make it difficult for journalists and civil society to investigate ownership or financial matters. This is why Tax Justice Network has developed the Financial Secrecy Index (FSI), ranking countries based on type of tax regime, regulations and financial services on offer to non-nationals, and the size of their financial sector (FSI, 2018). Financial centers can be governed both nationally and locally. While the UK is not considered a tax haven, the City of London district is described as “the spider in the web of tax havens” (Oswald, 2017).

However, if one was to define a pure example of a tax haven, some main features could be identified. First and foremost, the jurisdictions offer different tax regimes to non-residents and residents. This twofold tax regime is a so-called *ringfencing of the tax regime* (Ringstad, 2017). Furthermore, the jurisdictions offer simple, quick and flexible rules with little supervision or control, often in combination with low or no taxes. One last main feature is the use of so-called straw owners. This is a method of hiding the ownership of a company, fund or bank account. A person is paid to be registered as the owner of a company he or she *de facto* is not involved in. A shell company is a company with no employees, created to obscure the ownership of another company. Anonymity for beneficial owners is the most important service offered in the tax haven complex (see Sharman, 2010). *Secrecy jurisdictions* is the preferred term used by the Tax Justice Network.

As shown in emails leaked by the whistleblower behind the Panama Papers, the law firm Mossack Fonseca singlehandedly created 123 shell companies in Nevada so that a friend of the former president of Argentina could steal millions of dollars from government contracts (Hamilton, 2016b).

Different jurisdictions specialize in different markets. Garcia-Bernardo, Fichtner, Takes and Heemskerk (2017) found both geographical and sectoral specialization in offshore financial centers of all sizes. Geographically, the financial centers in developed countries in Europe and Asia have well established connections to a separate set of smaller offshore financial centers. Sectoral specialization can be seen in how different countries offer different organizational structures and services to industries such as oil, computer manufacturing or shipping. More than 60 percent of the bank accounts in Switzerland are established through a shell company. Gabriel Zucman observes that the different jurisdictions do not compete with one another, but use different yet deeply intertwined strategies (Zucman, 2017).

Tax evasion is often the main purpose of organizing a part of the company structure in a secrecy jurisdiction. However, regulatory evasion is a more apt term for what happens in these places. Organizational structures evolve into a network of different judicial units and judicial contracts, which in sum become tools for regulatory evasion (Anker Sørensen, 2016). Dating back to the 1980s the diminishing accountability of transnational corporations has been called “one of the great unsolved problems of modern company law” (Schmitthoff, 1982 in Anker Sørensen, 2016, p. 158).

The theoretical and political limitations of defining a country or jurisdiction as a tax haven (or not a tax haven) show that it might make more sense to consider a tax haven complex. Here, ‘complex’ is understood as a whole structure consisting of interconnected or related structures. The interconnectedness and specialization existing in the tax haven complex could be exemplified through the distinction made by Garcia-Bernardo et al. between sink and conduit offshore financial centers (OFCs). Sink OFCs are jurisdictions that draw in and retain foreign capital. Conduit OFCs are attractive intermediate destinations channeling the flow of capital. These include developed countries with the right regulatory infrastructure in place. The Netherlands, Ireland, Singapore, the UK and Switzerland channel the majority of offshore corporate investment globally (Garcia-Bernardo et al., 2017).

In this sense, while not being defined as a tax haven based on strict criteria, a country like the Netherlands arguably constitutes an important part

of the whole complex. The Netherlands is the largest host of shell companies globally, and is an important jurisdiction for corporate profit shifting based on internal debt and different income deductions. This attracts capital flows ranging from tax-financed, private Norwegian health companies to Vietnamese oil revenues (PWYP, 2011; Herning, 2016).

For companies and individuals to exploit the possibilities existing in the tax haven complex, they need help. Herein enters the industry that builds, maintains and manages transnational corporations' tax haven subsidiary networks (Jones, Temouriac & Cobhamb, 2018). How do they contribute to the global structures investigated by journalists and researchers?

Consultancy firms creating the infrastructure

Audit firms and consultancy agencies offer mainly two services for their clients, claim Fjeldstad, Jacobsen, Ringstad and Ngowi (2018). First, they make sure that the current accounts are correct. One job could be to make sure that all internal trading in a company is in line with regulations. Tax planning is offered inside this framework. Second, they audit finished accounts. The demand for these services is increasing, and four companies dominate this industry. The Big Four are: Pricewaterhouse-Coopers (PwC), Ernst & Young, Deloitte, and KPMG (Fjeldstad et al., 2018; Jones et al., 2018).

Jones et al. reveal a correlation between corporations' use of the Big Four and tax avoidance. Transnational corporations that are audited by the Big Four accountancy firms are more likely to have a larger tax haven subsidiary network compared to those corporations that do not use the Big Four to audit their accounts. The study also shows that the growth rate of a corporation's tax haven network is enhanced via the use of a Big Four firm (Jones et al., 2018).

For the purpose of this article, I will concentrate on two features of the tax haven complex. The first has to do with pure regulatory evasion, specifically, how consultancy agencies make agreements with a country to avoid taxes in this country or other countries. The second is how tax haven infrastructures facilitate corruption by concealing identity and ownership.

Despite an increasingly opaque global economy, several international journalism projects have succeeded in reporting excellent, accessible and engaging stories about company structures, regulatory avoidance and business operations that harm the public interest and challenge democracy.

Before the analyses of two examples of such journalistic work, an explanation of the choice of cases and other methodological reflections are needed. Why are the Lux Leaks and Telenor/VimpelCom cases important years after their closure? What elements do they contribute to the discussion of investigative journalism, whistleblower protection and journalist-whistleblower collaboration, and perhaps also to democracy in a broader sense?

Collaboration in investigating the global economy: Methodological reflections

To assess the status of whistleblower protection and the conditions for journalistic collaboration both with and without whistleblowers, I have analyzed the Lux Leaks scandal of 2014 and the Telenor/VimpelCom corruption case, which ended in 2016.

Here, whistleblowing is understood as “the act of telling the authorities or the public that the organization you work for is doing something immoral or illegal” (Collins Dictionary cited by Ottosen, 2018).

The reasons for analyzing the two cases are threefold. First, they demonstrate the different types of collaboration needed to latch onto the global economy. Whistleblower collaboration is showcased in the Lux Leaks investigation. International collaboration among investigative journalists is displayed in the Telenor/VimpelCom case.

Second, the two cases demonstrate how different actors can follow different routes when they receive notifications from a whistleblower. The Lux Leaks case shows the bumpy yet targeted road of whistleblower-journalist collaboration. Beyond communication and safety issues, employer retaliation and judicial struggles, the collaboration exposed, for the first time on a global scale, how Luxembourg works as a tax haven in the middle of Europe (ICIJ, 2014). Meanwhile, the Telenor/VimpelCom

case shows how a whistleblower had been effectively sidelined for years when information on the issue was finally called for in the public debate, both in the ongoing investigation in the media and in public hearings in parliament.

Third and most importantly for this analysis, the two cases highlight the need for improved whistleblower protection. An important element in the debate on whistleblower protection is to what degree collaboration between journalists and whistleblowers is acknowledged and inscribed into legislation. Whistleblowing to journalists or to civil society is often contrasted with internal recipients of whistleblower reports addressed to an employer, either private or public (EU, 2018; NOU, 2018; Loyens & Vandekerckhove, 2018). As we will see, the two cases offer insights into the processes and outcomes produced by the choice of different whistleblower recipients.

I conducted one interview by email with each of the two known sources of Lux Leaks, Antoine Deltour and Raphaël Halet. Bernard Benoit has produced a brilliant documentary film on Halet referred to in this article, offering useful perspectives on the details of the case. One *POLITICO* interview with Raphaël Halet also provided details to the string of events relevant to the Lux Leaks case.

To gain an insight into the Telenor/VimpelCom case, I have studied the two parliamentary hearings of the Standing Committee on Scrutiny and Constitutional Affairs. A journalist at that time in the Norwegian daily *Klassekampen*, Emilie Ekeberg contributed to finalizing the investigation on Norwegian and Swedish corruption in Uzbekistan in 2014–2015. She wrote a method report to the Norwegian investigative journalist institute SKUP that provides a comprehensive understanding of the Telenor/VimpelCom case and of journalistic collaboration and investigation in general. I conducted one telephone interview with Ekeberg to retrieve more details from the investigative work. Moreover, the work of Gottschalk (2018) and Allern and Pollack (2018) offer the necessary recap of the Telenor/VimpelCom case, along with the articles printed in *Dagens Næringsliv* in 2012 and *Klassekampen* in the autumn of 2014.

Finally, I made an explorative discursive analysis of a set of public documents on whistleblower protection. To explore the context and detect

the core of the wider societal debate in the EU, I rely on declarations in the EU Parliament and in the legislative background paper for new whistleblower protection presented by the EU Commission. The summary of the Lux Leaks Court of Appeals Judgment on Antoine Deltour, Raphaël Halet and journalist Eduard Perrin of March 2017 also adds valuable material to the debate on whistleblower protection.

To understand the Norwegian context in relation to the debate on and legislative development of whistleblower protections, I have analyzed the Ministry of Labour and Social Affairs' Official Norwegian Report (NOU) on whistleblower protection published in the spring of 2018. The NOU is the background for a new whistleblower act and a whistleblower ombudsman. Reflections on the legislative background work for earlier whistleblower protection in the Working Environment Act are also needed for proper consideration of whistleblower protection in Norway.

The range of parliamentary output highlights the development of new whistleblower protections, and offers insights into the debates and priorities as the process matures. As we will see, the analyses of the legislative background work in the EU Commission, the EU parliament and the Norwegian parliament feed into the response to the Lux Leaks whistleblowers and the parliamentary hearings on the Telenor/VimpelCom case, and vice versa.

To break down the elements of the problem at hand, I will start by presenting the Lux Leaks case.

Tax planning in Luxembourg

Luxembourg is developing into a central component of the tax haven complex. The finance industry comprises 40 percent of the economy of the small duchy and has specialized in tax agreements with corporations and investment funds (Zucman, 2017).

In 2011 the former PwC employee Antoine Deltour leaked information on secret tax agreements between transnational companies and Luxembourg authorities to the French investigative journalist Eduard Perrin. The material was first presented on French TV in 2012, before

it was handed over to the international journalist network the International Consortium of Investigative Journalists (ICIJ). Their network of publishing houses released stories on the Luxembourg tax agreements on a larger scale. In total, the leak exposed 548 different tax agreements made between transnational corporations and Luxembourg from 2002 to 2010. All the Big Four consultancy firms were involved. The companies involved were the partly state-owned Norwegian Bank (DnB), along with Pepsi, IKEA, Apple, Amazon and many more (ICIJ, 2014).

Lux Leaks was the second revelation of the tax haven complex from the ICIJ, which started with the Offshore Leaks of 2013. This streak of revelations has arguably changed the political climate on the issue of tax havens (Oxfam 2016). Lux Leaks preceded the Swiss Leaks (2015), the Panama Papers (2016), and the Paradise Papers (2017–18).

Raphaël Halet was the second identified whistleblower provoking the Lux Leaks scandal. Like Deltour he worked for PwC.

In June 2016 Antoine Deltour was sentenced to 12 months of conditional prison and a 1500 euro fine. Raphaël Halet received nine months conditional prison and a 1000 euro fine for his leak. The journalist Eduard Perrin was exonerated. Neither Deltour nor Halet was acknowledged as a whistleblower, which at the time was a huge setback for whistleblowing and investigative journalism according to Tax Justice Network (Furuly 2017). An appeal reduced the penalties for Deltour and Halet before a final appeal to the Supreme Court in Luxembourg acquitted Deltour and Halet of all claims. The Supreme Court acknowledged Deltour as a whistleblower. Halet's penalty was reduced and only the fine remained. Halet was not acknowledged as a whistleblower.

To understand the background for court decisions like the one on the whistleblowers Deltour and Halet, we need to review the literature.

Whistleblowing

Thanks to whistleblowers, many white-collar criminals have been exposed. While the police only account for two percent of the revelations of white-collar crime, Petter Gottschalk affirms that 101 out of 405

convicted white-collar criminals were exposed by journalists through the work of a whistleblower (Gottschalk, 2018). A background paper of the NOU concludes that the indirect benefit of whistleblowing is expected to be considerable, also from a socioeconomic perspective (Oslo Economics, 2018).

Therefore, whistleblowers are protected by law. But at what point is a person acknowledged to be a whistleblower?

In Norway whistleblower protection has been enshrined in the Working Environment Act. As we will see, the parliamentary report published in the spring of 2018 suggests changes. Still, the criteria found in the Working Environment Act represent the foundation of any future whistleblower protection in Norway.

This protection has two criteria. First, the notification must be about “censurable conditions”. Second, the employee shall “proceed responsibly”. The employer has the burden of proof that a notification has been made in breach of these criteria.

There is an ongoing discussion about who should be the receiver of a whistleblower alert. Gottschalk points out four criteria from the literature. The recipient must have enough knowledge about the subject to understand the substance of the notification; the recipient must corroborate or disprove the alert with other sources; the recipient must have knowledge of the nature and motives of white-collar crime; and the recipient must have experience with investigation.

The Norwegian Working Environment Act strongly emphasizes internal notification, due to the wording of “responsible” notification. The idea is that if you notify the organization where the misdeed was done, the organization has the ability and power to put an end to the censurable conditions. The Act mentions public authorities as a second option. The media are only acknowledged as a legitimate recipient of a notification if internal notification is tried first, or if the whistleblower has reasonable grounds to believe that internal whistleblowing will harm the case, such as fear of the destruction of evidence.

Gottschalk highlights the expectation that the whistleblower do the whistleblowing internally at first. As we will see, this is a fundamental question in whistleblower protection.

Internal and external whistleblowing

Lux Leaks

When Antoine Deltour was acknowledged as a whistleblower by the Luxembourg Supreme Court, the court referred to six criteria from Article 10 of the European Court of Human Rights (ECtHR). There is no definition of a whistleblower in the ECtHR, but a judgement summary from Vandendriessche states that ECtHR jurisprudence does “protect persons denouncing apparent or hidden facts, which are of general interest and which are contrary to law, ethics or the public interest” (Vandendriessche, 2017, p. 16). Illegality is not a precondition for blowing the whistle, according to Vandendriessche. Severe dysfunctions can also be denounced.

The six conditions assumed by the Supreme Court were: (i) the communicated information represented a real public interest; (ii) the information was authentic (exact and believable); (iii) communication to the public was a means of last resort; (iv) the importance that the public receive the information outweighed the damage caused to the employer by the revelation; (v) the whistleblower acted in good faith; and vi) the intervention was proportionate, meaning that the same revelations could not be made by a smaller leak.

Raphaël Halet did not fulfill the fourth condition, as he did not present any new information in addition to the leak already made by Antoine Deltour.

The Luxembourg Supreme Court spends surprisingly little time discussing criteria (iii), whether Deltour or Halet should have notified internally or to the authorities instead of to a journalist. A look at the Raphaël Halet case as it happened offers valuable insights as we proceed into the discussion of new legislation on whistleblower protection in Norway and the EU.

As a clerk working at the bottom of the hierarchy in PwC, Halet himself said that he was working “like a worker on an assembly line”, where you work on small pieces of a bigger whole you never see yourself (Bringer, 2016, *my translation*). The investigative story presented on French TV changed Halet’s perception of his job, since the TV report showed a reflection of the global economy in his daily tasks. Halet leaked

to the journalist a range of “tax rulings”, i.e. agreements on how companies registered in Luxembourg would be taxed in the future. The organizational structure coupled with political will allowed the companies to shift their profits to Luxembourg, where they had no production.

The whistleblower shared the documents on unencrypted platforms. This led to PwC exposing Halet’s leak by means of tracking software. Subsequently PwC forced Halet into a confidentiality agreement. PwC cooperated with the French police and retrieved information from Halet using the most questionable methods involving Halet’s family, described elsewhere (Bringer, 2016; Marks, 2016). Deltour and Perrin used encryption tools (Deltour, 2018).

Whistleblower collaboration can indeed suffer from a lack of resources in digital communication. On the other hand, besides technical skills in its use of tracking software, the employer also received judicial support. PwC obtained a search warrant from the Metz courthouse, quoted by journalist Benoit Bringer as giving PwC permission to “take copies of received and sent email, including all emails or attachments sent or received from a journalist”. Article 2 in the French press Freedom Act deems all actions aimed at exposing journalistic sources an indirect attack on source protection and are illegal (Bringer, 2016). This did not prevent the judge from providing the *ad hoc* search warrant, seriously challenging the fundamental right of source protection.

The PwC scandal was already known to the public, and PwC was in the process of taking on whistleblower Deltour and journalist Perrin in court. During the trial Halet took sides with PwC, and said that he worked as an accomplice for PwC to get information from Perrin. Two years passed before Halet would break the confidentiality agreement, speak the truth alongside Deltour, and win in court.

The ruthless response of the employer adds weight to both Halet’s and Deltour’s judgement faced with a whistleblower’s dilemma. How does one proceed to make an impact and maintain personal safety?

For Halet it was never an option to blow the whistle inside the organization. “There was no committee, no procedure, no contact person” (Halet, 2018). Deltour points out that tax avoidance is a part of the business model of the Big Four. “It is not possible to blow the whistle if [the

notification is] against the normal activity of the company,” says Deltour (Deltour, 2018). He says that PwC has channels for dealing with harassment and other types of discrimination issues, but not unethical business behavior.

Surveys done in the EU show that 49 percent of respondents did not know where to report corruption if they encountered it (Special Eurobarometer on Corruption, 2017). Only 15 percent knew there were laws protecting whistleblowers in their country.

One employee knowing very well how to blow the whistle by the book was the whistleblower in the Telenor/VimpelCom corruption scandal. He also came to realize the limitations of such an approach.

Telenor/VimpelCom

The unveiling of the Telenor/VimpelCom corruption scandal is the second case I will discuss here. The Norwegian state owns 54 percent of Telenor shares through the Ministry of Trade and Industry (Regjeringen.no). At the time of the revelations, Telenor owned 43 percent of the shares in VimpelCom (Ekeberg & Tallaksen, 2015).

Dating back to 2011, Swedish and Norwegian journalists had done thorough investigations on corruption involving the operations of each of the national telecom companies Telia and Telenor in Uzbekistan. Both the collaborative work of journalists and the reception of the whistleblower in Norway are of interest here.

The collaboration ranged from building on existing stories, to sharing material and personal on-site teamwork. The Norwegian daily *Dagens Næringsliv* picked up on the investigations done by Swedish Television (STV) into the national telecom company Telia in 2011, and ran a series of stories on the Telenor subsidiary VimpelCom (DN, 2012a; 2012b; 2012c). The first report showed how VimpelCom was used as a tool to prosecute opposition in Uzbekistan (Kibar & Eriksen, 2012). Two years later the Norwegian daily *Klassekampen* followed up and managed to shed light on systematic corruption practices in Telenor’s investments in Uzbekistan (Ekeberg, 2014; Ekeberg & Tallaksen, 2014; Ekeberg, Tallaksen & Lysberg, 2014). *Klassekampen* also showed that Telenor executives and

Telenor's representatives on the VimpelCom board should have known about the corrupt payments (Ekeberg, 2015).

The investigative work done by *Klassekampen* was possible due to two forms of cross-border collaboration. First, *Klassekampen* built on earlier work, especially the investigations done by STV. The Swedish journalist handed over all his material to his Norwegian colleague (Ekeberg, 2018). Furthermore, close collaboration with the Organized Crime and Corruption Reporting Project (OCCRP) was key in developing the story. Based in Sarajevo, Bosnia, the OCCRP was conducting an ongoing investigation into the Uzbek dictator's regime, with a network of sources and investigative journalists contributing to the work. The OCCRP managed to retrieve an account statement that was instrumental in revealing the corruption by VimpelCom in Uzbekistan (Ekeberg, 2018).

The methodology of the OCCRP highlights some points of entry into the tax haven complex. *Klassekampen* and the OCCRP spent weeks retrieving and analyzing tax haven company registers, which are mostly names, dates and key events like new directors. The OCCRP is experienced in eking out tax haven data, where an aggressive and brash style is needed. Calling officials continuously is mandatory, and from time to time the OCCRP visits the tax havens in question to retrieve documents physically from company register functionaries. The OCCRP has even developed its own visualization software to systematize the material (Ekeberg, 2018).

Klassekampen and the OCCRP had no collaboration with whistleblowers in developing the Telenor/VimpelCom revelations. One or more whistleblowers did however try to get in touch with the Norwegian owners. Whistleblower *reception* is our second topic of interest in the Telenor/VimpelCom case.

On two different occasions there was internal whistleblowing on Telenor's investments in Uzbekistan. First, several Telenor executives were notified in 2011, but this was finally rejected by the CEO of VimpelCom, Norwegian Jo Lunder (Gottschalk, 2018).

Then, one week before the public hearing in 2015, a Telenor employee contacted the Norwegian Ministry of Trade and Industry (NFD). The ministry forwarded the email to the hearing committee in the form of a

letter the day before the hearing. The ministry said it was too short notice to include the notification in the public hearing. At first the ministry said that the whistleblower provided some new information on the payments made by VimpelCom to a shell company in Gibraltar (260S, 2014–2015, p. 5), but that in general there were no new details on the issue. After further written questions from the hearing committee, the minister chose to play down the information from the whistleblower, maintaining that the whistleblower added no new information to the workings of the VimpelCom board and its Telenor representatives, which seemed to be their main concern (260S, 2014–2015, p. 6).

From the manner in which the minister and high officials responded in the two open hearings on the Telenor/VimpelCom case, it is difficult to know what kind of formal structures were in place in the ministry to handle whistleblowing, or if there was any formal structure at all. According to the government's homepage, all state employers shall have formal notification routines, "based on the needs of the entity"¹.

In this particular case, such a structure does not seem to have been applied. Ministry Director General Mette I. Wikborg responded that the administration considers notifications on a case to case basis, and that in some cases they even forward the notification to the company involved (Attachment 16 in 413S, 2015–2016, p. 120).

The minister herself concluded earlier on a general basis that notifications should be forwarded to the relevant recipients and authorities for further review and follow-up (260S, 2014–2015, p. 6). In this case, the ministry forwarded the notification to the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM) and did not itself develop contact with the whistleblower (413S, 2015–2016).

The whistleblower confirmed the work published by *Klassekampen* starting in November 2014, including details on payments to the shell company in Gibraltar. A lack of follow-up on whistleblower notification from both private and public stakeholders was fortunately compensated

1 «Alle statlige virksomheter skal ha utarbeidet egne varslingsrutiner, basert på virksomhetens behov», from Regjeringen.no. Retrieved 15.8.2018 <https://www.regjeringen.no/no/dokumenter/retningslinjer-for-utarbeidelse-av-lokal/id485618/>

by ongoing parallel investigations made possible by international collaboration.

In 2016 VimpelCom recognized the crimes committed and made a settlement with both Dutch and US authorities, where VimpelCom is registered. The chairperson resigned after the second hearing, along with the CEO when it became clear that he had withheld information to the hearing committee (Ekeberg & Ekeberg, 2015b). Telenor later sold all their shares in VimpelCom (Hinna, 2018).

The Lux Leaks revelations and the Telenor/VimpelCom corruption scandal offer several valuable experiences for a discussion on whistleblower protection.

The Lux Leaks and EU whistleblower protection

After several whistleblower induced revelations in recent years, the EU Commission presented a new whistleblower protection directive (EU, 2018). The commission highlights Lux Leaks, the Panama Papers and the Paradise Papers in the very first sentence of the regulation's background paper. Furthermore, the commission maintains that whistleblowers represent a "key element in preventing wrongdoings and protecting public interests" (EU, 2018a, p. 1). In the second paragraph the commission emphasizes that whistleblowers are a "crucial source for investigative journalism" (EU, 2018b, p. 1) and compares the protection of whistleblowers with the protection of journalistic sources in general.

Despite the strong wording on whistleblowers and journalism, the EU directive maintains that the "reporting persons are generally required to use internal channels first". Competent authorities are next in line. Reporting to the public or the media is considered a measure of last resort (EU, 2018b, p. 12). However, there are several provisions allowing exceptions to this requirement. Situations where the whistleblower has either tried to report internally or to public authorities, or situations where there is reason to believe that internal reporting is not expected to function properly, are mentioned.

The issue of disclosing material in a proportionate manner is not clarified in the EU proposal. Raphaël Halet was not deemed a whistleblower

because he provided tax agreements of the same type as were leaked by Antoine Deltour. Even though he added *more* material to the case, revealing more companies, the material was not *new*. His action was therefore not judged to be proportionate to the damage inflicted on Luxembourg, PwC, and the companies granted the tax agreements.

There is a non-exhaustive list of issues considered to be whistleblower worthy in the EU directive, but few further details on additional requirements, like the novelty criteria or one leak's relation to another, which were two elements that struck Halet. This causes uncertainty for future whistleblowers. One could hardly blame Halet for not assessing whether his leak represented something substantially new in the case compared to Deltour, as he did not have access to Deltour's documents. One further requirement is that the whistleblower must have reasonable grounds to believe that the information reported was true at the time of reporting. Honest errors do not disqualify you from protection.

On the question of advice for future whistleblowers, both Deltour and Halet highlight the need for collaboration with a lawyer as early as possible. However, Deltour also says that whistleblowers act "spontaneously and with a feeling of 'internal emergency'", which might hinder a cautious, judicious approach (Deltour, 2018; Halet, 2018).

Norwegian whistleblower protection

The Telenor/VimpelCom corruption scandal was among the cases that sparked a debate on whistleblower protection in the Norwegian parliament in 2016. Like the EU, Norway has made an effort to update its whistleblower protection. In 2018 the Ministry of Labour and Social Affairs published an Official Norwegian Report (NOU) on whistleblower protection. The NOU is the background for a new whistleblower act and a whistleblower ombudsman.

There are two main concerns regarding the perspectives presented in the NOU. The first concern is a definition of so-called "censurable conditions". It is unclear whether the authors want to narrow or broaden the scope of breaches deemed whistleblower worthy. "Corruption and other economic crime" is the first of six short categories

defining the scope of the protection. The categories are fresh proposals in the NOU.

In the legislative background paper on whistleblower protection from 2006 censurable conditions are defined as criminal offenses, breaches of ethical guidelines firmly stated by the company or institution in question and acts contrary to “ethical standards broadly supported in society” (Ot. Prop. Nr. 84, 2005–2006, p. 50, *my translation*). Petter Gottschalk concludes that the scope of censurable conditions is insufficient, and points out unjustifiable budgets, professional issues and questionable priorities as examples. Blowing the whistle on aggressive tax planning might also fall outside of the scope of the act. The NOU concludes that there is need for additional definitions of what is considered “censurable conditions”.

Meanwhile, the EU proposal is both more detailed and broader in defining censurable conditions and important public interests deemed whistleblower worthy. First, ten categories are mentioned, ranging from denouncements on transportation safety and public procurement to financial services. Furthermore, there are three more subparagraphs, where tax avoidance is explicitly mentioned:

Breaches relating to the internal market [...] as regards to acts which breach the rules of corporate tax or arrangements whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law. (EU, 2018, p. 32)

Finally, there is a paragraph referring to sector specific rules on reporting listed in an annex.

Discussion

As seen in the Lux Leaks case, there is rarely talk of purely economic crime when harmful practices are established in the global economy. Also, despite being a clear-cut corruption case, ØKOKRIM dismissed the case against the VimpelCom executive and the Telenor representatives on the VimpelCom board for being held responsible for the corruption in Uzbekistan. VimpelCom made a settlement with US and Dutch authorities. Regardless of how the question of guilt was concluded in the

Telenor/VimpelCom case, the fact that revealing “crime” is a prerequisite in invoking whistleblower protection causes uncertainty for future whistleblowers.

Based on the complex judicial nature of questions related to economic crime, coupled with an opaque global economy, I will argue that “crime” is not a suitable precondition for whistleblower reporting. Future legislation on whistleblower protection should maintain that whistleblowers who have reasonable grounds to believe that misdeeds, whether crime, unethical behavior, acts against the public interest or severe dysfunctions are taking place, can denounce them.

Further, I will argue that whistleblowing to journalists and civil society organizations must be acknowledged as “responsible notification”. The NOU does not highlight the democratic value of journalism and whistleblowing. This runs contrary to the sentiments shown both in the EU directive and in the statement of the EU parliament, leading up to the directive.

First, in 2016 the EU parliament asserted that “Member States should ensure the protection of legitimate business secrets while in no way hindering, hampering or stifling *the capacity of whistleblowers and journalists to document and reveal illegal, wrongful or harmful practices* where this is clearly and overwhelmingly in the public interest” (EU 2016: 19, my emphasis). The EU parliament refers to Lux Leaks and the Panama Papers and “[s]trongly emphasizes that the work of whistleblowers is crucial for revealing the dimension of tax evasion and tax avoidance.” Second, the background paper for the EU directives gives credit to investigative journalism and the collaboration with whistleblowers at the very beginning of the paper.

Time will show if the Norwegian parliament has the same interest as its EU counterpart in highlighting the democratic value of whistleblower–journalist collaboration.

The starting point, however, is poor. Looking into the method chapter of the Norwegian NOU, one finds no journalistic material and no interviews with the media or civil society listed. The issue of notifications to the media is discussed in a subchapter on source protection in which a summary of the legislative status of source protection is provided. An interesting remark by the authors is that the unwavering source protection

enshrined in press ethics is contrary to current legislation. The current practice in journalism is in fact civil disobedience.

The NOU does not propose any changes in legislation to solve this problem. However, the authors call for clarification on what is deemed a “responsible notification”. The legislative background paper (Ot.prp. nr. 84, 2004–2005) explains some circumstances that must be in order for the whistleblower to report externally. Whether the notification is responsible will in each case depend on an “overall assessment” including: (i) if the reported criticism has a “sound basis”; (ii) the employee has taken due consideration of the employer’s objective interests; (iii) if the employer acted in good faith and was convinced of the authenticity of the information; (iv) who was notified and how; (v) the nature of the information and the damage potential of the information; and finally (vi) whether the information is of general interest. In the next paragraph it is nevertheless briefly maintained that there cannot be strict conditions on the employer, and that the employer should have some leeway in deciding how to proceed. (Ot.prp. nr. 84, 2004–2005, p. 50).

The authors point out other criticisms of these requirements. The requirements can seem unclear, create insecurity and limit employees’ freedom of speech. The NOU refers to judicial reviews concluding that there are very few cases in the courts and before the ombudsman that even question the legitimacy of external whistleblowing. This coincides with the Luxembourg Supreme Court’s consideration of the Lux Leaks case, in which the legitimacy of external whistleblowing was not questioned. The NOU concludes that cases brought to the courts and the ombudsman might already be constrained by strict conditions. Finally, they refer to the criticism that the requirements are based on a “mirrored principle”, and that the main responsibility is placed on the whistleblower and not the employer (NOU, 2018, p. 159).

In an individual remark, the General Secretary of the Norwegian Association of Editors Arne Jensen asserts that whistleblowing cannot only be considered a work environment phenomenon, but instead must be seen as a resource for society as a whole (NOU, 2018, p. 146).

In their final remarks on due process, the following recommendations are suggested. First, the whistleblower should report internally. Second,

reporting censurable conditions externally is not considered irresponsible if the notification is made internally first. Third, external whistleblowing is acceptable if others have earlier tried in vain, or if the notification concerns the executive management. Finally, external whistleblowing should be acceptable if there is reason to fear retaliation or destruction of evidence.

Conclusions

In this article I have described a set of challenges emerging from a century of the development of the tax haven complex. Countries and jurisdictions have developed a deeply intertwined network of financial services, and a social, political and physical infrastructure enabling regulatory evasion, tax avoidance, and eradicating accountability in business operations.

Consultancy firms represent an industry with excellent working conditions under these circumstances. As shown in the Lux Leaks case, these actors are a powerful factor that needs political attention. Gabriel Zucman claims that the extended use of tax havens is not only an issue of demand. He says that the part of the tax haven industry that offers the gateway into secrecy jurisdiction, such as the big consultancy firms, must be weakened if we are to reduce or end tax avoidance and tax evasion (Zucman, 2017).

There has been a surge in ‘tax haven laws’ all over the world, says Fjeldstad et al. (2018, p. 17). Indeed, it seems that what Fjeldstad calls ‘tax haven laws’ are becoming the laws of the global economy. However, any policy aimed at reducing tax avoidance or strengthening accountability must be tailored to the particular circumstances in those developed countries within the tax haven complex. It might also be worth mentioning that the policies should not be written by those developed countries alone, as is being tried in the OECD. The recent EU “black list” of so-called tax havens is revealing. None of the major conduit offshore financial centers identified by Garcia-Bernardo et al. (2017) are on the list.

Collaboration with whistleblowers is a strategy that journalists and civil society have utilized to overcome the challenges they face in investigating the global economy. In recent years, whistleblowers have been crucial

in developing ground-breaking stories on the dark side of a lustrous economic system, as well as the mundane workings of local government. Whistleblowers have a role in revealing how the global economy works.

Allern and Pollack site the World Bank study conducted by Stapenhurst (2000), which maintains that investigative journalism has the long term effect of considerably strengthening accountability among politicians, public bodies and institutions (Allern & Pollack, 2018). Journalists and whistleblowers seem to share a community of interest, because of the democratic ideals grounded in investigative journalism and the whistleblower ethos, as can be seen in the work of Halet and Deltour (Halet, 2018; Deltour, 2018).

Whistleblower protections are being developed in the EU and in Norway. The collaboration between journalists and whistleblowers is explicitly acknowledged by the EU, but is so far being played down in the Norwegian context. The strict conditions tied to external whistleblowing must be withdrawn to reduce the obstacles whistleblowers face. The perceived responsiveness of internal or external recipients can also affect the decision of potential whistleblowers to report their concerns or not (Loyens & Vandekerckhove, 2018). Regulations will decide whether the whistleblower remains silent or speaks up (Gottschalk, 2018).

Both the EU parliament and the Norwegian parliament have yet to ensure the needed protection for whistleblowers faced with unscrupulous employers or vested national interests.

The Lux Leaks case shows the indispensable need for collaboration between journalists and whistleblowers. The subsequent court cases also show that despite the lack of judicial protection for whistleblowers at the time, whistleblowing to a journalist was deemed legitimate. In the Norwegian context, external whistleblowing is rarely questioned in the relevant court cases, nor in the cases brought to the ombudsman.

Whistleblowers who do everything by the book can be marginalized, as seen in the Telenor/VimpelCom case. Strict formal conditions for external whistleblowing might hinder proper handling of important notifications. The similarity in the responses from Telenor and the Ministry of Trade and Industry are striking. First, the whistleblower was rejected after notifying the Telenor hierarchy. Then, one can argue that the whistleblower was not

properly considered by the ministry. Ekeberg claims that this is hardly surprising, as the ministry itself is a majority shareholder, and has the same interest in playing down the situation as Telenor itself (Ekeberg, 2018).

Not all unethical behavior is illegal, and as the ECtHR maintains; also “dysfunctional” or “questionable practices” could be disclosed (Vandendriessche, 2017, p. 5), as they are also a threat to democracy and the legal economy. The reasoning of the Ministry of Trade and Industry for why they forwarded the notifications to the investigative unit ØKOKRIM is therefore weak. ØKOKRIM is indeed not responsible for executing the Norwegian state ownership policy, which is the job of the ministry. The drawback of forwarding the notification to ØKOKRIM can be seen through the fact that ØKOKRIM dismissed the case in the end. The information provided by the whistleblower could have been valuable to the accountancy process in parliament. The ministry has a huge responsibility as a majority owner, especially keeping in mind that the ministry is a majority owner on behalf of the Norwegian population.

Without the massive work done first by Swedish then by Norwegian journalists with Bosnian and Uzbek assistance and guidance, the misdeeds in VimpelCom would probably never have seen the light of day. This investigative work took years. When *Klassekampen* latched onto the last phase, vast amounts of material were shared with the *Klassekampen* journalist. Allern and Pollack (2018) point out the increased cooperation and sharing of material among investigative journalists in the past decade. Ekeberg highlights a flexible employer, financial support, and supportive colleagues as other elements enabling the investigative work (Ekeberg, 2015).

How can parliaments facilitate a safe environment for whistleblowers? The EU highlights the ombudsman as a safe harbor for whistleblowers, in their insistence on notifying the authorities before considering notifying the media. The newly designated Whistleblower Ombudsman in Norway will likely create a much safer environment for anyone wanting to report censurable conditions in their workplace. However, it remains to be seen how such an institution will be able to handle the reports. A whistleblower might face the same limitations as seen in the Telenor/VimpelCom case, when the ministry forwarded the message to ØKOKRIM.

Discussing the range of recipient institutions is beyond the scope of this article. This is a growing concern among scholars. Loyens and Vandekerckhove maintain that rather than discussions on legislation, “the emerging policy question for the next decade will be through what institutional framework whistleblowing legislation can be implemented” (2018, p. 3). While this is an exciting field for further research, we cannot afford missed opportunities in strengthening journalistic collaboration with whistleblowers. This remains a political responsibility.

Gottschalk (2018) reminds us that any new legislation on whistleblower protection must have only one target group, namely the whistleblowers.

Protection from retaliation is not discussed in this article, but is one of the gravest challenges in whistleblower protection, especially for those reporting in the public sector (Ottosen, 2018). As seen in the Lux Leaks case, not even adequate law is enough to protect whistleblowers when powerful corporations request assistance from the authorities. Perhaps the most controversial aspect of the treatment of whistleblower Raphaël Halet is that the Metz court assisted a foreign company in using illegal methods against a national citizen.

Eduard Perrin, Antoine Deltour and Raphaël Halet managed to tell excellent stories on the global economy when they exposed the secret Luxembourg tax agreements enabling the snatching of tax revenues from other countries. Despite inexperience, lack of proper digital tools, and retaliations, Perrin and journalists from all over the world managed to tell intriguing stories on complicated matters in the global economy. Lux Leaks sparked an interest in tax havens never seen before.

Both cases shed light on whistleblower regulations from different angles. First and foremost, the Lux Leaks case shows the indispensable need for whistleblowing in revealing the workings of the global economy. Furthermore, the Telenor/VimpelCom case shows the questionable reception of internal notifications from both the corporation and the state as a majority owner. The truth behind the Telenor/VimpelCom case was nonetheless exposed through traditional journalistic handicraft, building on and sharing material, and finally, tight international cooperation.

These cases show that whistleblowing to the media must be acknowledged as responsible whistleblowing, and the strict limitations on

media–whistleblower cooperation must be withdrawn. Whistleblowing must be considered a broad democratic issue. Conditions for investigating the global economy are unfavorable, and the adversaries of investigative journalism and civil society are resourceful and fierce. However, the stories emerging from international cooperation in the last few years suggest that there are only more to come.

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CHAPTER 15

What Is a Leak, Who Is a Whistleblower? An Evaluation Within the Scope of the *Cumhuriyet* Newspaper, Can Dündar and MIT Trucks Case

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Abstract: Information leaks and the revelation of government secrets by hackers have become issues of note in Turkey's political sphere during the course of the last ten years. Turkey has also witnessed a steady flow of leaks in recent years. Of these, the MIT (The National Intelligence Organization) trucks case, concerning the role of the Turkish secret service in supplying weapons to jihadist militants in Syria, has perhaps been the most distinctive. This chapter discusses whether the MIT Trucks scandal can be regarded as a whistleblowing leak serving the public interest in terms of its revelations, the identities of its sources, its wider political entanglements, and the timing of its emergence into the public domain.

Keywords: leaks, whistleblowing, leaks journalism, *Cumhuriyet*, Can Dündar

Introduction

The increasing use of information technology, the significant decrease in information storage costs, data's instant reproducibility and ready dissemination, have all made leaks such as the Panama or Paradise Papers cases ever more difficult to police and prevent. Today, information leaks

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provide a sustained and extensive view of how power works, as well as what it thinks and does, as Beckett and Ball (2012) maintain.

Those who have gained access to confidential information, whether by virtue of their privileged status or through other means, have undoubtedly changed the concept and practice of investigative journalism dramatically, with leak journalism increasingly becoming an essential part of the investigative journalism canon.

Information leaks and the revelation of government secrets by hackers have also become issues of note in Turkey's political sphere during the course of the last ten years. In fact, Turkey has witnessed a steady flow of leaks in recent years, many of them concerning alleged corruption by members of government and their inner circles. Other leaks, such as those relating to the AKP government's alleged illegal ties with Islamist jihadists, and those dealing with Turkish state military secrets have been revealed by anonymous sources. Of these, the MİT (The National Intelligence Organization) trucks case, concerning the role of the Turkish secret service in supplying weapons to jihadist militants in Syria, has perhaps been the most distinctive.

In order to place this in context, the "Whistleblower Prize 2017", awarded to the former editor-in-chief of the independent Turkish newspaper *Cumhuriyet*, Can Dündar, may be a good starting point. Dündar received the prize "for his revelations, under the most difficult, repressive conditions in Turkey, of a so-called state secret of the Erdoğan regime" (Die Welt, 2017). The revelation involved the attempted delivery of weapons and military armaments to jihadists in Syria, conducted by the Turkish secret service, the MİT, and contrary to applicable international law – a case known as the "MİT Trucks case".

This chapter discusses whether the MİT Trucks scandal can be regarded as a whistleblowing leak that serves the public interest in terms of its revelations, the identities of its sources, its wider political entanglements, and the timing of its emergence into the public domain. Within these criteria, this article will examine some of the motivational elements underpinning the journalism of the *Cumhuriyet* newspaper, and attempt to identify the variables contributing to the decision to award the prize to Can Dündar. The article draws on "whistleblower" and "leak" definitions

set out by Peter B. Jubb (1999) and David E. Pozen (2013) respectively, as well as Stephen Hess's (1984) typology on why leakers leak.

The "MIT Trucks" case

On 19 January 2014, the prosecutor of the Anti-Terror Court of Adana province in Turkey instructed the Adana Provincial Gendarmerie Command to stop and search three trucks. A security force of 200 personnel stopped the trucks and a car accompanying them at the Adana Sirkeli motorway entry point. Eight drivers and other personnel in the convoy were detained by the police (Taştekin, 2014). First reports from the scene suggested that there were MIT officers in the truck, and they had clashed with the gendarmerie, who tried to confiscate the truck's contents and arrest the officers. Hatay's governor intervened and demanded the release of the officers, since they were subject to Law Number 2937 (MIT law), according to which the personnel have a special status directly subordinated to the prime minister's office, and their undue detention would result in criminal consequences. Nonetheless the trucks were searched and videoed, despite the efforts of MIT officers to obstruct this (Başaran, 2017). President Recep Tayyip Erdoğan later announced that the trucks were carrying humanitarian aid to Syrian Turkmens and it was *parallel*¹ judicial and security personnel who had tried to stop the MIT trucks in Adana (Pamuk & Tattersall, 2015). A broadcast ban was immediately imposed on the case. All relevant online content was deleted by court order, and even commenting on the subject was prohibited. The prosecutors and gendarmerie officers who conducted the investigation were arrested on suspicion of espionage. However, despite all the attempts at a cover-up, the trucks' search documents and testimonies of the gendarmerie included in the charges were leaked (Başaran, 2017).

On 21 January 2014, the *Aydınlık* newspaper, a nationalist daily affiliated with the Patriotic Party of Turkey, a strong supporter of the government,

1 A term used by President Recep Tayyip Erdoğan to describe members of the Gülen movement who have major military and judicial positions, and have been accused of attempting to bring down the government.

particularly in its struggle against the Gülen movement, published the first images of the search and a report claiming that the trucks were carrying munitions from Turkey to Syria. In the report entitled “Here Is the Ammo in the Trucks”, it stated that thanks to the images captured by the newspaper’s personnel, it had been proven that the Turkish trucks were carrying munitions and not the humanitarian aid claimed by government officials.

The interception of the trucks in the MİT Trucks case was linked to the struggle between the AKP government and the Gülen movement. The Gülen movement, also known as “Cemaat”, is a religious group led by Turkish preacher Fethullah Gülen, who has been living in the United States since 1999. The search was seen as a continuation of the struggle between the two organizations, which began in 2013. As a well-established supporter of the government when it first took office, the Gülen movement commenced criminal investigations on 17 December 2013, through the offices of its members in judicial and security units, of businessmen connected in various capacities to the ruling party. These included several family members of cabinet ministers, who were accused of bribery, corruption, fraud, money laundering and gold smuggling. Shortly after these investigations, tape recordings of the then Prime Minister Recep Tayyip Erdoğan’s phone calls were leaked to the media by anonymous and hitherto unknown sources. This scandal, also known as the *corruption scandal*, revealed details of Erdoğan’s relationships with people from the media, business and politics, and along with the investigations, it was seen essentially as an attempted coup against the government by Gülen party members. Although the opposition reacted to the scandal with large demonstrations and called on the prime minister to resign, the investigations were considered by the public to be an attack by the Gülen movement on the government. Set against this background, it has been claimed that leaking the images relating to the delivery of munitions was the work of Gülen-movement-related sources. Immediately after the incident, investigations into the actions of the prosecutors, gendarmes and police officers involved in the interception of the MİT trucks were initiated. Adana Chief Public Prosecutor, Süleyman Bağrıyanık; Deputy Chief Public Prosecutor, Ahmet Karaca; Prosecutors, Aziz Takçı and

Özcan Şişman; as well as Colonel Özkan Çökay were among those who were detained on charges of attempting to subvert the Republic of Turkey (Hamsici, 2017).

Following his appointment as the new editor-in-chief of the *Cumhuriyet* newspaper in 2015, journalist Can Dündar began to publish stories critical of the AKP government. However, the uploading of a video of the MİT trucks search to *Cumhuriyet* newspaper's website on 29 May was the catalyst for a more extensive discussion of the issue of espionage in general. It was evident from the published photos that cardboard boxes, which had been placed inside steel boxes, had medicines in them. However, the munitions had been hidden under the medicines. These revelations caused a political storm in Turkey, and enraged President Recep Tayyip Erdoğan, who vowed that Dündar would pay a "heavy price".

Dündar, and the newspaper's Ankara bureau chief, Erdem Gül, were arrested on 26 November 2015 on the charge of military espionage, and of wilfully aiding an armed terrorist organization (Bilginsoy, 2015). After 92 days in jail, Dündar and Gül were released on 26 February 2016 after Turkey's constitutional court ruled in a majority decision that their freedom of expression and that of the press had been violated in conjunction with their right to liberty and the security of their persons (The Constitutional Court, 2016). Dündar moved to Germany in June 2016, after he was sentenced to five years and 10 months' imprisonment for "leaking secret information of the state".

Leaks, whistleblowing and journalism

The figurative sense of the verb 'leak' meaning "to come to be known in spite of efforts at concealment" dates from at least 1832, while it has been used as a noun in the sense of the "revelation of secret information" since 1950 (etymonline.com). Today, it is used broadly to mean "an array of practices involving the accidental and strategic sharing of information, including whistleblowing, settling grudges, culling favors, drawing attention to policy initiatives, signalling foreign governments, and releasing trial balloons so as to discern early public response" (Thorsen et al., 2013, p. 103). Within the scope of this chapter, a leak is taken to be "a targeted

disclosure by a government insider (employee, former employee, contractor) to a member of the media of confidential information the divulgence of which is generally proscribed by law, policy, or convention outside of any formal process with an expectation of anonymity” (Pozen, 2013).

Leaks vary depending on the motives of the leaker, the identity of the leaker, and the scope of the leaked material (Kwoka, 2015). With regard to the motives of leakers, Hess (1984, pp. 77–78) examines leaks under six different categories: the ego leak, the goodwill leak, the policy leak, the animus leak, the trial-balloon leak and the whistleblower leak. The ego leak refers to the providing of information primarily to satisfy a sense of self-importance; in effect, “I am important because I can give you information that is important.” The goodwill leak is a ploy for a future favor. The primary purpose is to accumulate credit with a reporter, whom the leaker hopes can be called upon later. The policy leak is a straightforward pitch for or against a justified proposal. The animus leak may be used to settle grudges: information is disclosed to embarrass another person. The trial-balloon leak reveals a proposal that is under consideration in order to assess its assets and liabilities. Finally, unlike the others, the whistleblower leak is usually employed by career personnel. Going to the press may be the last resort of frustrated civil servants, who feel they cannot correct a perceived wrong through regular government channels.

As a synthesis of seven widely quoted definitions, spanning a range of views within the literature (Bowie & Duska, 1990; Elliston et al., 1985; Chiasson et al., 1995; Chambers, 1995; Miceli & Near, 1992; Courtemanche, 1988; De Maria, 1995), Jubb (1999) defines whistleblowing as “a deliberate non-obligatory act of disclosure, which becomes part of the public record and is made by a person who has or had privileged access to the data or information of an organization, about nontrivial illegality or other wrongdoing, whether actual, suspected or anticipated, which implicates and is under the control of that organization, to an external entity having the potential to rectify the wrongdoing”.

This runs the risk, however, of equating whistleblowing with informing. Whistleblowing is a distinct act of dissent, in which a member or former member of an organization goes outside the organization or outside normal organizational channels to reveal organizational wrongdoing,

illegality, or actions that threaten the public, and typically involves inside informants who want to expose “actual nontrivial wrongdoing” by collaborating with the media (Thorsen et al., 2013, p. 102). However, whistleblowing is not merely informing. There are many kinds of informers, from simple conveyors of messages to sneaks, spies or squealers. Whistleblowing is distinguishable from these types of informing because the disclosure is an indictment. It identifies perceived wrongdoing, typically a *bad-news* message about misconduct, incompetence, fraud and the like, alleged to have been ignored and/or covered up; or it might be about good news concealed for private advantage (Jubb, 1999). In contrast to informers, a whistleblower is usually cast in a positive light: that is, as someone who discloses confidential information to the press reluctantly, in the belief that it is necessary to do so because public attention must be directed toward a perceived wrong, crime, or injustice (Thorsen et al., 2013, p. 102).

The European Commission’s proposal for a directive of the European Parliament and of the Council on the protection of whistleblowers defines them as: persons who report (within the organization concerned or to an outside authority) or disclose (to the public) information on wrongdoing obtained in a work-related context; or help prevent damage and detect threat or harm to the public interest that may otherwise remain hidden (European Commission, 2018). However, the definition of the Commission differs from the definitions in the literature noted above in its restriction of the act to work-related activities only. It also excludes the disclosure of classified information, “which European Union law or the laws, regulations or administrative provisions in force in the member state concerned require, for security reasons, to be protected from unauthorised access.” According to the whistleblower definition of the German non-profit association Whistleblower-Netzwerk e.V., whistleblowers are people who no longer silently accept illegal actions, grievances or dangers to people and the environment, but rather reveal them. They do this internally within their companies, agencies or organizations, or externally to competent authorities, third parties, or the press.

According to the jury of the “Whistleblower Prize” (IALANA, 2017), journalists can also be whistleblowers. Whistleblowers are insiders who

act in their “own sphere of influence” or “own working environment” and “sound the alarm” where necessary. They no longer silently accept illegal action, serious grievances or serious dangers to people and the environment, democracy, peace or the common weal, but reveal them. They collect data and facts, analyze them critically, weigh up counterarguments, seek remedies, and refuse to continue to participate in these abuses and aberrations themselves, to trivialize them and to shield them against criticism, or even to make themselves accomplices. By doing that, they make a contribution to open critical discourse and act in the interest of the public welfare. They follow their conscience – even when it can become uncomfortable for them. As such, they often place themselves at great risk, and put their reputation or even their existence on the line. They are frequently pressured by those who want to hide uncomfortable truths. On the other hand, the term “whistleblower” does not normally include people who are simply performing a professional task, such as journalists, who conduct investigations and then publish their findings. However, a journalist may become a whistleblower because of an investigation and a publication, if he/she has to act under extreme, repressive conditions and still decides to do so for important public interest reasons.

A whistleblower is a person who is motivated by a strong belief that wrongdoing has occurred and that it needs to be corrected. In this context, motivation is dealt with as the driving force causing employees to come forward and report wrongdoing (Çalışkan, 2018, p. 315). In order to better understand and analyze the motives underpinning whistleblowing, a broader categorization has been proposed, one that embraces both altruism and self-interest. As part of his research project entitled “Whistling While They Work”, Roberts (2014) compiled the motives of Australian public sector whistleblowers, and identified altruistic reasons such as disagreements with organizational policies, legal obligations to report wrongdoing, personal morality and ethical breaches such as fraud, theft, breaches of codes of conduct, misuse of allowances, and falsification of records.

However, according to the model of “prosocial behavior”, another effective theoretical framework for analyzing motives for whistleblowing, it is not necessary for the whistleblowing act to have only altruistic motives.

Many whistleblowing incidents are positive behaviors. Even if avoiding and stopping wrongdoing benefits society, but not the organization per se, it is still a positive behavior. In this context, whistleblowing may be seen as prosocial behavior intended to benefit other persons (Miceli et al., 2008, pp. 33–35). However, according to Staub (1978, p. 10), prosocial behavior has another class similar to altruism, but which does not require total unselfishness on the part of the actor. Prosocial actors can, unlike altruistic ones, also intend to gain rewards for themselves. The degree to which people intend to benefit themselves by benefiting others varies across instances of prosocial behavior. Consequently, it is not necessary for unselfish motives to dominate, but simply that they be present. So, even though whistleblowing may benefit the whistleblower personally, whistleblowing can be viewed as prosocial behavior because it generally also benefits persons other than the whistleblower (Dozier & Miceli, 1985).

Numerous examples can be adduced of individuals whose position in an organization has afforded them access to otherwise secret or classified information, and who have initiated noteworthy news stories. In 1967, Daniel Ellsberg leaked 7,000 top-secret documents about the Vietnam War to reporters of the *New York Times* and the *Washington Post*. The “Pentagon Papers” were from the “Vietnam Study Task Force” that had been established within the Pentagon without the knowledge of the US president, and was charged with examining the history of US involvement in the Vietnam War. The leaks created a sense of distrust in the US decision-making process within the American populace, and played a significant role in ending the Vietnam War. During the Watergate scandal, information leaked by the former FBI Associate Director, William Mark Felt Sr., under the pseudonym “Deep Throat” to reporters of the *Washington Post* revealed unlawful activities on the highest levels of government. In consequence, Americans began to look at their political system anew, and several reforms were introduced in relation to issues such as political ethics and eavesdropping.

In addition to Ellsberg and Deep Throat in the Watergate scandal, several other individuals whose place inside an organization afforded them access to otherwise secret or classified information have

generated noteworthy news stories. Jeffrey Wigand, who worked with CBS's *60 Minutes* in 1996, revealed how the tobacco company Brown & Williamson manipulated nicotine content in cigarettes to addict smokers. Also Sherron Watkins, who helped uncover the Enron crisis in 2001, is among the other significant whistleblowers to emerge over the years (Thorsen et al., 2013, p. 102–103).

In the context of the intricately and densely networked spheres of communication pervasive in all our lives, information leaks have provided a detailed and extensive insight into the workings of power. In this way, they have changed the concept and practice of journalism, and leak journalism has increasingly become a noteworthy component of investigative journalism. With respect to the form of investigative journalism practised through the collaboration of citizens and journalists, leak journalism may be defined as a process in which leaked information obtained from whistleblowers within a network is edited by journalists and published through mainstream and alternative media. Leak journalism is described by Beckett as “leaking with a purpose” (2012). According to Uçkan (2011, 2012), it constitutes a fundamental dimension of journalism, which has always had a democratic function at its core, and an important communication channel helping citizens understand “the real scoop” in relation to what’s actually going on in the world around them. Leak journalism is the process of editing and publishing information leaks submitted by whistleblowers with the help of journalists and experts through mainstream and/or alternative media, and appears as a normative model encompassing descriptions of the organizational and operational factors underpinning it, as well as the motives of the actors involved (Çalışkan, 2016). Although these norms can appear in different ways, as a whole they define leak journalism as a new form of journalism. Organizational factors of the model consist of the network-based and decentralized organizational structure of the leak platform, as well as the security and privacy measures provided to the actors involved in the leaking. Journalistic work related to the process of obtaining, editing and publishing leaks en route from whistleblower to audience establishes the operational factor of the model. Finally, the motives of the actors involved serve to shed light on the human dimension.

Whistleblower Prize

In October 2017, Can Dündar was awarded the “Whistleblower Prize” together with economist, Martin Porwoll, and pharmaceutical technical assistant, Maria-Elisabeth Klein. The Whistleblower Prize has been presented biannually by the German section of the International Association of Lawyers against Nuclear Arms (IALANA) and the Federation of German Scientists (VDW) since 1999, and is given to individuals whose behavior meets certain criteria:

1. Revealing wrongdoing: The whistleblower should reveal grave wrongdoings, serious abuses or undesirable developments in her/his own work environment or sphere of influence.
2. Going outside: If her/his internal alarm is suppressed and/or remains ineffective, the whistleblower goes outside and depends upon outsiders or the public.
3. Serving the public interest: The whistleblower serves the public interest and does not achieve any economic benefit for herself/himself or those close to her/him.
4. Risking retaliation: In committing to the action, the whistleblower accepts that her/his behavior is associated with considerable risks and/or disadvantages for her/his own professional career or personal existence.

To date, perhaps Daniel Ellsberg, Chelsea Manning and Edward Snowden are some of the better-known winners of the Whistleblower Prize. Daniel Ellsberg received the prize for his leak to the press in the early 1970s of the so-called “Pentagon Papers” on US involvement in the Vietnam War, thus making a significant contribution to ending the war. Chelsea Manning posted hundreds of thousands of documents on WikiLeaks in 2010, detailing serious war crimes by US soldiers in Iraq. As a member of the NSA, Edward Snowden publicized the mass surveillance and storage of communications data by US intelligence and other Western intelligence agencies.

According to IALANA and VDW (2017), Can Dündar met the criteria for the Whistleblower Prize in 2017, in revealing that the Turkish

government had violated not just the UN Security Council's binding decision to combat Al-Qaeda and its cells, but also other relevant provisions of the UN Charter as well. They noted that Dündar, through this revelation, had shown that he was not only a critical journalist and editor aware of his responsibilities, but also a brave whistleblower. He was deemed to have served the public interest by covering the weapons delivery to jihadists in Syria, which was contrary to international law, had been denied up to that point, and had not been sanctioned by the Turkish parliament. Finally the committee noted that, despite advice to the contrary from his colleagues and lawyers, Dündar, through his action, had undertaken the gravest risk of arrest and long-term imprisonment.

In lieu of a conclusion

In terms of both the public's right to know and freedom of the press, it could be argued that the MIT Trucks case is of particular significance and that Dündar's receiving the Whistleblower Prize in Germany flows directly from that. However, in order to understand why the prize was awarded to him in particular (and others such as Daniel Ellsberg, Chelsea Manning and Edward Snowden), and not, for example, the German Federal Intelligence Service (the BND had eavesdropped on representatives of the Syrian government and army through the use of a signals-intelligence ship in the Eastern Mediterranean [Lambeck & Özgenç, 2012]), a number of points need to be examined. When evaluated within the scope of the literature on leaks and whistleblowing, and against the political background discussed above, describing Dündar's behavior as whistleblowing and awarding him the Whistleblower Prize seem problematic in three respects.

Firstly, contrary to common belief, it was not *Cumhuriyet* that broke the story on the seizure of the MIT trucks. As stated above, the *Aydınlık* newspaper published the first images of the search and a report claiming that the trucks were carrying munitions from Turkey to Syria on 21 January 2014, only two days after the trucks were stopped. Just like the *Cumhuriyet* newspaper did 15 months later, the report stated that thanks to the images captured by the newspaper's staff, it had been proven that the

Turkish trucks were carrying munitions and not the humanitarian aid claimed by government officials. Orhan Ceyhun Bozkurt, former news editor-in-chief of the newspaper, said that a state officer from Ankara sent the images to him via WhatsApp and the newspaper published the images and the report because they were newsworthy (Aydınlık, 2017). Later, the newspaper's editor-in-chief Mustafa İlker Yücel and Bozkurt were both charged with "revealing confidential state information" (Aydınlık, 2017). The only difference in the report published in the *Cumhuriyet* newspaper was that it contained video material of the search of the trucks in addition to images. The court justified its decision not to charge *Aydınlık* staff with military espionage and wilfully aiding an armed terrorist organization, unlike Dündar, by the argument that *Aydınlık*'s report didn't contain any information, document or video other than the images, and that the report published by Dündar revealed much more newsworthy information, documents and images.

Secondly, if the MİT Trucks case could be considered within the realm of whistleblowing based on the leaks journalism model, it would be more appropriate to define Dündar as the publisher of the leaked information, rather than the whistleblower per se. In the MİT Trucks case, on 27 May 2015, Dündar was given a memory stick containing a video by a hitherto unknown informant. Later in his book (2016, p. 12), Dündar stated that it was a leftist member of parliament who had delivered the video to him. Some 15 months later, following the publication of the book, the main opposition Republican People's Party deputy and former journalist Enis Berberoğlu was sentenced to 25 years in prison for allegedly "leaking state secrets" in the MİT Trucks case, by providing the video to the *Cumhuriyet* newspaper (Hürriyet Daily News, 2017). According to the available information, the memory stick was prepared by the gendarmes who had searched the MİT trucks at Adana on 19 January 2014, and the video on it recorded the entire process from the initial interception of the trucks to the opening of the transported boxes containing the weapons. After checking the authenticity of the video, Dündar realized that he had proof of Turkish government violations of international and domestic law. The *Cumhuriyet* newspaper then published on 29 May 2015 a lengthy front-page article including photos under the heading "Here Are the Weapons

that Erdogan Denies”. *Cumhuriyet* also published the video on its website (2017). The Whistleblower Prize jury announced Dündar as the whistleblower of the MİT Trucks case, saying that journalists can also be whistleblowers, and for a journalist, research and publication can turn into a whistleblowing act in and of itself if the journalist has to act under extreme, repressive conditions and still chooses to do so for the public weal. In his book entitled *We Are Arrested*, the story of the MİT Trucks case and his detention, Dündar also claims that he himself was a whistleblower by comparing his act with earlier whistleblowing incidents:

I knew that crimes could not be kept secret. One after the other, files stamped Top Secret concealing dirty operations sanctioned by politicians had been exposed: Watergate, Irangate, the Pentagon Papers and WikiLeaks being just a handful of examples. And in each case, it was the guilty politicians who were tried, not the journalists. (Dündar, 2016, p. 14)

However, Dündar was one of the publishers of the leaked images of the MİT Trucks in the same way that Neil Sheehan of the *New York Times* was in the “Pentagon Papers” case, or Glenn Greenwald of the *Guardian* was in the “Snowden Files” case. In the cases of Sheehan and Greenwald, the investigative reporters acted under repressive conditions, and chose to publish stories on leaked documents for the public weal after working on the confidential documents revealing wrongdoing, together with the whistleblowers Daniel Ellsberg and Edward Snowden.

Finally, it would be more accurate to say that in terms of the motives of the person who leaked the images to the *Cumhuriyet* newspaper, the objective was to settle grudges and to embarrass another person – Hess describes it as an “animus leak” – rather than a desire to serve the public interest or to reveal wrongdoing. From this perspective, the MİT Trucks case is reminiscent of the case of the German intelligence ship in the Eastern Mediterranean. The activities carried out by the ship showed that Germany was playing a far greater role in the Syrian conflict than had hitherto been known. According to the report published by the German *BILD* newspaper, the information gained on military operations of the Syrian army was passed on to the American and British secret services, and from there was relayed to the so-called “Free Syrian Army”. At first

glance, this information leak would appear to be clearly different from well-known whistleblowing cases such as the Pentagon Papers or Cablegate. Listening to the enemy is a method of communications intelligence during war, and as such made Germany a party to the conflict in Syria (Lambeck & Özgenç, 2012; Cieschinger et al., 2016; Die Bundesregierung, 2016; El-Hamid, 2017). But when evaluated with regard to the motivation behind the leaks, both cases may be regarded to be similar. The searching of the trucks heading for Syria was one of the incidents that resulted in the Gülen movement and the government eventually coming into conflict with each other. In addition to the corruption investigations and the leaked tape recordings of Erdoğan's phone calls, this raid and the leaking of the images were perceived as attacks against the government by the Gülen movement (Gürsoy, 2015, pp. 34–35). Before the power struggle between the AKP government and its former ally in 2013, the Gülen movement was a well-established supporter of the government when it first took office. As part of this struggle, the Gülen movement often leaked audio and video documents obtained by its members in judicial and security units without revealing their identities. As already noted, leaks vary depending on the motives and identity of the leaker, and whistleblowing is done out of altruism to further the public interest without expectation of personal gain. Accordingly, with regard to the source of the leaks in the MIT Trucks case, it could be argued that it is a matter of public discretion as to whether the subsequent publication of that information could be regarded as whistleblowing within the framework described above.

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CHAPTER 16

Chilling Effects on Free Expression: Surveillance, Threats and Harassment

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Abstract: This chapter addresses global surveillance as revealed by Edward Snowden in 2013 and discusses the effects such surveillance – and indeed its revelation – may have on freedom of the press and investigative journalism. The chilling effect – an act of discouragement – has proven to be an effective way of deterring public intellectuals and other citizens from voicing their opinions in the public sphere. This chapter presents some examples of how it works on practicing freedom of expression for both groups and individuals, as well as how it may affect relationships between various actors in the public sphere, particularly the state and the media, and journalists/writers and politicians. Finally, it discusses consequences for the future of investigative journalism.

Keywords: chilling effect, investigative journalism, surveillance, freedom of expression

Rarely it is mentioned, in this regard, that surveillance fundamentally questions journalistic work as such – at least in its form of investigative journalism that requires confidential communication with sources.

—Arne Hintz (2013)

Introduction

This chapter addresses the *chilling effect* on freedom of expression and freedom of the press. As a case study, it discusses how investigative journalism,

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revealing modern global surveillance helped by whistleblower Edward Snowden (in June 2013), may be hampered by this effect, oftentimes in the form of a tight relationship between state power and the media.

It elaborates on how *journalism* – which is essential for whistleblowers’ outreach – treated the revelations, and which challenges such independent investigative journalism faces. The concept *chilling effect* is central to my approach, since this effect has demonstrated its effectiveness in stimulating self-censorship and thus less transparency in any given public sphere, and since the chilling effect may have severe repercussions vis-à-vis this particularly important strand of journalism. Surveillance and the threat of being surveilled (and thus perhaps also persecuted) are in turn important components of the *chilling effect*, as claimed by the U.S. PEN chapter (see below).

After clarifying the concept *chilling effect*, a major part of the chapter presents the Snowden revelations of mass surveillance, Edward Snowden being the most important whistleblower of our era. This part discusses the ways in which threats of surveillance may affect people’s willingness to make full use of their freedom of expression. It then takes on journalism and other public individuals’ practices, and demonstrates how revelations of surveillance (and its chilling effects) have deepened conflicts between the media and state power, between various actors in the journalistic field (for example editors and journalists), and between whistleblowers and society at large. Last, but not least, I outline some future scenarios for journalism and free expression.

An act of deterrence

The concept *chilling effect* has been thoroughly treated as a phenomenon linked to the judiciary, as shown by a variety of lexical definitions. This short one synthesizes the legal approach: “A discouraging or deterring effect, especially one resulting from a restrictive law or regulation”.¹ Schauer (1978) writes that the “very essence of a chilling effect is an act of deterrence” (p. 689). Furthermore, he finds it proper to distinguish

¹ <https://www.dictionary.com/browse/chilling-effect> accessed 24.09.2018

between “an *activity* as being chilled” while one oftentimes talks of “*people* being deterred” (ibid.).

The two concepts [activity and people] go hand in hand, of course, in that an activity is chilled if people are deterred from participating in that activity. Although an individual’s decision not to engage in certain behavior may be influenced by a wide range of stimuli, in law the acknowledged basis of deterrence is the fear of punishment - be it fine, imprisonment, imposition of civil liability, or deprivation of governmental benefit. (Schauer, 1978, p. 689)

Furthermore, Schauer discusses how laws on obscenity or defamation may impose a chilling effect on citizens, preventing some types of expression. This chapter’s focus is not primarily on the judicial approach to freedom of expression. The emphasis on *deterrence* enables a broader approach to the *chilling effect*, i.e. as an effect constituted by a variety of institutions or groups/individuals, contributing to the exclusion or barring of people from the democratic exercise of their right to free expression. The aim of this chapter is to investigate how this works, with a particular emphasis on surveillance and other threats to public speakers/writers/journalists.

In a world where media platforms and channels offer themselves in multitudes, laws still play a role. However state and military *practices* in conflict with laws (or with a country’s adherence to international charters and treaties), as well as threats and actions by non-government entities, may also cause deterrence. We should also not forget that conventions of loyalty to authorities within news organizations might have a ‘chilling effect’ on journalists, especially when working with sensitive areas such as national security. *The Post*, a recently released movie, clearly demonstrated this (Spielberg, 2017) by focusing on controversies within the mainstream press on whether to print *The Pentagon Papers*.² Below, we shall see how (the practicing of) laws as well as other factors contribute to a chilling effect on free expression, whistleblowing and democratic rights in a given society.

2 For more on the Pentagon Papers: <https://www.britannica.com/topic/Pentagon-Papers> Accessed 24.09.2018

Surveillance: The Snowden revelations

In June 2013, a person hitherto unknown to the world, Edward Snowden, revealed how the U.S. National Security Agency (NSA) practiced mass surveillance on citizens in large parts of the world. The surveillance included phone tapping, and data gathering helped by email services and IT giants such as Google, Facebook and others. It was a global revelation, involving other countries' secret services as well, not least the GCHQ (General Central Headquarters) in the U.K. Edward J. Snowden was working as a senior IT consultant at the Booz Allen Hamilton Company, but on lease to the NSA, where he had access to top secret surveillance data. When he could no longer tolerate what he knew about the illegal surveillance, he made an appointment to meet reporters and left for Hong Kong.

When the news of mass surveillance was revealed, it caused massive reactions from political leaders, as well as from citizens, as WikiLeaks had previously done. Unlike in WikiLeaks, Snowden entrusted experienced reporters to transform/translate his whistleblowing into investigative journalism. He contacted Glenn Greenwald, who had worked for *The Guardian*, as well as documentary filmmaker Laura Poitras, to do the job. Both had experience in writing about surveillance and secret services. In his book on the 'affair', Greenwald confirms that it was "vital to publish the documents journalistically [...] rather than just publishing them in bulk" (Greenwald, 2014, p. 52), thus hinting at the previous experiences of WikiLeaks, which did just that – publish 'in bulk'.

In Hong Kong, *Guardian* staff reporter Ewen MacAskill joined Poitras and Greenwald. Together, they went through the vast material Snowden had stored, and started publishing the revelations, but took care not to endanger ordinary citizens. Snowden has later revealed that he had never spoken to a journalist before, and thus labelled himself a "virgin source".³

3 Coll, Steve. (2014, October 21) How Edward Snowden changed journalism. *The New Yorker* Retrieved from <https://www.newyorker.com/news/daily-comment/snowden-changed-journalism>, accessed 13.07.2018

More transparency

The Snowden case is a perfect example of how a whistleblower joining hands with professional journalists, with support from a powerful media institution, may shape a series of powerful investigative journalism reports on issues vital to hundreds of millions of people. It may remind us of the Watergate affair, but unlike the *Washington Post*'s "deep throat" who kept his identity hidden until late in his life⁴, Snowden wanted to go public about his role in the revelations, and did so in a video interview in *The Guardian*. Thus, his strategy is more related to the way in which former military analyst Daniel Ellsberg revealed The Pentagon Papers, and took the risk of going public as the source of the revelations on the historical role of the U.S. in the Vietnam War (Ellsberg, 2001).⁵ Snowden stated in the interview that he "did not want to live in a society that does these sorts of things" and that the surveillance activities were done "outside the democratic model".⁶ By stepping forward in this manner, he made the issue of transparency even more prominent, since working with anonymous sources remains a contested area within professional journalism. This was also an important gesture vis-à-vis the public, since he could be explicit about his motives and be judged accordingly.

This ultimate revelation of Snowden's own identity came at a high cost, not least to the whistleblower himself, since he has lived involuntarily in Russian exile since 2013. It seems he will remain there for the foreseeable future, although the European Parliament with a slim majority voted in favor of granting him asylum in a member country.⁷

4 von Drehle, David (2005, June 1). FBI's no. 2 was 'Deep Throat': Mark Felt ends 30-year mystery of The Post's Watergate source, *The Washington Post*. Retrieved from https://www.washingtonpost.com/politics/fbis-no-2-was-deep-throat-mark-felt-ends-30-year-mystery-of-the-posts-watergate-source/2012/06/04/gJQAwseRIV_story.html?noredirect=on&utm_term=.2978cbe5b769 Accessed 14.07.2018

5 Ellsberg has, after the Snowden revelations, toured many countries together with other American whistleblowers in support of Edward Snowden.

6 <https://www.theguardian.com/world/video/2013/jun/09/nsa-whistleblower-edward-snowden-interview-video> Accessed 13.07.2018.

7 Friedensdorf, Conor (2015, October 29). European Lawmakers Vote in Support of Edwards Snowden, *The Atlantic*. Retrieved from <https://www.theatlantic.com/international/archive/2015/10/european-parliament-edward-snowden/413257/> Accessed 14.07.2018

The case of Norway

Norway, being part of the NSA's 'nine eyes', has a particularly close connection to the U.S. surveillance system. The most important results regarding the surveillance of its citizens until now have been provided by reports from the "Status for Freedom of Expression in Norway" (Staksrud et al., 2014). This survey of citizens in general includes several questions on attitudes towards surveillance and other security measures. It reveals a rather divided people when it comes to confidence in the government being able to hinder a terror attack on Norwegian soil (35 percent have great or moderate confidence, 30 percent have low or no confidence, and a substantial number say neither/nor or do not know).

These results must be judged in context, appearing just three years after a major terrorist attack against the government and the Labor party's youth camp in Norway, killing 77 people and wounding many more. Also important here is the context of the subsequent *Gjørvi commission*⁸, revealing severe weaknesses in Norway's preparedness in relation to such attacks. Another question concerned phone tapping in a situation with a "rapidly approaching terror attack" (ibid. my translation). A vast majority (81 percent: 42 percent 'absolutely', 39 'probably') would accept this measure in such a situation (ibid., p. 53). About two thirds would – to an extent or absolutely – accept surveillance of emails in the same described extreme situation, while one third would not (ibid., p. 57). Approximately the same proportions emerge when respondents are asked about surveillance of social media, with somewhat fewer being negative (ibid., p. 58). The phrasing of the questions (immediate danger) might have influenced the outcome in a more pro-authorities direction.

When asked in general about attitudes towards the authorities' control of the Internet, the sample population is more equally divided, the proportion of "control skeptics" being slightly larger than those who are "control supportive" (ibid. p. 60). The report reveals that journalists in the survey are significantly more skeptical to such measures than the public.

8 <https://www.regjeringen.no/contentassets/bb3dc76229c64735b4f6eb4dbfcd8e8/no/pdfs/nou201220120014000dddpdfs.pdf> Accessed 16.07.2018

Source protection – for whom?

Such discrepancies between citizens in general and people whose livelihood depends on freedom of expression, may in the long run have political consequences, although a significant Supreme Court decision ruled in favor of source protection.⁹ The case in question concerned documentary filmmaker Ulrik Imtiaz Rolfsen, who was working on a film about extremists recruiting young people for the so-called Islamic State. Such a decision, whereby the surveillance authorities (PST) had to return confiscated material to the filmmaker, may be seen as working in the opposite direction, i.e. as part of an *unchilling effect* on journalists and related professionals working with sensitive issues of national security.

As we can see from the above, the questions in the survey were different from the ones in a survey orchestrated by U.S. PEN (see below), although the Norwegian research was also conducted in the autumn of 2013, i.e. while the Snowden revelations were still fresh news. What the answers reveal, though, is a varying alertness in the general population on questions concerning freedom of expression, but also a varying level of confidence towards the media, exemplified by the fact that about one third of the respondents think journalists may refrain from writing about politically extremist groups in fear of their reactions (Staksrud et al., 2014, p. 77).

In an anthology on surveillance (Hausken et al., 2014, not treating the Snowden revelations in particular), several chapters warn against not taking surveillance seriously enough, and Bjørn Erik Thon (Thon, 2014) envisages with fear a situation where you may be arrested due to an algorithm. Furthermore, he warns against a “development where confidence in data analysis overrides the human analytic ability”. He also says that the law passed concerning the fight against terror is not precise enough on these issues. He concludes that it is not acceptable that Norwegian citizens may be surveilled by programs such as PRISM (one of the programs later revealed by Snowden¹⁰), and therefore it is of vital importance

9 https://www.aftenposten.no/kultur/i/qkJo/Full-seier-til-kildevernet-i-Hoyesterett_-PST-magi-tilbake-6-8-timer-med-filmopptak Accessed 16.07.2018

10 Lee, Timothy B. (2013, June 12). Here is everything we know about PRISM so far. *Washington Post*. Retrieved from https://www.washingtonpost.com/news/wonk/wp/2013/06/12/heres-everything-we-know-about-prism-to-date/?utm_term=.a6903843234b Accessed 14.07.2018

that the Norwegian government pressures the U.S. on these issues. This does not seem to be the case, and politicians have in general been reluctant to take part in public discussions of the Snowden revelations (Eide & Lånkan, 2016).

The case of U.S. writers

The revelations of mass surveillance may have changed the practices of people who work with journalism and literature more than we know so far. Journalists increasingly use encryption techniques to safeguard exchanges with sources and colleagues. This has proven to be a good tool for many professionals, but when/if noticed this usage itself may raise suspicion among surveillance services.

A survey conducted by U.S. PEN¹¹ among its members, done after the Snowden revelations in 2013, may be an indicator, although the response was low (which may in itself be an indicator of a chilling effect of sorts). Respondents expressed having reservations to the survey since it was conducted online (U.S. PEN, 2013). Nevertheless, the results may be connected to chilling effects, and to the need for further research on this vital issue. The members of U.S. PEN are writers, translators, and journalists, and among the more than 500 who responded, 85 percent expressed worries about government surveillance of Americans. While 73 percent were worried about privacy rights and freedom of the press, almost all, 96 percent, were concerned about government efforts to compel journalists to reveal sources of classified information, and most of these were *very* concerned. After the Snowden revelations, more than one fourth of the respondents reported limiting their exposure to or totally avoiding social media. Equally, one fourth avoid speaking of certain issues on the telephone. Sixteen percent have avoided writing or speaking publicly on special subjects. Several respondents also reported a reluctance to communicate with sources or friends abroad for fear of endangering them.

¹¹ PEN is a global organization promoting literature and free expression. Created in 1921, it organized poets, essayists and novelists, thus the acronym PEN.

In addition, quite a few PEN members expressed reluctance to pursue *research* on certain types of subject matter. The surveillance of professional research, be it directed against journalists, writers or academics, is of particular importance, as such research oftentimes has to do with accessing controversial websites, and mass surveillance does not include monitoring the researcher's *motivation* for accessing these websites.

Among the respondents, the 'younger' writers (below 50 in this survey), seemed less concerned about surveillance, but simultaneously more likely to take precautionary measures against it. The explanation may be that the younger generation is 'groomed' to reveal matters of privacy on digital platforms, yet on the other hand this generation is more digitally literate and thus more aware of digital surveillance methods.

According to U.S. PEN, surveillance of a mass character, such as the one revealed by Edward Snowden, represents a great detriment to the study of foreign cultures, and a subsequent loss of international understanding. A high proportion (88 percent) felt a real concern that a vast amount of data is already in government hands, and is as such vulnerable to bureaucratic bungling, misuse and partisan abuse.

Despite its shortcomings (for example a non-satisfactory percentage of respondents), the results from this PEN survey included very relevant questions, and ought to inspire researchers elsewhere to take up the challenge of monitoring or doing research on the *chilling effect* and its consequences.

Post-privacy society?

It is no exaggeration to claim that in late modernity, citizens are much more than before subject to Foucault's *panopticon*-like surveillance (Foucault, 1977). Surveillance has become a fundamental model of social organization and, I would add, a threat to *any* social organization. One may dispute the claim that most citizens connected to the digital world contribute every day to their own surveillance by innocent actions on email and a variety of social media platforms. Nevertheless, it is relevant to discuss, as seasoned commentator Gary Younge (2012) does, whether we are seamlessly transforming ourselves into a *post-privacy society*, partly by way of low citizen digital media literacy.

Whistleblower Edward Snowden's revelations taught us that mass surveillance is a global phenomenon, and that everyone using phones, email or social media, risk being part of the so-called 'haystack' where the agents of mass surveillance eventually search for the 'needles', i.e. those individuals or groups who pose alleged threats to society. The 'needle in the haystack', albeit a bad metaphor, was a prime argument in defense of the NSA surveillance.

Threats to journalists and public individuals

The journalists (Laura Poitras and Glenn Greenwald) and media (*The Guardian*, *The Washington Post*) at the heart of the revelations, have reported being subject to special scrutiny in the aftermath of publication. *The Guardian*, the newspaper that broke the NSA news, received visitors from GCHQ (Government Communication Headquarters, part of British surveillance), who ordered journalists to destroy their laptops in a futile exercise to destroy the 'Snowden files'.¹² Furthermore, Greenwald's partner, David Miranda, was arrested and searched at Heathrow airport after the revelations, and the police justified their action by referring to anti-terror legislation.¹³ If these acts were intended to produce a chilling effect (knowing that the Snowden data would also be in storage elsewhere), they might have worked.

However, surveillance is far from the only way in which the *chilling effect* operates. Globally, between 2012 and 2016, 530 journalists were killed, which amounts to an average of two deaths per week (UNESCO, 2017). The absolute majority (92 percent) of these were reporters working in their home country. The norm in such cases remains impunity, since in only ten percent of the cases the perpetrator(s) are brought to justice

12 Editorial in *the Guardian* (2013, August 20). NSA files: Why the Guardian in London destroyed hard drives of NSA files. Retrieved from <https://www.theguardian.com/world/2013/aug/20/nsa-snowden-files-drives-destroyed-london> Accessed 15.07.2018

13 Green, Damian (2013, August 20). Police who arrested David Miranda were 'protecting us from terrorism', *The Telegraph* Retrieved from <https://www.telegraph.co.uk/news/uknews/10254309/Damian-Green-Police-who-arrested-David-Miranda-were-protecting-us-from-terrorism.html> Accessed 15.07.2018

(ibid.). UNESCO also emphasizes growing threats to digital safety, by way of cyberattacks, hacking (see also Patrikarakos, 2017), intimidation and more online harassment, particularly of women journalists.

Navigators between states and extremists

In countries at war, journalists and writers risk a lot just by being in contact with a ‘westerner’, since terrorists and extremists do not differ between journalists critical of Western policies and ‘US agents’, the latter being particularly targeted. Extremist organizations in many cases pay special attention to foreigners, to them synonymous with *Americans* and their policies in the Middle East and beyond. Thus, for example, visiting a country such as Afghanistan may put friends and colleagues with whom I work at risk. In their world, the threats – indeed a source generating chilling effects – may take the form of death threats from terrorists, threats to entire *media houses*, or the threat of arrest from government officials, central and local. Extremists and terrorists in Afghanistan have explicitly targeted media institutions and groups of journalists, resulting in record numbers being killed during recent years.¹⁴ They have their own system of surveillance enabling them to target special individuals, not least by using ‘insiders’ both in the military and elsewhere.

Journalists in countries such as Afghanistan may have to navigate between threats from the state and threats from multiple extremist groups, the latter in particular often branding freedom of expression a ‘Western value’, as also happened during the ‘cartoon controversy’ (Kunelius et al., 2007; Eide et al., 2008). Quite a few reporters facing such circumstances leave the country or choose another profession (for example joining government circles), if possible. The ultimate ‘goal’ of the chilling effect is thus achieved. According to local sources, a couple of hundred journalists leave Afghanistan each year to avoid persecution, bleak prospects or death threats.

14 <https://rsf.org/en/journalists-killed>

The case of investigative journalism

The ways in which Snowden's revelations were treated, varied widely. In the U.K. and elsewhere *The Guardian* (being a global news institution) stood firm in their contribution to the revelations, while an editor for another liberal-leaning media group, Chris Blackhurst, issued a statement in *The Independent* declaring his trust in the surveillance authorities. He revealed that the media group, to which the newspaper belongs, had received advice from the government not to publish news on the global surveillance revelations, as it would hurt national security (Blackhurst, 2013). The then editor-in-chief of *The Guardian* Alan Rusbridger stated (see Eide & Kunelius, 2018) that he had a hard time understanding this as a journalist – since relations to the state are so fundamental to journalists.

In the *Washington Post*, a newspaper that stood alongside *The Guardian* in its news coverage of the NSA revelations, the leadership thought differently. An editorial signed by the editorial collective of the newspaper appealed for a stop to the “damaging revelations or the dissemination of information to adversaries”. The main argument against going public with documentation of mass surveillance was in many cases national security, framed by the ongoing ‘war on terror’. While this national security argument is used against openness in many countries, in yet other ones restrictive laws, including blasphemy regulations, may add an additional chill to the work of journalists.

In the ‘Hong Kong process’ (when three reporters secretly met with Edward Snowden for the first time)¹⁵, there were moments when Greenwald was so impatient that he thought he would publish without *The Guardian* on board (Greenwald, 2014). While the media house checked all legal routes and made the decision to let its New York newsroom publish, Greenwald and his colleagues waited together with a 29-year-old whistleblower who was at great risk of being found out by U.S. intelligence and deported to his home country to receive a lifetime prison sentence. The strain caused by the reporters’ sense of responsibility to their unique source and the resistance they anticipated following publication,

15 The reporters were documentary filmmaker Laura Poitras, Glenn Greenwald (connected to *The Guardian*), and Ewan MacAskill from *The Guardian*.

may indeed be seen as part of a *chilling effect*. However, it did not deter them or the newspaper from publishing.

Many editors seem to disregard the journalistic principle of the *people's right to know* when it comes to national security and surveillance (Kunelius et al., 2017). Of course, this is a contested issue, and no doubt, there exists information, which is not always fit to publish, for example when peoples' lives are at stake. On the other hand, the magnitude of this global mass surveillance calls for journalistic vigilance, since it does not at all discriminate between legitimate targets and surveillance of millions of people's legitimate activities, their writing, their research and their right to privacy. Attitudes such as these editorial statements are blatant signs of the weak autonomy of the journalistic field in relation to the political field (Bourdieu, 2005; Champagne, 2005; Hallin, 2005), and another indication that editors are often closer to the political elite than to grassroots people, and thus more prone to pressure. Consequently, it leaves a narrower space for investigative journalism on sensitive issues – which is what investigative journalism is oftentimes about.

This narrowing space might be one of several driving forces behind the emergence of new, investigative media institutions, such as the one born in the aftermath of the Snowden affair, named *The Intercept*. The three main journalist personalities behind this wholly net-based medium are Laura Poitras, Glenn Greenwald and Jeremy Scahill, who is from the U.S.-based progressive newspaper *The Nation*, and is also responsible for two huge volumes based on much investigative work (Scahill, 2008; 2014). *The Intercept* is financed by E-bay owner Pierre Omidyar, which means a business model dependent on one of the “rogue members of the plutocracy” (Boyd-Barrett, 2005), and in a sense more vulnerable than an institution Scahill had previously worked for, the crowdfunded *Democracy Now*.

In Norway, many newspapers of different leanings actually recognized Edward Snowden as a whistleblower. Norway's largest print newspaper, the liberal-conservative *Aftenposten*, published an editorial even supportive of his nomination for the Nobel Peace Prize. This rather unique situation of reduced *chilling effects* may have emerged due to Norway's experience with an earlier surveillance commission, as well as an open debate on the EU's data retention directive, and a few well-known cases

in which specific media had intruded on celebrities' privacy (see Eide & Lånkan, 2016).

Conclusion: The future of investigative journalism and free speech

In the near future, most journalists may still depend on mainstream media for the publication of their investigative stories. Nevertheless, the emergence of 'new' channels, such as the two publications mentioned above, and groups of freelancers offering their stories to fringe media willing to take the risk, reveal a changing landscape, in which new actors may be able to play a greater role. They may enjoy more freedom to publish controversial investigative stories, but simultaneously they will be living with more economic vulnerability and less political and other (editorial) protection against surveillance, threats and harassment. Related professions, such as writers and artists, also fear the future and as shown above, some resort to self-censorship to protect themselves.

Future investigative journalism and free speech in an era of global digital surveillance will depend on several relationships. One is the relationship between the journalistic field and the state (or multi-state institutions, such as surveillance networks). Whether the journalistic field is able to exercise its autonomy from the political field, in the face of dwindling resources and more pressure, is a delicate question. The role of editors, as in the examples of *The Independent* and *The Washington Post* editorial collective, may serve as an illustrative example of weak autonomy (see also Eide & Kunelius, 2018). In the latter case, a conflict *within* the journalistic field became apparent, when editors positioned themselves against their own journalists, referring to the question of *national security*. Furthermore, the issue of journalists' relationships to sensitive sources in general and whistleblowers in particular, is significant. Potential whistleblowers may feel discouraged from contacting the media considering the lack of protection and reluctance of the media to support openness and transparency in a given society. If the mentality of "who are we to question the authorities?" gains even more momentum, investigative journalism is bound to meet with more constraints in the years to come.

The Snowden revelations and the journalism surrounding them may have worked in different ways. Snowden's fate in (permanent?) exile, but with the status of prominent intellectual (digital) speaker around the world, may encourage both doubt and courage among future whistleblowers. Journalists and related professionals facing harassment and harsh control mechanisms, as well as editorial hesitance, may, in order to protect themselves, be tempted to find less sensitive areas of (creative) work. On the other hand, journalistic determination, as in the case of the supportive Snowden coverage in Norway where most newspapers endorsed him as a whistleblower, or indeed in cases of transnational co-operation such as the Panama Papers, may point towards a more promising future.

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CHAPTER 17

Reporting on Unfinished Business: Emerging Digital Media and Investigative Journalism in Guatemala

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Abstract: Cross-border cooperation among journalists represents a new situation for investigative journalism and new challenges for security and safety. Publishing articles about corruption and financial crime can have different reactions and consequences depending on the context of the specific country. This study focuses on emerging digital media and cross-border cooperation in investigative journalism as it relates to safety and security. Major international leaks, like the Panama and Paradise Papers and Lux Leaks, have shown the importance of collaboration across borders. As financial crime and corruption traverse borders, so must journalistic work. International networks of journalists represent opportunities for collaboration in both data sharing and exchanging experiences, as well as in gaining information and knowledge on safety and security. Doing investigative journalism and exposing financial corruption can represent a risk for editors, journalists, and sources.

Whereas financial crime and collaboration among journalists can transcend borders, journalists operate physically within borders. It is therefore crucial to understand national and local contexts in order to make in-depth reporting on sensitive issues safer. This study explores the need for greater knowledge about specific local and national contexts to develop manuals for in-depth journalism, safety, and security. The focus is on investigative journalism in Guatemala and the digital platform for investigative journalism, Plaza Pública. The basis is interviews, reports, and published speeches and an analysis of the role of new digital media in a post-war process in Guatemala. Important also is an analysis of the types of physical and digital risk journalists face while reporting on power structures related to established elites, politicians, private companies, and illicit financial flows. An important finding presented here reveals how reporting on the links between national political

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elites and illicit financial flows increases the risk of attacks on journalists. These attacks tend to create a ‘chilling effect’, aimed at scaring and intimidating journalists. The study also points out the lack of research on the safety and security of the partners in countries in, for instance, Latin America in relation to international collaboration.

Keywords: digital journalism, safety and security, cross-border cooperation, Guatemala, chilling effect

Introduction

In 2016, the chair of the board of the International Consortium of International Journalism (ICIJ) presented a keynote address entitled, “A Golden Age of Global Muckraking at Hand”, arguing that cross-border cooperation among journalists and editors ushers in a new era of investigative journalism (Coronel, 2016, June 20). One of the reasons for this thriving collaboration is the need to report on issues that transcend borders, like illicit financial flows (IFF), corruption, business networks, criminal groups, and politicians (Sambrook, 2018). Another reason is technology. Technology makes it possible to collaborate over distances and with large amounts of data, and technology enables the establishment of digital platforms for investigative journalism that are able to compete with, or complement, traditional media (Grennan et al., 2015). Cross-border cooperation brings together small, independent media platforms and larger, more established platforms. Looking, for instance, at cross-border cooperation on the Paradise Papers, we find twenty-one media partners from Latin America, only five of which were from traditional media, while the great majority were from new and digital media platforms for investigative journalism.¹

Many journalists work in countries where reporting on the ‘wrong muck’ can be a matter of life and death. Between 2012 and 2016, 530 journalists were killed, 90 percent of whom were local reporters (UNESCO, 2018). Coronel (2016) claims we need “watchdogs who can transcend borders because we live in a borderless world”, however working conditions for journalists still depend upon local and national contexts within the

¹ <https://www.icij.org/paradise-papers-media-partners/>

borders. Even though there is an increased focus on safety and security, Hughes and Márquez-Ramírez (2017) stress the importance of understanding how unsafe contexts and overlapping risks influence journalism, and the ways that context and overlapping risk can vary significantly. In considering cross-border cooperation, the safety of investigative journalists should be a matter of great concern. More specifically, the working conditions for small and independent media platforms contributing to cross-border cooperation need to be addressed. This paper seeks to highlight the working conditions for investigative journalism in Guatemala, and thus to contribute to an ongoing discussion of security and safety for journalists in a new digital era with ever increasing cross-border cooperation.

Latin America and Guatemala

In Latin America, the new digital media have grown rapidly (Weiss, 2015), and Guatemala is no exception. In 2011, the digital platform Plaza Pública was established to support in-depth journalism in a country struggling to implement peace and a trustworthy democracy after four decades of war. Plaza Pública is a part of the Global Investigative Journalism Network (GIJN) and a founding member of ALiados, an association of online media from nine Latin American countries. Plaza Pública has a team of approximately 15 people and after seven years of experience they have produced more investigative journalism than any other media outlet in Guatemala (Avila, 2013). They recognize that transcending national borders and creating alliances with journalists around the world is fundamental to their work (Plaza Pública, 2018, January 26).

Safety and security have become issues of great concern due to an increase in harassment and the killing of journalists on a global scale (UNESCO, 2018). The numbers are especially worrying in Latin America. Between 2012 and 2017, Latin America and the Caribbean have registered a significant upward trend in the killing of journalists, connected largely to organized crime, drug trafficking and corruption (UNESCO, 2018, p. 133). Guatemala shares borders with Mexico, El Salvador, Belize and Honduras, all countries where threats against journalists are a serious

concern (Benítez, 2017). Although the three countries share some similar problems, there are important specificities to consider. Despite the signing of the peace agreement in 1996 in Guatemala, steps towards democracy including efforts to comply with international transparency standards (Tax Justice Network, 2018) have not been fulfilled. The current political situation in Guatemala has exposed a deep crisis of corruption involving politicians and high-level officials, including the former president and vice-president of the country, making reporting on issues like embezzlement and tax evasion extremely sensitive (Tax Justice Network, 2018). The Committee to Protect Journalists (2018) reports that twenty-four journalists have been killed in Guatemala since 1992, however almost all of them are local reporters, mainly from radio stations, in smaller cities or rural areas. The media, particularly community radio and digital media, have been at the forefront of the demand for a democratic transition (Velásquez, 2016; Støen, 2018). Yet, the statistics on both physical crimes and increasing digital harassment against journalists in Guatemala remain worrying (Cerigua, 2017). In the Corruption Perceptions Index for 2017 published by Transparency International, countries are ranked by their perceived levels of public sector corruption, according to experts and business people. Almost all the Latin American countries, with few exceptions, are found to have high levels of corruption, and Managing Director Patricia Moreria underlines the link between corruption and safety for journalists: “CPI results correlate not only with the attacks on press freedom and the reduction of space for civil society organizations. In fact, what is at stake is the very essence of democracy and freedom”.²

Existing literature on digital investigative journalism and collaboration

A well-functioning society depends on a free and independent media. It is the lifeline of freedom of expression and democracy (Carlsson, 2017). For decades, journalists have worked on corruption, human rights abuses

2 https://www.transparency.org/news/feature/corruption_perceptions_index_2017

and corporate exploitation called either global muckraking (Schiffrin, 2014), investigative journalism, or in-depth journalism (Hunter, 2012; Lindholm, 2018; Witschge et al., 2016). Despite different names, all consider the journalist to be a watchdog or a digger with one mission: “to bring accountability to a global scale” (ICIJ Manifesto).

Investigative reporting is increasing, despite the news industry being caught up in “the biggest crisis since the Second World War” (Hunter, 2012, p. 8). This crisis consists of, and is provoked by, the concentration of news media, leading to huge budget cuts that again affect the number of working journalists (Hunter, 2012). The crisis has appeared in almost all OECD (Organisation for Economic Co-operation and Development) countries. Journalists struggle to adapt to both a new technological era and to fast-changing social, political, and economic circumstances (Sambrook, 2018). The media has lost a great amount of credibility, threatening to undermine the legitimacy of serious in-depth journalism with ‘fake news’ as a rising phenomenon (Sambrook, 2018). In addition, the crisis in investigative reporting is growing, not only in the OECD countries, but also in countries where media ownership concentration has been the rule rather than the exception for a much longer period (Hunter, 2012). According to Sambrook (2018) collaboration is fundamental for finding a way out of the current crisis.

Investigative Reporters and Editors (IRE), the world’s largest non-profit investigative journalism association, defines investigative journalism as “systematic, in-depth and original research and reporting, often involving the unearthing of secrets, heavy use of public records and computer assisted reporting, with a focus on social justice and accountability” (Investigative Reporters & Editors, 1983). The idea of working in cross-border networks on investigative journalism is not only about sharing data and information, but also about sharing methods (Hunter 2012). “Methods of conception, research, organization and composition” are all the foundation blocks of investigative journalism (Hunter, 2012, p. 3). According to Sambrook (2018) journalism is normally a competitive and investigative activity seeking exclusivity. When ICIJ got the IRE award for innovation in investigative journalism due to the Panama Papers investigation, the IRE emphasized “the unprecedented collaboration [...] making public something that

others would want to keep secret” (ICIJ, 2017). Sambrook (2018) claims that increasing collaboration is driven by several factors: firstly, data leaks require specialist expertise in handling data, which can put an economic strain on news organizations making collaboration more attractive; secondly, accountability journalism should cross borders to meet the globally networked challenges of, for instance, corruption and IFF; and finally, collaboration is needed to address safety and security concerns.

Going back to the ICIJ manifesto, we can understand investigative journalism, both historically and in the digital era, as a tool to deepen our knowledge of how the world works. Who is in power? Who controls war and peace? Who controls the money and the power? Piketty (2015) argues that if we are interested in inequality, global injustice and the future of democracy, we should care about how private persons and companies hide money in tax havens. Reuter (2017) estimates that IFF exceed \$1 trillion annually. IFF have five major sources: bribes, tax evasion, criminal enterprise earnings, corporate profit shifting and currency regulating evasion (Reuter 2017: 1). Tax havens and IFF contribute to a dysfunctional world-economy deepening the gap between rich and poor (Tax Justice Network 2016). Some countries are more vulnerable to this than others, especially countries in Latin America and Africa that suffer from hidden fortunes and tax evasion (Alstadsæter et al. 2016). “The rule of law is partly dependent on the support of economic and political elites [...] Broader public trust can also be eroded by the revelation of elites moving money out of the country” (Reuter, 2017, p. 2).

Sorting out the power and money structures hidden in the massive leaks requires a system to handle big data. A specific team for data journalism inside the ICIJ was established in 2014 to organize the 2.6 terabytes of information from the Panama Papers leading to thousands of articles around the world on tax havens and IFF (Knightscenter, 2016). This is one example of how collaboration can lead not only to one breaking story, but multiple stories simultaneously. The amount of data can be overwhelming, however, and for this reason books on data journalism are increasingly shared and updated frequently online.

Changes in digital technology combined with an increased dependency on digital communications technology pose a new risk for journalists

and their sources (UNESCO, 2018). Telling stories that want to be hidden can lead to the silencing of journalists. The 2015 press freedom index of Reporters Sans Frontières documents that freedom of expression is declining on all five continents, and that the main reason lies in information wars and increasing attempts to control information, leading to physical and digital threats against journalists. Hunter (2012) also highlights the concentration of ownership of news media as a problem for freedom of the press, leading to censorship if the news questions an owner's political or financial interests.

According to the ICIJ manifesto, the journalist's job is to arm the public with information, to empower citizens to strengthen democratic institutions and democracy itself.

The media and journalists can play an important role in post-conflict processes by promoting participation and dialogue, providing information to civil society, as well as through their watchdog function (Orgeret, 2016). Combining in-depth muckraking and data collection with the capacity to tell *the* story to the public, is what makes investigative journalism powerful. Yet when this has an influence on public debate and touches the “untouchable”, it can represent a risk to the journalist.

Methodology

This study is based upon six semi-structured interviews with investigative journalists, editors, academics, and digital security consultants. The names of those interviewees have been anonymized.

The study is also based on an analysis of the manual “Así investigamos (y así nos cuidamos)” (“this is how we investigate (and how we protect ourselves)”)³ for in-depth journalism created by Plaza Pública. The manual explains how Plaza Pública seeks to engage investigative journalism and access data inside Guatemala. The study is also based upon a close reading of the material published by Plaza Pública related to the Panama and Paradise Papers and Lux Leaks, in particular the articles that connect

3 <https://www.plazapublica.com.gt/content/material-formativo>

the Guatemalan economic and political elites with tax havens. Additionally, the study refers to published keynotes, presented by relevant actors, to understand both the importance of collaboration in investigative journalism and the political context in Guatemala. The keynotes are from the conference “Making Transparency Possible” organized by Publish What You Pay in Oslo in December 2016 entitled “Against all odds in Guatemala: A corruption case involving the highest political and military levels” by Iván Velásquez, Commissioner of the International Commission against Impunity in Guatemala, (CICIG, Spanish acronym), and the panel debate from the same conference, “How to hold a president and a vice-president accountable for corruption charges”⁴ with Ivan Velasquez, Professor Mariel Støen (University of Oslo) and Rodrigo Véliz, investigative journalist from Guatemala (Plaza Pública and CMI Guatemala). The study is also based upon a published article by the journalist Véliz, an interview with Iván Velásquez published on InSight Crime (2018, February 1), and the Open Society Foundations report: “Unfinished business: Guatemala’s International Commission against Impunity (CICIG)”.

Guatemala: Digital investigative journalism

After almost four decades of war in Guatemala, the Truth Commission (1999) documented the killings of 200,000 people, the majority indigenous people from rural areas. During the civil war, the formation of Illegal Bodies and Clandestine Security Apparatuses (CIACS, Spanish acronym), groups of parallel structures composed of (former) military intelligence officers, judges, prosecutors, police officers and other state officers, was revealed (Velásquez, 2016). The CIACS basically took control of Guatemala after the signing of the peace agreement in 1996, with violent results and destructive effects on Guatemalan society and the young democracy (Open Society Foundations, 2015). The CIACS became ‘untouchable’ both for the justice system and for the media. In 2007, the International U.N. Commission against Impunity in Guatemala started

4 <https://www.youtube.com/watch?v=VTfoVzIRGjM>

working with national authorities to resolve complex cases and investigate and prosecute the ‘untouchable figures’ in Guatemala (Open Society Foundations, 2015). In 2015, CICIG and the Public Prosecutor’s Office, together with the Attorney General and the National Civilian Police, revealed how several politicians in the administration of former President Otto Pérez Molina set up a corrupt customs ring with the help of high ranking officials in the tax and customs administration, a case known as La Línea (Velásquez, 2016). The revelation led to massive demonstrations for 22 weeks throughout Guatemala and culminated in the downfall of President Molina and the government. Velásquez (2016) calls La Línea a watershed in Guatemalan history and underlines three key elements for understanding the events that shook Guatemala in 2015: the work of CICIG, the role of the population and the role of the press.

New digital platforms like Plaza Pública, Nómada and Centro de Medios Independientes (CMI) reported on the case of La Línea on a deeper level than simply the court case. They reported on the historical connections among the power elites in Guatemala, making it possible to reveal to the public how La Línea was merely one example of how power structures persisted in Guatemala since the war. However, there is still some ‘unfinished business’ in Guatemala (Open Society Foundations, 2015). In August 2017 the current Guatemalan President, Jimmy Morales, ordered the immediate expulsion of the head of the CICIG, Iván Velásquez. This has resulted in a climate of insecurity in Guatemala, making it hard to predict what will happen (Støen, 2018). This unpredictability and uncertainty also affect the work of journalists who, for the last few years, had been able to write about formerly ‘untouchable’ issues in Guatemala (Anonymous, 2018).

Media ownership concentration and the rise of digital platforms

Media ownership and the absence of public service media exacerbate the problem of a free press in Guatemala (Avila, 2013). As mentioned, the concentration of media ownership is now of great concern in many OECD countries, but in most of the Latin American countries media ownership

concentration has historical roots. Four out of five terrestrial television channels and 90 percent of television audiences in Guatemala are controlled by a single individual, the Mexican born Remigio Ángel González, and four out of five major national newspapers are controlled by two families (Avila, 2013). González not only owns the TV channels 3, 7, 11 and 13, and 25 percent of the radio stations in Guatemala, he also owns the Latin American media network Albavisión, consisting of 45 TV channels and 68 radio stations. In 2016 Interpol issued an international arrest warrant for the registered owner of the Guatemalan TV channels belonging to Albavisión, González's wife, Alba Elvira Lorenza Cardona. Cardona was accused of illegally financing former President Otto Pérez Molina's political campaign in exchange for favoring her companies (Alonso, 09.09.16). Despite historical media ownership concentration, Guatemala has a long history of investigative journalism. The Guatemalan Journalists' Association (Asociación de Periodistas de Guatemala, APG) was founded in 1947, but the civil war, the criminalization of journalists, and corporate control of the media have, together, effectively silenced journalists and editors. A quarter of all adults in Guatemala are unable to read, and although television is increasingly popular, radio is still the only mass medium readily available throughout the country (Avila, 2013, p. 6). No official number of community radio stations exists: some estimate that there could be 240 stations broadcasting in more than twenty-three indigenous languages (Cultural Survival, 2005), while others estimate between 500 and 1000 community radio stations in Guatemala (Skaar, 2010). According to Avila (2013, p. 7) community radio stations offer the best hope of challenging the corporate media in Guatemala.

However, internet use is also rising in Guatemala, leading to the emergence of new digital platforms. Today, 42 percent of the Guatemalan population can access the internet (We are Social, 2018). Facebook is by far the most used social media with 7.2 million users, followed by Twitter and Instagram (ibid.). Since 2002, different initiatives, from television and the printed press to social media journalism and digital platforms, have entered the communication scene (Anonymous 5, 2018). Anonymous 1 (2018) calls the last decade "the golden age for investigative journalism in Guatemala". Crucial for this 'golden age' in Guatemala is the work of

CICIG and the juridical processes starting to tear apart the parallel structures, as well as increased access to technology and the internet, thus creating alternatives to traditional media (Velásquez, 2016; Støen, 2018; Anonymous 1, 2018, Anonymous 2, 2018). “The new media and emerging digital platforms are important, first because they are a sign that the public sphere and freedom of expression have expanded in Guatemala, and second because for that same reason the population has access to better information” (Anonymous 5, 2018). Anonymous 5 (2018) even claims that to some extent, the alternative media have set the tone for the information being presented in Guatemala, and that even the traditional media now present more courageous and diverse analyses compared to what was possible even just ten years ago.

Eroding the muck – the work of Plaza Pública

Plaza Pública (Public Square) was established in 2011 as an autonomous digital platform for in-depth journalism in Guatemala. The site’s name and concept was inspired by Jürgen Habermas’ idea of the public sphere, where private citizens come together to discuss matters of public relevance. Plaza Pública is hosted by the private Rafael Landívar University, but claims total autonomy from the university in their editorial perspective. Plaza Pública began covering subjects that were invisible or ignored by the national media due to the “injustice committed by previously unmentionable powers in the country” (Plaza Pública, ¿Quiénes somos?).

In October 2018 Plaza Pública published a manual on investigative journalism, or what they call profound journalism. The manual has two purposes: to educate the journalists inside Plaza Pública, and to distribute information to students who want to become journalists. The first part of the manual explains how they work to develop a story, what kind of language they use and the length, thus providing in-depth insights while retaining people’s attention. The second part outlines how to investigate and where to look for information. Distinct from online manuals like “Computer-assisted reporting: A practical guide” (2014) or “The data journalism handbook: How journalists can use data to improve the news” (2018), this manual presents detailed information on how you can

work *in* Guatemala. There are lists and explanations with addresses, institutions, people and offices where you can go to obtain information. The core of their work is based upon the methods of the old muckrakers: to ask people in the field who, why, how, where and when, and combine this with digital data and investigation in physical archives.

In 2008, Guatemala approved the law of free access to public information (Ley de Libre Acceso a la Información Pública), yet getting access often remains a matter of security (Anonymous 3, 2018). There are two problems concerning access to data: firstly, not all is made public despite the law; and secondly, you will be registered if you search for data, which can be a risk (*ibid.*). The information system for private companies in Guatemala is opaque and even looking for small data can take weeks (Anonymous 2, 2018). The opaque system in Guatemala is partly explained by the parallel structures that for years learned how to protect themselves, creating a system so opaque that it is nearly impossible to access information on ownership of the media and large scale companies (Anonymous 2, 2018, anonymous 4, 2018).

Through their work with the ICIJ, Plaza Pública was able to process data from the Paradise Papers and LuxLeak. Plaza Pública was the only news outlet in Guatemala with access to the data, and for eight months three journalists worked on it full time with the editors. When writing stories based on the leaks, it was important for Plaza Pública not to be tempted by ‘dynamite news’, explained as the shocking information of the leak itself, but rather to go deeper into the stories by linking national companies to a global network of IFF, and emphasizing the underlying structures (Anonymous 2, 2018). Even though data from the leaks revealed the connection of companies and politicians in Guatemala to tax havens, it was challenging to track down this data and trace the money back to its origin (*ibid.*). “The leaks give us a hint that can bring us to an international plot with national actors, but you don’t know exactly where the leak will take you” (Anonymous 2, 2018). In the case of the Paradise Papers the “hint” brought Plaza Pública to one of the ‘untouchable’ sectors in Guatemala: the sugar producers (*los azucareros*). “*Los azucareros* had been a ‘no-go’, something you can’t write about because they are part of the ‘untouchable’ elite. With proof from the leak, together with our

earlier investigations of the companies, we could do solid publications, not only on their connection to tax havens, but also on the power they have in Guatemala” (Anonymous 2, 2018).

Security and safety

In February 2018 two journalists were killed in the department of Suchitepéquez in Guatemala. “The murders [...] only further chill the climate of press freedom in Guatemala, where journalists work with constant fear of intimidation and violence” (CPJ, 07.02.18). The assassination of journalists is a phenomenon affecting the rural areas of Guatemala (Støen, 2018). The city of Guatemala appears to be physically safer for journalists (Anonymous 2, 2018). However, digital harassment of a different kind is becoming more common among emerging digital journalists in the cities (Cerigua, 2017; Avila, 2013). Anonymous 4 (2018) explains how digital and physical threats have different motivations. While the former try to disqualify people, censor and steal information, the latter aim to put an end to the work of a journalist by simply taking his or her life. Death threats against journalists are common and Véliz (2017) explains in his article “The coal case of Guatemala” how he experienced death threats after publishing an article that revealed some parallel structures. According to Avila (2013) threats against journalists create a chilling effect due to the general failure to bring perpetrators to justice, and the lack of reliable investigation makes it harder to claim that those deaths are directly connected to journalism. The two journalists killed in Suchitepéquez in February 2018 were doing investigative reporting on corruption, and they were investigating the murder of two journalists from 2015 in the same area. These two journalists are often included in lists of community leaders killed during 2018 in Guatemala, murders characterized by one fact: there are no results from the investigations. Cerigua has tried to put pressure on the on the government to complete the development of the Program to Protect Journalists. However, as of now, the murders remain unpunished and organizations like Reporters Without Borders⁵

5 <https://rsf.org/en/guatemala>

characterize Guatemala as a country where crimes against journalists are protected with impunity.

Assassinations and direct physical violence against journalists are more serious problems in the rural areas of Guatemala, however digital threats against journalists in urban areas are increasing. Plaza Pública is concerned about this increase in digital attacks, both personally against journalists, but also against the website itself. Anonymous 2 (2018) relates how increasing harassment affects the political climate in Guatemala, and creates insecurity in relation to how the elites might adapt after the case of La Linea. More recently, there has been a growing awareness of what the journalist Luis Assardo calls “digital assassins” or “armies of opinion shapers” (Medium 2018, February 8). The “digital assassins” are described as net centers that routinely and relentlessly harass and intimidate opponents of Guatemala’s entrenched elite. The net centers involve people who can manage hundreds of fabricated accounts on social media at the same time. The Intercept (2018, April 7) also explains this phenomenon referring to Assardo’s work showing how “digital assassins” have attacked people like the head of the CICIG Iván Velásquez, former Attorney General Thelma Aldana, and several journalists. The “armies of opinion shapers” are a global problem, and according to a report from Freedom House (2017) there are thirty countries where governments were found to employ “armies of opinion shapers” to spread government views, drive particular agendas, and counter government critics on social media. The number is rising and the technology is becoming more sophisticated, with the proliferation of bots, propaganda producers and fake news outlets (Freedom House, 2017). Guatemala has a growing population connected by the internet, and there is increasing concern about how both “digital assassins” and “armies of opinion shapers” can affect the possibility for more open and free debate, which had been developing during the last ten years (Anonymous 5, 2018).

Concluding remarks

Studies on safety and security for journalists reveal an increase in violence against journalists, and at the same time, investigations and reports

like the World Press Freedom Index show us that working conditions for journalists around the world are inequitable (Hanitzsch, 2017). Hughes and Márquez-Ramírez (2017) in their case study on Mexico underline an awareness of unsafe contexts and overlapping risks for journalists, while Torsner (2017) stresses the need to explore the multidimensional nature of risk. As was stated in the introduction, investigative journalism through cross-border cooperation is increasing, both due to the need to transcend borders just as financial crime transcends borders, but also because digital technology makes it possible to share big data. The work and development of the digital platform Plaza Pública in Guatemala, discussed in this article, offer insights into the potential of these types of platforms, which are in many cases partners in cross-border cooperation on leaks like the Panama and Paradise Papers and Lux Leaks. What experiences from Guatemala can help us understand are the multidimensional and overlapping risks in doing in-depth journalism on financial crimes and corruption. Revealing what those in power want to hide is far more dangerous in countries with greater corruption, and where there is a weaker judicial system. It is therefore important to highlight how investigative journalism in Guatemala has been able to develop due to a judicial system that manages, partially, to put an end to the pattern of impunity for the political and economic elite. Ulla Carlsson (2017) claims that a well-functioning society depends on a free and independent media; however, it is also the other way around. Freedom of speech and freedom of the press also depend on a trustworthy democracy where crimes do not go unpunished. It is likely that the development of cross-border cooperation will continue to increase, because the work is indispensable in order to end illicit financial flows, but it is also important for ensuring that major leaks do not lead to silencing journalists who work in vulnerable situations. Developing safety manuals based upon proper work and experiences, like the one Plaza Pública is working on, can be a step towards not only enabling journalists to do the digging, even in opaque countries like Guatemala, but also helping to secure the work of the journalists. The fact that this manual is written specifically for the context of Guatemala and specifically for the journalists who will continue the work on financial crime and corruption in Guatemala, makes the manual much more

adapted to securing the safety and security of these journalists than generalized manuals aimed at journalists who work on in-depth journalism 'anywhere'. The potential of cross-border cooperation depends upon the work of the journalists who operate inside the borders of countries where corruption is at its worst. However this requires a much greater focus on the working conditions for both the editors and the journalists.

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CHAPTER 18

“What someone wants kept in the dark.” An Analysis of the Norwegian Panama Papers Coverage

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Abstract: The Panama Papers was a successful example of investigative journalism, both in terms of scope and international cooperation, as well as, to an extent, even having an impact on police and tax authorities’ practices. But to what extent did the investigation contribute to influencing public understanding – thus awakening public awareness and enhancing democratic participation with regard to the question of transparency? Norway is a country where no politician or other elite representative had to resign as a result of the leak. This article analyses the messages of those Norwegian media outlets having the most comprehensive coverage in the first weeks following the leak, and tries in part to see it through the eyes of an ordinary citizen attempting to make sense of this complex phenomenon.

Keywords: Panama Papers, investigative journalism, tax base erosion, public empowerment

The Panama Papers was impressive work, and has given rise to claims of a new kind of international cooperation in the press (Sambrook et al., 2017). Not only did the cross-border handling of over 11 million digital files lead to a string of exposures and millions of dollars of unpaid taxes suddenly finding their way home, but Europol also used tools from the journalistic

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investigation to disclose trafficking and money laundering.¹ In Norway, the editor of *Aftenposten*, the front-runner of the Panama Papers' Norwegian coverage, stated in an op-ed only a few days after the launch of the leak that “together we can achieve anything”.²

Despite all the good work, the Panama Papers was far from solving the problems that tax base erosion represent to the world's nations. On the other hand, neither is this the task of the press. But what is the task of the press? Most codes of ethics for journalism emphasise its function as a ‘watchdog’, whose task is to scrutinise power and disclose power abuse on behalf of the ‘ordinary citizen’, and thus contribute to transparency and democratic participation. As the ICIJ's manifesto reads: “We believe it is the job of journalists to arm the public with information, to empower citizens to strengthen democratic institutions and democracy itself. We believe that truth is society's best weapon against corruption, injustice and inequality.”³ The Norwegian press code of ethics, *Vær var-som-plakaten*, is one among many with similar formulations.

The notion of transparency, used in a media context, subsequently means more than making financial flows transparent to tax authorities. It also means making complex international issues intelligible to citizens. As *Aftenposten*'s editor also wrote in his op-ed: “Investigative journalism is important because it gives to all of us the information that makes debate in society more fact-based.”⁴

National economies are exceedingly intertwined in a global network, and economic issues are exceedingly difficult to understand. In many countries people still struggle to cope with the repercussions of the recent financial crisis. The European welfare states are said to be threatened due to a dwindling tax base. Researchers claim that social and economic inequality is on the rise. In other words, the gap between the ordinary citizen and the rich and mighty seems to be widening. The need for informative journalism on what those with power do, can be said to be more

1 *Aftenposten*, 2 December 2016.

2 *Aftenposten*, 9 April 2016.

3 <https://www.icij.org/about/icijs-manifesto/>

4 *Aftenposten*, 9 April 2016.

pressing than ever. This is where investigative journalism and work like the Panama Papers come in.

This paper is a study of the outcome of the leak in one country, Norway, mainly built on a study of *Aftenposten* and two other important newspapers that specialise in economic journalism. The participants in the ICIJ consortium cooperated on all cases of international interest, whereas national outlets contributed by revealing their own cases and stories. Norway was one of the countries where the leak did not have any notable immediate consequences, as opposed to neighbouring Iceland, for example, where the Prime Minister had to leave office after the disclosure of his family's tax arrangements. The lack of immediate consequences in Norway does, however, also make it more interesting – it begs the simple question: How much useful information for readers, in the context of democracy, did the coverage contain?

In this paper I will discuss the relationships between international issues and national journalism; between actors and structure; between law and morality; the problem of information without sufficient context; and finally, touch upon the special relationship between the media and 'experts'. A crucial question is whether journalistic genres and journalistic self-understanding in itself may be impediments to achieving the journalism the public need in an internationalised world.

I will do this in part by trying to see the coverage through the eyes of a 'typical' ordinary reader, attempting to make sense of all the comprehensive information in a complex, globalised economy.

Corpus and context

This article is based primarily on an analysis of the first two weeks after the news broke, in particular in the ICIJ partner *Aftenposten*. Two other important Norwegian newspapers have also been studied during the same period – *Dagens Næringsliv* and *Klassekampen*. Together these three are at the top of the list in the Norwegian monitoring agency Retriever when one searches for the phrase "Panama Papers". *Klassekampen*, number three, shares its rank with another newspaper, *Dagsavisen*, but *Klassekampen* is particularly interesting for its broad coverage of issues at the intersection

between international and national economic affairs – a trait it shares with *Dagens Næringsliv*. There is also an interesting spread in political viewpoints between the the two papers I have chosen to supplement the major, mainstream (but liberal-conservative in editorials) daily *Aftenposten* – namely the economic liberalist, business daily *Dagens Næringsliv* and the more left-leaning *Klassekampen*.

I have used the articles from Retriever as a base, but have also read all three newspapers during these two weeks carefully to be sure I did not miss any important articles that did not have the phrase “Panama Papers” in them.⁵ In addition I have checked the overall developments in journalism in relation to tax havens during the last five years in all major Norwegian news media using Retriever’s database, and therefore I occasionally also refer to some broader trends.⁶

Before proceeding to a discussion of the Norwegian coverage and an assessment of how informative the coverage may seem from the point of view of an ‘ordinary’ citizen, I will comment briefly on two specific aspects of the context in which the Panama Papers became media texts: (a) the (still) national character of news media, and (b) the news content of the Panama Papers case.

a) For one thing, the complexity of the international economy is to an extent mirrored in journalism. The news media have, to an increasing extent, cross-national owners, and when there are no language barriers they have a possible global reach. In addition, it is difficult to imagine a story on the finance pages, the life-style pages or the politics pages that does not have some kind of international link. Not least, a globalised and digitalised world makes exactly the kind of information transfer and international cooperation that characterised the Panama Papers possible.

5 Most references to dates refer to the print editions of these newspapers. *Klassekampen* was at the time a predominantly print paper, and as some of this work was done at a stage when *Dagens Næringsliv* had unfortunately withdrawn from Retriever, it was necessary to work with the print editions for practical reasons.

6 For the reason described above, *Dagens Næringsliv* is also not included in all this material. As these are broad trends, one can get a fairly good picture without including niche media, but due to this weakness in the underlying material I have not included any numbers.

Nevertheless most news outlets also still have what Benedict Anderson (1991) has coined an 'imagined community' in mind. They must constantly strive to appeal to a sense of identity in their audience. There is basically nothing wrong with that. If one upholds a belief in journalism's democratic function, this is in fact a necessity. In the foreseeable future it is difficult to imagine democracy without some kind of national media monitoring what the national elites or other power elites do – and the nation state is still the entity with the best prospects of fulfilling democracy.

At the same time, this highlights the complexity of covering global issues for a national audience. They have to be deconstructed, interpreted and explained: Why is this important to 'the little reader' in society, and what issues can the readers influence? A story of international dimensions will normally be given a domestic angle, or at least some domestic spectacles through which to view it – as Eide & Simonsen (2004) have put it, "the world is created from home". This is seen as a necessity to catch the readers' interest, but it also implies that attention may be led away from other, more comprehensive questions.

b) The other aspect of interest to us is what was the 'news' in the Panama Papers story?

The news was not the fact that tax havens exist. Admittedly, there was not much international attention paid to tax havens until the 1990s, when the US and Switzerland both started investigations of this practice (Zucman, 2015, p. 16), but after that date the existence of tax havens has been more or less part of our common knowledge. The OECD started its work for more openness in 1998, an ambition that has been confirmed and deepened on several subsequent occasions. One can register almost one important media leak a year, at least for the last five years, and recently the international community has also seen the publishing of important books about tax evasion and tax avoidance. One very important contribution was economist Gabriel Zucman's *The Hidden Wealth of Nations*, published in its original French version in 2013 and in English in 2015. In this popularised and highly accessible book Zucman estimated that 7600 billion dollars – eight percent of the total financial wealth of the

world's households – was stowed away in tax havens, which paralleled a total tax loss for the world's nations of 200 billion dollars a year.

In Norway, the question has furthermore been discussed in official Norwegian reports and research reports, and the work of the G20 or the OECD has been covered regularly by the press, albeit often without much enthusiasm. As a well-organised welfare state with a still quite solid tax base and relatively high tax ethics, tax havens have often been regarded as something that 'happens abroad' by Norwegian public opinion. Multinationals that run their businesses in Norway with considerable public funding and still stow away their profits in tax havens are occasionally mentioned, and the media outlets that cover economic issues on a regular basis are naturally more interested in tax issues than the mainstream press. But on the whole, when browsing through Retriever data from the last five years, I find that there are occasional peaks, which also often seem to coincide with various international leaks, but the issue is normally not very salient.

So what was the news? The news was rather that an enormous amount of information from a law firm in Panama, Mossack Fonseca, had become available to the press, and that this information had been subject to profound, investigative journalism. The news was to a great extent, in other words, the journalism.

We all agree that the investigation was a great achievement – which also won several of the participants important awards – but it is important to bear in mind this question of the news content when analysing it. In Norway it is also safe to say that the news to an extent was that a *Norwegian* newspaper had participated in the investigation. This was also an important point raised with admiration by *Aftenposten's* competitors.⁷ Norway is a small country, but often with some degree of international influence or international success, a point that is rarely overlooked in the national media.

This contrast between the celebration of the journalistic work in 2016 and the varying degree to which the issue has regularly been covered was noted by debaters who had followed the issue closely. The British writer

⁷ E.g. *Dagens Næringsliv*, 5 April 2016.

George Monbiot wrote with unconcealed irony in an op-ed translated in *Klassekampen* that “nobody knew (before the Panama Papers) that tax avoidance was neoliberalism’s favourite activity”.⁸ The Norwegian professor Guttorm Schjelderup, leader of an official Norwegian report on the issue (NOU, 2009, p. 19) wrote in *Dagens Næringsliv* on 6 April that the news was that “many journalists from all over the world (had) simultaneously become interested in tax havens”.⁹ Even more important was the criticism raised a month later by the Panama Papers’ own deep throat, “John Doe”. He wrote that the reason he had to leak the data, was that the media generally had failed completely when it came to tax havens.¹⁰

The Panama Papers in Norway

I will now go through the coverage in the chosen outlets, divided into four different parts. I also want you to follow me through this coverage and see it through the eyes of an average reader, the reader that the fact-based information is for. Let us, just to get a little acquainted with that person, assume that this ‘little’ reader is a she. We can imagine her as a busy person with a job and family, but she wants to stay relatively well informed. For this purpose, she mostly turns to the press. Let us say that she subscribes to one paper that she browses through, online, while having her morning coffee – Norway’s major mainstream paper, *Aftenposten*. However she also likes to get her news from different angles, so sometimes at work she browses through two more quality papers, *Dagens Næringsliv* and *Klassekampen*, and apart from that she gets a more sporadic impression of public debate by checking other outlets on her phone or PC or sometimes by watching the news when the children are in bed. She knows very well that tax havens exist, but she finds the whole issue extremely complicated. She is an ardent taxpayer herself, but she often hears the politicians say that “we cannot afford” this and that aspect of the welfare state any longer. She sometimes worries whether the welfare state is under so much pressure that her parents will not get a proper nursing home when

8 *Klassekampen*, 9 April 2016.

9 *Dagens Næringsliv*, 6 April 2016.

10 *Aftenposten*, 7 May 2016.

they grow old, and it sometimes strikes her that she hopes her toddler's kindergarten is not involved with a tax haven. But most of the time she has demanding, everyday tasks to attend to, and has little time to ponder these things. Then, suddenly, a major leak occupies all the front pages and newscasts. This raises her awareness of the issue considerably. Now she decides to seize the opportunity to understand it all.

1) Actors and structure, episodes and themes

The fact that there are peaks and valleys in the coverage of this issue is somewhat understandable. It is impossible for the media to cover everything all the time, and structural issues are hard to translate into interesting media stories. That is one reason why journalism frames information as *news*, which also implies that specific *events* enhance the chances of an issue being brought to public awareness. Based on Goffman's classic notion of 'framing' (1974), which was further developed by Entman (1993), Iyengar (1991) has claimed that journalistic stories will often have *episodic* as opposed to so-called *thematic* frames – thematic frames being attempts to describe structures and explain context.

Personalisation is a technique that is often particularly associated with episodic frames. Through the use of certain narratives, journalism can choose certain persons to represent a more complex issue, or to serve as the public face of problems or conflicts in society, hereunder to be ascribed the role of 'villain'. To an extent, this reflects a democratic necessity: if nobody is held accountable, even if the issue is profoundly a result of a system failure, there may also be no incentive to try to improve the system. On the other hand, it is often argued that if the press can make a prominent person resign from his position, it is considered a professional victory in itself (Lindholm, 2015). This point is echoed in the op-ed by *Aftenposten's* editor cited above. Thus a desirable result may sometimes be confused with the real goal.

The choice of frames is, however, not only a question of newsroom choice. Indeed, what the various types of framing do to the public's understanding of an issue is also interesting. The extensive use of episodic frames, personalisation and other related forms has, over the years,

given rise to concern. Whereas *thematic* framing is believed to provide more profound information on the background of a special problem, it has been argued that *episodic* framing makes the public assume that responsibility in relation to a certain issue is both individual and able to be solved by individual action (Iyengar, 1991). If so, the public may react with cynicism and distrust in the system.

Other scholars have also pointed out how different kinds of non-thematic frames can make members of the audience who do not care much about politics in the first place, more interested (f.ex. Norris, 2000). This is an unfinished debate. But it is important to bear in mind that any journalistic choice also implies leaving out something. It is likely that complex issues related to the international economy demand a certain amount of thematic coverage to be understood.¹¹

In the Panama Papers, the major focus was on the prominent individuals who had connections to Mossack Fonseca, as in Iceland, or alternatively the institutions with such connections. In the latter case, the individuals who represented these institutions were often brought to the foreground. This was the case in Norway.

Unlike Iceland, Norway had no national politicians involved in the scandal. Instead the Norwegian coverage very soon began to concentrate on Norway's major bank, DNB. DNB's Luxembourg branch had assisted customers with so-called discrete banking services. In 2007, the then finance minister requested that the bank cease doing so. In 2016, it turned out that DNB had been setting up mailbox companies in the Seychelles between 2006 and 2010, with strawmen from Panama as board members, and stayed in contact with Mossack Fonseca until 2015. As late as in 2012, the bank discussed whether they should extend their cooperation with the law firm. All this had taken place despite the fact that, almost ten years earlier, the bank had been publicly criticised for its practice.

11 There is not much research on how the public reacts to different media approaches to complex international affairs. Two recent contributions however tie a focus on so-called "self-serving elites" specifically to the question of tax havens. They indicate that this may result in reduced democratic participation and reduced "faith in the social contract and confidence in political institutions" (Kolstad & Wiig 2018: 12), especially among people in countries where power is less evenly distributed. In countries with a properly functioning democracy, voters were more likely to react with mobilisation (Kolstad and Wiig forthcoming).

The DNB case was promoted as a major part of the coverage from the very start. *Aftenposten* devoted four of its 21 full pages on the first day to DNB. DNB became more or less *the* main Panama Papers story in Norwegian media, with a strong focus on DNB's CEO, who appeared on front pages and in TV news headlines all throughout the period. How much had the CEO known, and was the bank's practice so grave that he should resign? Politicians, professors, lawyers and PR consultants scrambled over each other to condemn the bank and question the position of the CEO. Even the Norwegian prime minister expressed disappointment in learning about DNB's practice, and emphasised the necessity of identifying those responsible.¹² The minister of trade and industry sent the bank a letter allegedly so inquisitorial that one professor described it as posing "the kind of questions you use when you reprimand a child".¹³

It is important to note that DNB holds an important position in Norway – for many reasons. For one thing, it is to an extent a state-owned bank. Originally a merger of two major Norwegian banks, it was partly nationalised in the wake of the Scandinavian banking crisis around 1990 – an early 1990s' version of 'too big to fail'. During the financial crisis of 2008, DNB was furthermore one of many European and American banks that had to be saved by the authorities. When the bank only a few years later raised its mortgage interest rates, with the CEO claiming that the customers were part of a necessary 'Dutch treat', the bank – and the CEO – were widely criticised for being greedy.

This is important because it shows how the Panama Papers leak was immediately translated into a well-known national context with Norwegian actors in central positions. There is a close connection between the media being nationally situated and the tendency to personalise disclosures. Most scandals that survive for some time in the media are national (with a few exceptions, as when the person in question is president of the US). The DNB case illustrated this clearly: a national CEO who had not taken a request from the authorities seriously, overshadowed not only the

¹² *Aftenposten*, 9 April 2016.

¹³ *Aftenposten*, 14 April 2016.

broader, international question, but even the story about the neighbouring prime minister who was forced to resign.

There are, however, indications that the Norwegian media must have realised even at an early stage that the DNB case was a national scandal of limited scope. Even after the first week, *Aftenposten* wrote in a summary that a corruption case in the partly state-owned company Yara was the most severe case disclosed during the last week – “yet DNB stole the show”.¹⁴ The paper explained the focus on DNB through the bailout after the financial crisis, and the lesser focus on Yara by the fact that the case was already partly known.¹⁵

2) The perception of investigative journalism

If the DNB case was not very serious, but still ‘stole the show’ – what does that mean? At this stage, the little reader might start wondering. What was, then, the DNB case about? A personalised focus on those responsible is not the only typical form investigative journalism can take. Another, sometimes related, aspect is that investigative journalism is often understood as a practice that should be directed against violations of the law, or, alternatively, more or less hidden violations of strong social norms.

In the op-ed about investigative journalism cited above, *Aftenposten*’s editor expressed this interpretation exactly when he stated that investigative journalism is about “bringing into the open what someone wants kept in the dark”.¹⁶

However, this understanding of investigative journalism is disputed. A definition published by UNESCO is more comprehensive: “Investigative journalism means the unveiling of matters that are concealed either deliberately by someone in a position of power, or accidentally, behind a chaotic mass of facts and circumstances – and the analysis and exposure of all relevant facts to the public.”¹⁷ An even wider definition may

14 *Aftenposten*, 11 April 2016.

15 *Ibid.*

16 *Aftenposten*, 9 April 2016.

17 <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/investigative-journalism/>

entail brilliantly written feature stories that convey important facets of human life.

Many of the examples exposed by the Panama Papers leak were illegal, or at least shady, and in that way one can say that they satisfied the strictest understanding of investigative journalism. But many were also perfectly legal. As for the issues in the DNB case, it was technically not even an attempt to conceal their practice – information about the service in question had been available on DNB’s homepage for at least nine years when the Panama Papers story broke. To an extent one might even say that one reason it could be framed as a disclosure was that the press had not taken sufficient interest in the issue earlier.

What implication does, then, this relationship between the legal, the shady and the illegal have for journalism? To answer that question, it may be helpful to recall one of the classic contributions to sociological theory, Robert Merton’s distinction between *manifest* and *latent* functions. If we apply this to journalistic disclosures, we can say that their *manifest* function is quite clearly to make someone accountable. But when the press focuses on the breaking of laws or norms, this also has a *latent* function: it serves to uphold the illusion of journalistic objectivity.

Media research has contested – and for decades even rejected – the idea that it is possible for journalists to be ‘objective’ (f.ex. Tuchman, 1972; Schudson, 1978). An important part of empirical journalism studies has furthermore shown how framing, rhetorical devices, the choice of sources, etc. combine into patterns of underlying – often unconscious – values. Ettema and Glasser’s seminal study of American investigative journalism from 1998 displays the paradox this entails: Modern investigative journalism constructs narratives that invite moral outrage, but the objectivity ideal demands that this moral outrage does not challenge the existing order. In a modern commercial press with a broad audience journalists are expected not to have political views. But as they cannot do without views at all, they must play within the spectrum of ‘dominant values’.

These dominant values are either enshrined in the law, or they are strong norms on which there is widespread agreement – and there is normally also a close relationship between norms and laws. The *status quo*

may thus be regarded as 'apolitical', and in that way the press can retain its image of being objective.

However sometimes the law differs too much from widely accepted norms. At other times, new norms emerge. In such cases, the 'objective' press may remove its value-free armour and, suddenly conscious of its role as a powerful actor in society, attempt to reconcile the two by speaking its mind – not only in editorials, but also in news. This is not done by mixing facts and opinions (at least not consciously), but rather the mere scope of an issue's coverage can carry a strong message about which side the press has chosen. The recent coverage of #metoo is a good example of this. It is quite unlikely that #metoo would have had anything like the scope it had in the 1950s, even if the internet had existed at the time.

Another way one can see what side the press takes, in particular in a situation where new norms are emerging and have not yet been fully established, is how far exposing actors who have *not* broken the law is taken. In #metoo several of the exposed power people had violated moral norms on harassment and gender equality – but not necessarily any laws. #Metoo was a strong message that sexual harassment is not acceptable, also when not covered by the law.

In the coverage of the Panama Papers it is also evident that someone, at some stage, must have decided to include on a large scale people or institutions who had not broken the law. This choice is reflected in comments and editorials: *Aftenposten* for example made it clear from the very start that there were no indications that all those exposed had done anything illegal,¹⁸ and repeated this moral aspect on later occasions. One commentator wrote that "we now need a lively debate on business morals and societal morals," a stance also echoed in editorials.¹⁹ In the op-ed on 9 April, which also functioned as a summary of the first week, *Aftenposten's* editor wrote that "(i)nterestingly enough, it is [...] not those cases where law violations have been exposed that have attracted the most attention, but those that focus on morals." The editor exemplified this with both the Icelandic PM and DNB.

¹⁸ *Aftenposten*, 4 April 2016.

¹⁹ Op-ed, 6 April, e.g. editorial, 5 April 2016.

Other parts of the Norwegian press seemed to agree with this focus. This is also obvious from a case handled by the Norwegian Press Council (PFU) later the same year. A Norwegian shipowner family with holdings administered by Mossack Fonseca filed a complaint with the PFU. The complaint was turned down, on the grounds that although the family had not done anything illegal, the scope of and the problems posed by the tax havens as such justified publication.²⁰

This means that we can regard the Panama Papers not only as an investigation, but as a campaign. As follows from the above, it is however quite rare that a major journalistic campaign of this sort takes place unless there is a clear sense that society is ready for it. Some op-eds and commentaries even referred openly to what we could understand as the worry of the little reader – one *Aftenposten* commentator for example pointed to the fact that the ‘others’ – all the ordinary taxpayers – were about to “turn sour” on the ways elites had served themselves both before and after the financial crisis, and the commentator also used the word “rage”.²¹ The Panama Papers can therefore be seen too as a manifestation of emerging societal norms, both nationally and internationally.

But with the spotlight turned on those who follow the law, and simply exploit it, we are again brought back to the question of structure. There will always be people who break or exploit the law. The question is how easy this breaking, and in particular, this exploiting, should be.

3) On the frontlines

As said, one reason why the focus could be so strong on the DNB CEO, was that in Norway no politicians had been involved. But even where politicians are concerned, focussing on those who exploit or break the law may take the focus away from those who make the law.

That there were aspects of tax haven use that were legal, but still immoral, might confuse the little reader, but also make her more interested. For when something is legal, but illegitimate, it normally means

²⁰ <http://presse.no/pfu-sak/15516/>

²¹ *Aftenposten*, 5 April 2016.

there are loopholes in the law – and again, that means the law is not good enough. So why had the authorities not eliminated these loopholes?

In the lead of the first DNB story *Aftenposten* stated that “Norwegian authorities (had) for many years fought the use of tax havens”. Further down in the article this point was repeated and reenforced – the authorities had been “on the frontlines of the fight against closed tax havens that facilitated money laundering and tax evasion”.²² The wording highlighted the contrast between DNB’s more dubious activities and the important work of the authorities.

The reader was now eager to find out what the authorities had actually done. One question, however, that complicated this issue, was how much power politicians have in an internationalised world. A reference to ‘structure’ was not entirely non-existent. In some cases the workings of global markets were portrayed as some kind of *force majeure* – a natural law, something outside human control.²³ But the activities of the politicians were also mentioned, and as a relatively informed citizen the reader also knew that nation states and politicians were still important actors. She might for example have noticed, during the Lux Leaks of 2014, the allegations that the president of the EU Commission, Jean-Claude Juncker, almost single-handedly created a tax haven out of Luxembourg when he was prime minister there.²⁴ She might also know that a country well-known to Norwegians, the UK (around the time of the Panama Papers about to vote on their membership in the EU) was almost a full-blown tax haven,²⁵ or that many states in the country that still in many respects is regarded as a global hegemon, the US, were strongly involved in tax arranging as well. She could also have noticed the point made by the American media that was even cited in an article in *Dagens Næringsliv* in the middle of the Panama Papers leak: “In some states (in the US)

22 *Aftenposten*, 4 April 2016.

23 E.g. *Aftenposten*, 5 April 2016.

24 E.g. *Dagens Næringsliv*, 7 November 2014; NTB and *Adresseavisen*, 8 November 2014; *Nationen*, 11 November 2014; *Aftenposten*, 13 November 2014. Also mentioned in *Aftenposten* during the Panama Papers leak.

25 www.foreignpolicy.com/2016/04/04/britains-empire-of-tax-evasion-panama-papers-mos-sack-fonseca/. For further information about Britain as a tax haven, see also Brooks 2016.

it is more difficult to get a library card than to set up a company with anonymous owners.”²⁶

In Norway during the leak, politicians prided themselves on how much progress they had achieved with this system within the confines of the OECD – which in itself implies that ‘the structure’ was something nation states had at least some control over. The Norwegian finance minister, with tax issues her particular responsibility, appeared in altogether five *Aftenposten* articles during the two weeks after the leak broke, one of them a debate article. In all articles she held forth the substantial effort of the Norwegian authorities in order to enforce the principle of openness around tax havens.²⁷ The finance minister also published a debate article in *Klassekampen* and was interviewed in *Dagens Næringsliv*,²⁸ and stated that the opportunities for tax evasion would be dramatically reduced from 2017. A prominent member of the major government coalition party and a later member of parliament even stated in a debate article that all tax haven problems would be history by 2017. She denounced the current public and media sentiment surrounding the Panama Papers leak as “Panama Papers populism”.²⁹

On the other hand, there were several other participants in the debate who alleged that neither Norwegian nor other authorities had done enough to curb the use of tax havens, or to put an end to creative tax arrangements by multinational companies. Some debaters and interviewees claimed that all use of tax havens contributes to upholding devastating imbalances in the world economy – in other words, that the system needs a profound overhaul. Some criticised the Norwegian authorities directly for not exerting enough effort to end this problem.³⁰ The leader of the International Monetary Fund, Christine Lagarde, even said that the achievements within the OECD were far from sufficient.³¹

26 *Dagens Næringsliv*, 11 April 2016.

27 *Aftenposten*, 5, 6, 14 and 17 April 2016.

28 *Klassekampen*, 14 April; *Dagens Næringsliv*, 15 April 2016.

29 *Aftenposten*, 15 April 2016.

30 E.g. *Aftenposten*, 5 and 6 April; *Dagens Næringsliv*, 6, 8 and 12 April; *Klassekampen*, 8, 11 and 12 April 2016.

31 *Aftenposten*, 14 April. In a debate article in *Aftenposten* on 15 April, a professor of political science furthermore referred to a major research project which showed that it was easier to set up anonymous bank accounts and establish shell companies in the US and the OECD than the most well-known tax havens. The project is available on www.globalshellgames.com.

What the reader could not find were articles that attempted to explain in more detail what really had been done, nationally or within the framework of the OECD, in a language she could understand and related to things she could understand.

The most informative articles did in fact come from the authorities themselves, in the debate articles by the finance minister (one of them co-signed by Norway's foreign minister), almost two weeks into the leak period.³² The point that Norway had contributed heavily to the progress in the OECD was repeated several times, but the claims were difficult to assess, both since the use of technical language implied a lot of background knowledge the ordinary reader would not necessarily have, and because it was difficult to know to what these achievements were related to. Where was the starting point, where was the end? What was the context for all this information? The notion 'on the frontlines' meant little as long as one did not know where the 'front' was.

The reader would also have noted that there were few critical questions directed at the authorities. Of course one country could not solve this problem alone. But as it was implied from the very beginning that the Norwegian government had played an important role in international work against tax havens, it would be useful to know exactly what the nature of that work was. This could also provide an important insight into how international bodies handle an issue like this.

4) The media and the experts

There was, however, an interesting simultaneous development focused on the Norwegian government.

The fact that some Norwegian state companies use tax havens, or at least have business associates that are associated with disputed tax issues, is information that has appeared in regular intervals in the news over the years. During the first two weeks of the leak, new independent stories (not stemming from the Panama Papers leak) on this same issue appeared. One was about the state company Argentum, a company that

³² *Aftenposten* and *Klassekampen*, 14 April 2016.

invests in private equity and that according to *Klassekampen* had doubled its investments in tax havens during the last five years.³³ Another piquant story was about the consulting agency PWC, whose name had played an important role in the LuxLeak. It turned out that this company had not only assisted DNB in their tax planning, but had recently also been employed by the authorities to ensure openness in the Norwegian public sector.³⁴

However, the main question in relation to the Norwegian state and tax havens concerns the activities of the Norwegian Oil Fund. The Oil Fund is a huge international investor owning shares, obligations and real estate registered to companies in tax havens – according to *Klassekampen* the Fund had invested almost 200 billion kroner in tax havens at the time of the Panama Papers leak.³⁵

What kind of investments does the Oil Fund have? It would be obvious to the reader that a Fund managed by the Norwegian authorities would not in any way be illegal, but the companies involved would contribute to eroding other countries' tax bases, so might some of the Fund's investments be seen as immoral? The reader could not know much about this, but the press stated that it also wanted to illuminate immoral practices, *and* the Oil Fund was now entering the spotlight. Our reader might therefore have a feeling that at least some of the Fund's investments might not pass the test of public opinion that was now about to emerge.³⁶

The year before, in the summer of 2015, three of the minor parties in the Norwegian parliament proposed that the Oil Fund withdraw its investments from tax havens. The parliamentary majority was against this, but the ensuing media coverage was paltry to say the least – I could only find four stories about it in all the Norwegian news media.³⁷ This is not surprising. When looking back on coverage of the Oil Fund in general, one

33 *Klassekampen*, 9 April 2016.

34 *Klassekampen*, 8 April 2016.

35 *Klassekampen*, 5 April 2016.

36 The argument about public opinion with specific reference to the Oil Fund was also brought up in a convincing way in a report published in the immediate wake of the Panama Papers, Kapoor and Zeilina 2016.

37 *Aftenposten*, 9 June; *Dagsavisen*, *Nationen* and *Rogalands Avis*, 10 June 2015. In addition, Retriever contains two references to it in trade union magazines. *Dagens Næringsliv* had withdrawn from Retriever at the time of this search.

sees that criticising the ethics of the Fund's investments, or (more rarely) its contact with tax havens, takes the form of a ritual. The media, NGOs or minor parties bring it up, there is a debate, and then the issue disappears from the public agenda again.

On one of the first days of the Panama Papers leak, the question was however brought up again, by two more opposition parties. This could have been a game changer. With two more parties (one of them even a major one), the situation was thus suddenly turned on its head. The parties that now signalled a desire to reconsider the Fund's portfolio were suddenly a parliamentary majority. Already on one of the first days of the leak, *Aftenposten* noted the contradiction between the way Norwegian politicians criticised DNB's practice, and the way they had so far accepted the practice of the Oil Fund.³⁸ *Klassekampen* even wrote on its front page that the Fund now might be forced to withdraw from tax havens.³⁹

There was a discernible difference between the three outlets in this study in relation to the Oil Fund. Most of the articles that cited the connection between the Fund and tax havens in *Aftenposten* were signed by external debaters. *Klassekampen* reported heavily on Norwegian political practice. Five of its frontpage stories during these two weeks focused on tax issues relating to Norwegian state companies or the Fund,⁴⁰ and the coverage was otherwise also broad. *Dagens Næringsliv* also played an active part in scrutinising the role of the state as such, for example, with a three-page feature story on 11 April about what they called the most important tax haven in the world – Delaware in the US (including the ease with which tax avoidance could be facilitated in other American states mentioned above). A main point was that Norwegian state companies, among them Oil Fund subsidiaries, were present in Delaware.⁴¹ Questions concerning the Fund and tax havens also spread to other outlets, in particular through the Norwegian News Agency NTB, which supplies other outlets with news.

But then the *experts* were brought in. Not to discuss what seemed to be a single episodic practice in DNB, but rather the whole underlying

38 *Aftenposten*, 5 April 2016.

39 *Klassekampen*, 5 April 2016.

40 *Klassekampen*, 5 April, 6 April, 8 April, 9 April, 13 April 2016.

41 *Dagens Næringsliv*, 11 April 2016.

Norwegian question of the Oil Fund. Six days after a sudden parliamentary majority suggested a willingness to reconsider the investments of the Oil Fund, *Dagens Næringsliv* published a two-page article about the Fund, and the question of withdrawal from tax havens.⁴² It turned out that the experts deemed a withdrawal to be difficult, on the verge of being impossible, because the Oil Fund's mandate was to invest broadly ("to have well diversified investments" as the Fund's own webpage reads). This point circulated quickly and was repeated by other outlets, among them NTB, other financial news sites, and tv stations.⁴³ One frequently-cited professor of economics even argued that one had to differentiate between different kinds of tax havens. One should for example not define Delaware – on three pages in the same issue of *Dagens Næringsliv* portrayed as the world's most important tax haven – as a tax haven. Why? Because if one did, it would be difficult for the Oil Fund to invest there.⁴⁴

"Moral indignation," the same professor continued, "must be directed primarily against countries that contribute to corruption and to hiding money."⁴⁵

After the experts had their say, and their analysis of the situation had made the rounds in the media, interest in the Oil Fund seemed to implode. It seems the global tax haven problem was not that huge after all, at least not when the state was involved. After all, the only real problems seemed to be the illegal ones – corruption and money hidden from taxation (and of course DNB). It was not that the press was unaware of the problem of Norway's use of tax havens. *Dagens Næringsliv* for example used the phrase 'double standard' about the Oil Fund in its editorial.⁴⁶ But the question of the demarcation lines between legal and illegal, moral and immoral remained unsolved. This may be another important reason why the focus on DNB and its CEO became so heavy – it was the only tangible solution.

42 *Dagens Næringsliv*, 11 April 2016.

43 E.g. <https://e24.no/boers-og-finans/oljefondet/eksperter-vanskelig-aa-trekke-oljefondet-helt-ut-av-skatteparadiser/23656546>; <https://www.tv2.no/a/8212411/>

44 *Dagens Næringsliv*, 11 April 2016.

45 Ibid.

46 Ibid.

The outcome of the attempts to discuss the activities of the Oil Fund illustrates a recurring problem not only with Norway's dependency on the Fund, but with economic journalism as such. Journalism is a trade where the actors are normally very dependent on their sources. This dependency increases with the complexity and international character of the issue. The more complex the issue, the more difficult it is for the journalist to question the authority of the 'experts', and economic journalism is in a special league being both extremely complex *and* internationalised (Bjerke et al., 2016). In this particular case, a few other debaters questioned the experts' conclusions, but there is also often a hierarchy of sources, and the opinions of mainstream economists have a tendency to override the opinions of other voices. In economic journalism we see that the same people are often interviewed again and again (ibid.).

It is of course quite unlikely that for the little reader everything then fell into place. The media, politicians and debaters alike had implied that the use of tax havens could be wrong even though it was not illegal. The major question in the Norwegian media, in relation to DNB, illustrates this clearly. The spotlight was then turned onto the practice of the Norwegian state, with 7 trillion Norwegian kroner invested in the global economy. During the peak days of the coverage, the reader learned that politicians had made considerable progress in the fight against tax havens (but she still did not know in relation to what). Suddenly there was a parliamentary majority ready to reconsider the practices of the Norwegian Oil Fund. But according to the experts it turned out that there was no such thing as simultaneously legal and immoral. Moral outrage had to be directed towards corruption and attempts at hiding money. In other words, the most prominent feature of immorality was that it was illegal. No wonder the little reader felt she was back at square one, and that a number of things still remained in the dark.

Epilogue

One and a half years after the Panama Papers a new leak broke, now called Paradise Papers. This was a much smaller leak, but one in which the major news was that companies like Apple were avoiding paying

taxes around the world. This was also hardly new information, but again it brought attention to the problem not only of global tax base erosion, but also to the law. Apple's practice was not at all illegal, but still drained national treasuries. Again *Aftenposten* and other media criticised tax arrangements that were legal.⁴⁷

Despite the massive media attention, it also eventually turned out there was not sufficient reason for the CEO of DNB to resign. By then the DNB case had more or less disappeared from the news.

Two years on, the OECD still reports progress in its work against tax base erosion, but no breakthroughs. The Norwegian Oil Fund still writes on its homepage that withdrawal is difficult, but that it has "long-term" expectations that the OECD work will be effective. After all, the decision is not for the Oil Fund to make, its managers write – this power lies with the authorities.⁴⁸

Conclusion

In many ways, the Panama Papers leak was a success – and a huge boost to journalism, a trade that is currently often described as "in crisis". It is also often implied that the solution is more international cooperation. In this article, I have nonetheless tried to show that cross-border cooperation may be a necessary, but not a sufficient factor for the success of coverage of complex international issues. There are considerable challenges to journalism if it wants to understand, cover and explain the complexity of global issues. Through a study of three important Norwegian outlets during the leak's first two weeks, I have pointed out a few problems that have to do partly with journalistic self-understanding, partly with the need to make journalism relevant to its (still often national) public, and partly with the strong dependency on journalism's sources.

The interesting question is the long-term impact on democracy and the public's understanding of how to deal with the problems. A main issue in the Panama Papers was to track down individuals and institutions with

47 *Aftenposten*, 18 November 2017.

48 <https://www.nbim.no/no/apenhet/brev-til-finansdepartementet/2018/forventningsdokument-om-skatt-og-apenhet/>

a connection to Mossack Fonseca. The major Norwegian story that could be framed as a disclosure, was however the DNB case. That DNB had carried on with this strategy for so many years was in itself no small issue. But when the hunt for an individual to be made accountable failed, and when the Norwegian state's own investments disappeared from the news as quickly as they appeared, the impact on democracy and the public's understanding of how to deal with these problems can be meager.

Leaks are valuable journalistic tools, and international cooperation in deciphering the contents of the leaks is invaluable. But leaks are not enough. Issues that have to do with the global economy must be contextualised and explained. Great journalism cannot rely on politicians and experts. To make the system transparent, journalists have to monitor law-making and international cooperation (and the lack of such) also in between 'the great leaks'. Global tax issues are complex, but there has also never before existed more open information: in the form of a huge landscape of national and international law, reports from international bodies, national databases, reports from international organisations and NGOs, university research, corporate websites, etc. They do not always expose individual wrongdoers, but they contain information that is at the very core of these problems.

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CHAPTER 19

Making Sense of Overwhelming Flows of Financial Data

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Publish What You Pay Norway

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Abstract: This chapter asks what investigative journalists working on revelations such as the Panama Papers, Paradise Papers, Lux Leaks, Swiss Leaks, etc. can teach journalism educators. Can this type of cross-border cooperation help prepare journalism education for a future in which money increasingly flows across borders? Without having some understanding of the core concepts of finance, it will be difficult to hold power to account. This chapter builds mainly on qualitative interviews with journalists around the world working on stories connected to illicit financial flows, corruption and tax havens. In the conclusion, we discuss the challenges and paradoxes educators must consider when designing journalism education for the future. Considering the growing importance of Problem-Based Learning (PBL), the journalists interviewed here emphasize the promise of teams learning together while investigating and solving problems as they arise. However, there are limitations to the usefulness of PBL in understanding economic or financial theories. For instance, it is doubtful that PBL alone would be the best and most effective way to learn the quantitative methods needed to understand economic theories. It would be helpful if journalism education could include basic instruction, at least, in economics and finance.

Keywords: journalism education, investigative journalism, illicit financial flows, economy, problem-based learning

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Introduction

Imagine being at the receiving end of a massive leak such as the Panama Papers, consisting of c. 11.5 million documents including emails, bank statements, passport scans, etc. (Obermayer, 2017). Even an experienced auditor would be hard pressed to sift through much more than a few dozen, perhaps a hundred, documents per day, not to speak of the time needed to do in-depth analyses of the complicated and impenetrable (on purpose) transactions described in the documents. At the rate of 100 documents per day, it would take a reader more than 300 years to get through the 11.5 million documents.

Journalists allowed to visit the ‘war room’ at *Süddeutsche Zeitung*, speak of “whiteboards hanging on the room’s walls [...] covered in complicated-looking diagrams” (Zerofsky, Elisabeth, How a German newspaper became the go-to place for leaks like the Paradise Papers, *The New Yorker*, 11 November 2017). To make it possible to analyze the millions of files, the newspaper installed computers that had never been connected to the internet, “so that they could be used to store securely the 13.4 million files” of the so-called Paradise Papers. The journalists at *Süddeutsche Zeitung* understood that a much larger collective of journalists was needed to read and analyze the documents. At least 381 journalists in 67 countries, in collaboration with the International Consortium of Investigative Journalists, worked to make sense of the millions of files. So far, much of the academic literature dealing with journalistic coverage of the Panama Papers, Paradise Papers, Lux Leaks, Swiss Leaks, etc. focuses on the emergence of a global network of journalists working together and sharing information, or the use of computers to analyze the data and facilitate secure communication among the journalists in the network. (See for instance Sambrook, 2017; Baack, 2016; McGregor, 2017.)

The Panama and Paradise Papers are not the only examples of journalists using leaked information to reveal illicit financial flows and their financial and political benefactors. Previously, the Lux Leaks exposed conditions many considered even worse: that large multinational companies were effectively allowed to write their own tax arrangements, which were signed by the authorities in Luxembourg. The revelation showed that the authorities allowed multinational companies to channel huge

sums of money through Luxemburg, thus avoiding billions of dollars in tax. Another leak, the Swiss Leaks, exposed how one of the world's biggest banks, HSBC, had profited from helping over 100,000 customers hide \$100 billion in Switzerland. The customers were multinational companies wanting to avoid taxes, as well as criminals. In South Africa, the journalists of *AmaBhungane* managed to expose the murky dealings of the so-called Gupta-Zuma scandal using 100,000 emails and scores of other documents. After many years the network collapsed upon those involved, leading up to former president Zuma's resignation.

Computers can indeed make the job of analyzing data quicker, easier and more user-friendly. For the individual journalist, however, the challenging task of understanding complex financial data and the workings of a complex financial industry remains. To be able to write stories that will hold under scrutiny, journalists must understand not only the legal and financial concepts used in the emails and documents. They also need to understand basic concepts in accounting, finance, economics and different countries' tax laws in order to understand how transactions may work, and for which ultimate purposes they may have been done. In particular, in order to explain why a story is important, journalists need a good understanding of the difference between the legal forms created and the actual financial substance achieved. So far, relatively little research has been done on this aspect of this emerging form of global investigative journalism.

Newspapers and weeklies around the world, such as the *Financial Times*, *The Economist* and other business dailies, can count on the expertise of journalists educated and trained in economics and finance. However, many of the groundbreaking stories published on the leaks and scandals mentioned above have not been written by journalists specializing in economics and finance, but rather by generalists with little previous experience in investigating global finance, who had to rely on the expertise of financial investigators and forensic accounting to make sense of the data before them.

We believe the experiences of these investigative journalists contain valuable lessons to be learned for the next generation of journalists. In this chapter, we are mainly interested in what such experiences can teach

journalism educators and others concerned with training and educating journalists for a future where money and information increasingly flow across borders. Without having some understanding of the core concepts of finance, accounting and law, and especially how they relate to the differences in form and substance, it will be difficult for journalists to hold power to account. This chapter builds mainly on qualitative interviews with journalists around the world working on stories connected to illicit financial flows, corruption and tax havens. We organized conferences, workshops and seminars to discuss aspects of cross-border journalism with 20 investigative journalists from almost as many different countries. Ten journalists later provided short stories based on detailed questions about their investigative journalism. Additionally, we conducted open in-depth qualitative interviews with eight journalists. The main goal of this chapter is to contribute to a better understanding of how journalists without formal training in economics, finance, accounting and law work to make sense of overwhelming amounts of complex financial data. Moreover, what can journalism education gain from these experienced investigative journalists when it comes to making sense of data on illicit financial flows and the complex service industry facilitating it?

Literature review

Transnational networks of investigative journalists are a relatively new phenomenon, yet to be fully explored by researchers. So far, research on journalism related to leaks, such as the Panama Papers, has focused on cooperation among journalists and newsrooms across borders, on the role of technology, on safety and security issues, and access to information and sources. In comparison, relatively little has yet been published on how journalists understand the complex data on the complicated legal set-ups and financial transactions revealed by the leaks. Here, we understand this as a hermeneutical process where journalists draw on their own knowledge and experience to make sense of the information found in the leaks. However, we also frame it as a learning process, where the key issue is not so much the knowledge and experience the journalists already have, but the ability of journalists to find ways to learn about new topics.

The debate on how best to educate journalists is as old as journalism education itself. Often journalists and editors have been quite critical, if not negative, towards developing programs for journalism education around the world. Many have argued that journalism is best learned by doing. (See for instance Folkerts, 2014; Kjos Fonn, 2015; Hovden, 2016.) From this perspective, journalism should not be made into an academic discipline in itself, but rather be understood as a skill or trade that draws on all types of other disciplines, such as social science, history, economics, law, and so forth. Eric Newton represents a different view. According to Hilary Akers Dunn (Dunn, 2018), “Newton argues for knowledge-based journalism education environments, where journalism schools pull from their resources throughout the whole university to assist their students in specific beats of journalism. For example, knowledge-based journalism courses are taught under the instruction of journalism educators, as well as educators from other fields (e.g. business, economics, law, science) to better equip the student to create media knowledgeably on the specific subject.” (p. 13). To some extent, this was the predominant model in the early days of journalism education in the Nordic countries (Kjos Fonn, 2015; Hovden, 2016). Still, a significant number of educators at journalism schools and institutions around the world have PhDs not in journalism studies, but in history, social science, sociology, media studies, anthropology and similar disciplines. Nevertheless, as journalism studies has matured as an academic discipline, it appears that many journalism curriculums emphasize language skills, storytelling and mastering new technical equipment, rather than subjects such as economics, social science and history, which were on the agenda in the early days. Hovden et al. note some important differences in the journalism education models of various countries and regions. Nevertheless, the authors find that “the general aims of teaching journalism in most countries are quite similar: students need to know how to express themselves, understand the genres, master the instruments of production and how to handle sources, become familiar with the national professional norms, and so forth. As a consequence, the teaching of journalism is in important ways quite similar all over the world.” As we see from the list of goals presented above, understanding economics, politics, law, etc. is not obviously amongst the

general aims of current journalism education. However, many journalism programs do still teach politics and economics, if not as subjects on their own, then as part of courses designed mainly to train students in news reporting, understanding statistics, making documentaries, and so forth.

Some journalism scholars such as Mark Deuze see the debate on practice and theory in journalism education as outdated (Deuze, 2001). Instead, education should focus on critical self-reflection. Nevertheless, according to Deuze, education needs to prepare students to understand ongoing changes in society, the economy and technology. Building on Deuze to make his argument, Hans Henrik Holm argues that journalism education needs to break the national mold (Holm, 2001). Instead, journalism needs to build an understanding of globalization. According to Holm, the time has come to develop truly transnational journalism education.

Richard Sambrook et al. in *Global Teamwork: The rise of collaboration in investigative journalism* provide fresh lessons on cross-border investigative journalism from some of those closely involved in the investigations (Sambrook, 2018). Charles Lewis, sums up the need for

broader, amassed knowledge and understanding across borders, professional disciplines, and cultures, perhaps through the precise prism of documented, reliably sourced, public accountability issues in the world, in the context of the uses, the occasionally glaring, wilful non-uses, misuses, and abuses of political, corporate, and other power in the world.” Lewis imagines combining “the most authoritative, known information from various disparate sectors, including journalism, but also such academic areas of expertise such as investigative history, forensic accounting, computer science and statistics, political science, economics, public anthropology, human rights, public interest, and other law-related fields (...). (Lewis in Sambrook, 2018)

Computers and digital communication accelerated the process of producing ever-increasing complexity in ways not seen before. For investigative journalists, this means not only “breaking the national mold” and being able to “collaborate in global networks”, but also conducting

interdisciplinary investigations not only by drawing on experts from relevant disciplines, but also by learning to understand basic concepts in key disciplines well enough to undertake independent investigations and source criticism.

Through the Panama Papers and similar leaks, citizens all over the world have gotten a glimpse into a world of finance and financial flows of ever-increasing complexity. As Linn Anker Sørensen explains, ever-changing complex structures are being created on purpose to make it increasingly difficult for tax authorities and others to investigate and understand financial flows across borders (Sørensen, 2016).

Richard Sambrook concludes that journalists “should stop thinking they can always ‘go it alone’”.

International accountability is an issue for lawyers, economists, politicians and lobbyists, scientists, healthcare professionals, academics, accountancy, business and finance professionals, and more. In a modern approach to accountability journalism, newsrooms should seek to partner and collaborate outside their profession as widely as possible, being open to the expertise of others. (Sambrook, 2018)

Methodology

The field of journalism studies often lags far behind the historical development of the subject of its study (Nash, 2016, p. 234; Conboy, 2013, p. 4). Digital investigative journalism and cross-border cooperation to uncover illicit financial flows are developing at increasing speed. Meanwhile, the research process and academic publication happen slowly. It can take years from when the research begins until results are published in peer review journals. Consequently, the research group within the project Making Transparency Possible has put emphasis not only on making the project interdisciplinary, but also making sure that researchers work closely alongside investigative journalists in analyzing this emerging field. This methodology is inspired by the Collaborative Action Research Network (CARN). CARN supports research that “involves active involvement with practitioners and participants” and seeks to generate inquiry

“where practitioners actively contribute to the generation of knowledge and theory”.¹

This chapter builds mainly on qualitative methodologies. We have organized conferences and workshops (December 2016 and February 2018) with a total of 30 participating investigative journalists from Asia, Africa, Latin America and Europe. The participating journalists represent important backgrounds in investigative journalism from countries as diverse as Guatemala, Ecuador, Colombia, Nigeria, Ivory Coast, Ethiopia, South Africa, Russia and Norway. In selecting participants, the diversity of experience also ensures equal representation of genders.

The workshops were organized to facilitate open discussion. Each participant presented the main features and challenges of the investigation they had been doing. The other participants could then comment or ask questions before the presenter would sum up. In addition to the journalists, professors of journalism, economics and law also participated. The methodology in the workshops has much in common with ‘focus groups’. “Focus groups are typically used to reveal through interaction the beliefs, attitudes, experiences and feelings of participants” (Litosseliti, 2003, p. 16). Here, the seminars were designed to reveal a multiplicity of experiences that most likely would not have been uncovered employing for instance individual interviews or surveys.

Additionally, ten participants were invited to write and publish accounts of the investigations they conducted. These stories were published on the website of the NGO, Publish What You Pay Norway, and the journalists received a small compensation for the time spent writing the requested stories.² These stories have been used in the research for this chapter.

We have also analyzed more than 300 articles in the Norwegian daily *Aftenposten* during the publication of the Panama Papers. The articles have been analyzed in order to understand which expert sources the newspaper used to define and explain information arising from the investigation. We have also looked for stories that break the ‘national mold’, in

1 CAR, Mission and philosophy. An outline statement. Retrieved from <https://www.carn.org.uk/about/2016>, on 1.9.2018.

2 <https://www.publishwhatyoupay.no/en/node/17478>

trying to explain the importance of the Panama Papers without using a national (Norwegian) angle.

Finally, eight additional qualitative interviews were made with selected participating journalists. These journalists come from countries in the global South as well as from Europe. Some live in environments that are not very friendly to investigative journalists. Rather, they may be targeted for doing investigative journalism. Following the guidelines of the Norwegian Centre for Research Data (NSD), we have not recorded any personal information on the interviewees from these interviews. These eight additional interviews are therefore anonymous.

Stories becoming more and more complex

“A very difficult topic to work with,” said Jan Lukas Strozyk³, an investigative journalist for the German broadcaster Norddeutscher Rundfunk (NDR) and author in the International Consortium of Investigative Journalists (ICIJ). “Access. The main idea of using a tax haven is to make access to information impossible. We are talking about an industry where very rich people and clever companies are paying some of the most expensive lawyers to prevent our reporting from happening.”

There are many reasons why investigating economic or financial stories is becoming ever more complicated. At least three parallel clusters of processes seem to make illicit financial flows more opaque. First, since the beginning of the Swiss banking secrecy laws in the early 1930s the intensity of establishing secrecy jurisdictions exploded in the 1970s, and today tax havens and their service industries play a prominent role in the global financial system (Baker, 2015). An investigative journalist trying to hold power to account today will find that almost a third of the world’s financial transactions pass through a tax haven.

We should clarify that we do not find it necessary or even purposeful to discuss questions of legality and illegality in relation to the use of tax havens. In most cases, it is not possible to determine whether something

3 Strozyk, Jan Lukas (2016, December 13). How can a journalist explain to the world what is going on in a tax haven? Retrieved from <https://www.publishwhatyoupay.no/nb/node/17154> 01.09.2018.

is legal or not, because of the available secrecy. The secrecy provided in tax havens makes it possible to convert profit from criminal activities, through whitewashing, into legal activities while curbing traceability, since the core business idea is making access to information and transactions opaque.

Second, other developments of the past few decades are the significant integration of the world economy and international trade, which has grown rapidly since the 1970s. By one estimate, the value of world trade has increased four to five times (at constant prices) between 1980 and 2015 (Ortiz-Ospina, 2018). In fact, international trade has increased twice as fast as world GDP, according to statistics released by the WTO. Other indicators also illustrate how world economies are becoming increasingly integrated. According to a World Bank paper, there is “only one publicly available dataset on international intra-firm trade with a comprehensive set of partner economies” (World Bank, 2017). The US dataset shows that around half of all US imports are intra-firm. Estimates floating around the OECD and the EU suggest that between 60–70 percent of world trade takes place within groups of related companies. This makes clear why attention to transfer pricing becomes important. Anything that has a price can be mispriced. A reader may understand transfer pricing as the pricing of single transactions, which should take place between unrelated parties (arm’s length principle). This is a fully legal way to value transactions. However, if the reader views transfer pricing more broadly, it may include all transfer mechanisms available to multinational companies that enable the transfer of untaxed profits across jurisdictions. Transfer mispricing is one of the most widely used techniques for extractive companies to transfer profits from host and home country to the company itself. Around 1/3 of all transactions go through tax havens, hiding significant amounts of global transactions from public scrutiny. When tax havens appear to be the world’s largest investment hubs, it has an effect on society at large.

Third, the problem of increasing inequality is seen as one of the defining issues of our time. When wealth is increasingly concentrated, this has implications for society at large, not only in terms of inequality between countries but also inequality within countries. The equivalent of 10 percent

of the world's GDP is now held in tax havens globally, this average percent masking a range of a few percent of GDP in Scandinavia to up to 60 percent in Gulf countries and some Latin American countries (Alstadsæter, 2018; Aaberge, 2018). Hence, the accumulation of wealth in tax havens is also key to understanding both global income and wealth inequality.

At the same time, the fragmentation of ownership and control of companies and assets is becoming more complex at a staggering rate. Strozyk: "We need to get used to working on ever more complex stories."

According to Linn Anker Sørensen, increasing complexity is driven by powerful computer networks that facilitate rapidly shifting financial structures (Sørensen, 2016).⁴ At the same time, the center of gravity in the world economy is also shifting. While oil and mining companies, and producers of goods dominated the list of the richest companies in the world up until ten years ago, some the biggest companies in the world today are producers of online content and computer programs (Economist, 2017). Whereas the oil and mining companies were drilling non-renewable and finite resources at a huge environmental cost, today's tech companies drill consumers' data at a huge cost in privacy. The most profitable products today are also those that are easiest to move across borders. This poses added problems for authorities as to how to regulate such companies. *The Economist* also recognized this with a front-page headline reading, "How to tame the Titans?" Sometimes governments, investors, tax authorities, organizations and journalists can be said to be in the same boat regarding access to information.

"I realize that there is not much we can do," said Strozyk. "The real heroes are the whistleblowers."

The national mold

A key challenge for journalists working on global stories is to break 'the national mold'. While finance stories today almost always have

4 Sørensen, Linn Anker (2016, December 13). The art of making a corporate maze with untraceable structures and owners. Conference keynote at *Making Transparency Possible*, Oslo. Available online from <https://www.publishwhatyoupay.no/nb/node/17159> accessed 25.8.2018.

international connections, which need to be explored, journalists may not believe their audience will be as interested in international connections as in more local or national ones. Therefore, investigative methodologies often produce strong national framing of the information. One Norwegian journalist (anonymous) explained:

The volume of information we got was enormous. We began by doing a number of searches for Norwegian names of politicians, business leaders, celebrities and companies in the material. This was the first step. When we encountered information on Norwegians, we investigated further.⁵

To frame is to “select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem, definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described” (Entman, 1993). In the case of this Norwegian newspaper, we see how the national frame is imposed by the methodology of researching the overwhelming flow of information. The overwhelming flow of information is simplified and systematized by organizing the information according to a perceived national relevance. The methodology is embedded within the national mold.

However, this should not be taken to mean that the Norwegian journalists working on the Panama Papers wanted to publish only stories on Norwegians and Norwegian companies, or were unwilling (or unaware) to see the international dimensions of the phenomena unveiled by the Panama and Paradise papers. On the contrary, an analysis of 300 articles published by *Aftenposten* on the Panama Papers demonstrates a willingness to deal with the global aspects of illicit financial flows. The newspaper ran stories as diverse as revelations of financial flows from Armenia, threats against investigative journalists around the world, and the murky world of finance and tax avoidance in professional football. Many of the stories published in Norway were researched and written by foreign members of the global team investigating the leaks. Still, these international stories were seldom followed up in the same way as stories that

⁵ Anonymous 1. Interview, August 2018.

dealt primarily with Norwegians or Norwegian companies implicated in the leaks. The story on DNB, a major Norwegian bank implicated in the leaks, evolved from shorter news items, via interviews with leading politicians and views of the users of the bank, to follow-up stories revealing how the bank promoted the use of tax havens over the years.

There are good reasons why stories with a Norwegian angle generated follow-up stories. First of all these stories typically invited discussion of the legality of the financial flows. At the same time, the stories prompted Norwegian politicians to discuss the practice of using tax havens in general, which again generated op-eds by NGOs and others working on issues related to illicit financial flows and transparency. Finally, the newspaper found it relevant to present opinions of ordinary customers of the bank. All this made the story live on, instigating further journalistic research on how the bank came to be involved in this type of financial flow. The result is that Norwegian stories came to dominate the coverage of the leaks, firmly placing this coverage within the national mold.

Experts needed to define and frame the issues at stake

According to Craig McKune, “It is very hard to explain complex and complicated information to our readers. The first thing we have to do is to understand it ourselves. Clear thinking is clear writing. You have to understand it first.” Still, as Jan Lucas Strozyk reminds us, it is “(s)ometimes hard to understand what we have. I spent a lot of time reading background papers, trying to understand general business procedures. In the beginning, you felt like you were not making any progress at all on the story, only reading background.”

Aftenposten could draw on a network of experts willing to help define and explain the issues arising from working on the leaks.⁶ Among the experts were well-established academics from disciplines such as corporate law, accounting and economics, as well as experts drawn from NGOs working on issues such as transparency and tax justice. Strozyk

6 Anonymous 1. Interview, August 2018.

also underlines the need to make effective use of experts: “We also need real experts – tax lawyers, investigators, and others that have seen from the inside, that have worked in banks, etc. These people are hard to find. However when we find them, they are usually very helpful in the end.” Nevertheless, several sources explain that in certain situations experts will not be able to resolve problems for investigative journalists.⁷ As one said, there will be situations when two experts have very different opinions. “The final judgement will have to be made by us, the team of journalists.” These evaluations are difficult to make for journalists, especially when they do not have specialist training in economics or law. The consequences of getting it wrong, another said, are grave and could potentially undermine a newspaper or television company financially.⁸

Anne Koch, Program Director at the Global Investigative Journalism Network and former Director of Transparency International, has discussed partnerships where boundaries between investigative journalists and NGOs are becoming blurred as interests align (Koch, 2018). According to Koch, “(c)oooperation depends upon mutual independence” and “clear understanding of potential conflicts of interest”. However, the complexity of illicit financial flows is so great that “independence” is becoming an illusion. As informer # 1 explained, the issues are so complicated that it is virtually impossible for the journalists to make independent judgements.⁹ In these cases, the newspaper has to rely on auditors, economists or experts in law to make the final call on whether or not to publish a story based on the information available. As the informant told us, this raises important questions related to source criticism and the autonomy of journalism, as the journalists are not in control of the final judgements. The informant explained that the team of journalists did discuss these issues and tried to mitigate the potential problems by seeking out more than one expert. Still, the pool of experts was limited, and it was not unusual to use the same experts who in the first place decided if something was newsworthy or not, also as expert sources quoted in the

7 Anonymous 2. Interview, February 2018; Anonymous 3. Interview, February 2018.

8 Anonymous 4. Interview, December 2016; Anonymous 5. Interview, December 2016.

9 Anonymous 1. Interview, August 2018.

article to explain the issues to the audience or interpret the meaning of a particular piece of information.

Based on the findings here, Koch is right to claim that “it would be a mistake to believe that journalists and advocates/activists can remain unchanged by this cooperation” (Koch, 2018).

Learning to understand and explain

Journalism studies scholars have noted that most news media produce too little critical journalism on economics considering the direct importance of the economy for people’s lives. Gans laments the fact that the economy is usually relegated to the business section, thus implying that issues related to the economy are mostly for specialists (Gans, 2004). Interestingly, the journalists we have met and interviewed for this article do not work for business papers or business sections. Instead, they are generalists working on a broad range of issues. If they have a speciality, it would be *synthesizing* – they are specialists in the fine art of drawing together information from a variety of sources, in order to make a coherent whole and tell a story, which is meaningful and relevant to the reader.

According to Kristine Aghalaryan, journalists do not have to know everything but they need to be able to learn *many* things. “In order to be a qualified journalist, in order to understand the issues, you need to read a lot of related material. If we don’t understand the material, we go to the experts.”¹⁰ Craig McKune recommends starting by recognizing how complicated it is:

Just recognize that it is complicated. Pay attention to how others do it. Hungrily consume other reports by forensic investigators, [...] other journalists, by prosecutors. How do they explain it to the courts, what do the judges understand? Look at where they succeed and where they fail, see how the way those stories are explained might help your story that you are trying to unpack. Every story is different, every set of financial flows is different, your audience might be

¹⁰ Aghalaryan, Kristine (2018). Investigative journalism on illicit financial flows: How to explain complicated and complex financial transactions to the public? Conference keynote: *Making Transparency Possible*. Oslo Metropolitan University.

different – it might be a jury, it might be a judge, it might be a reader if you are a journalist. You have to tailor how you tell the story. If you can compare case studies, you will find lots of lessons that you can pull together.

McKune underscores the importance of learning what conclusions you cannot draw from the evidence. There will always be a degree of interpretation, according to McKune.

[Only] when we understand it ourselves very well, can we then understand what we are trying to explain to our readers. And then, if we can write well, and if we are well practiced at it, then we can do a good job of that.

The work of the journalist is not complete when she understands the information in front of her. She needs to find a way to communicate that knowledge to readers, listeners and viewers.

In the beginning, we did not explain these things very well. Our stories were often too dense. At the time, we were working only for a newspaper [...] so we were restrained on word length. And we would try to unpack a lot of forensic detail, a lot of dry detail, into a very small space.

Journalists such as Strozyk and Aghalaryan use drawings, figures and other forms of visualization only to explain complicated matters to the audience. However, journalists also draw and make figures as part of the process of trying to understand and grasp the meaning of the information at hand.

Strozyk finds it helpful to

Write down the story. If you have painted a whole complex web, it might be wise to describe only the bottom-left corner. It is painful to leave out information you know could have enriched the story. It is very important. In my view, breaking down the story might be the most important aspect of writing the story.

According to Kristine Aghalaryan

It is very difficult to explain complicated documents or reports or figures. [...] We do not only use simple storytelling methods, like short phrases or short sentences, but visual tools like infographics, videos, photos and other graphics.

Now we are using other methods like writing down something or painting something as a picture to use in our stories [...] we draw it and paint it by hand, so our readers can see those pictures. When the story or article is very complicated, we have places for comments, and readers write, “What is this story about?” [...] “We don’t understand.”

Aghalaryan finds it useful to use ‘interactive platforms’ such as Facebook, Twitter and other social media accounts to “respond to questions from readers” and to “improve storytelling methods”. The complexity of the stories led the newspaper *Aftenposten* to organize a team with varied backgrounds to work on the leaks. This included investigative journalists, some with experience from reporting on the economy and business related topics, and experts on the use of visualization and storytelling skills.

Understanding key concepts of accounting, auditing, corporate law and economics

The journalists interviewed here developed tools, such as visualization and interactive dialogue in order to understand and explain complex issues. In addition, most found it necessary to learn the language and key concepts used in the leaked documents. This meant learning key concepts in international banking, auditing and corporate law.¹¹ In the process, the team developed an informal ‘dictionary’ defining the most central concepts. The dictionary had to be created in both English and the local language in order to translate correctly.

Three concepts kept surfacing during the interviews with the journalists: intra-group contribution, transfer pricing, and the arm’s length principle. We will not attempt to define these concepts here, but only briefly explain that the arm’s length principle is the “international consensus on transfer pricing, the valuation for tax purposes of cross-border transactions between associated enterprises” (OECS, 2010). The principle is used in contract law to arrange agreements when the parties have shared interests or are too closely related to be seen as independent. The Tax Justice

¹¹ Anonymous 1. Interviewed August 2018.

Network believes transfer pricing to be “the leading edge of what is wrong with international tax”.¹²

Transfer pricing happens whenever two companies that are part of the same multinational group trade with each other (...). Transfer pricing is not, in itself, illegal or necessarily abusive. What is illegal or abusive is transfer mispricing, also known as transfer pricing manipulation or abusive transfer pricing.

The Commission to the Council, the European Parliament and the European Economic and Social Committee explain ‘intra-group loss transfer’ and ‘intra-group contribution’ in the following way:

The term ‘intra-group loss transfer’ covers both ‘group relief’ and the ‘intra-group contribution’. Both of these system types allow a definitive transfer of income between companies in order to relieve losses against profits within a group. Under a ‘group relief’ system a loss from one group member can be transferred (or surrendered) to a profitable group member. Under an ‘intra-group contribution’ system, the profits from one group member can be transferred to a loss-making group member. (Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, 2006)

Concepts such as ‘intra-group contribution’, ‘transfer pricing’ and the ‘arm’s length principle’ are not easily accessible. They are connected to the increasing complexity of financial flows described above, and are needed to describe and understand financial mechanisms with huge consequences for profits as well as taxes and tax avoidance. As explained above, corporations, ownership and financial flows are growing increasingly both opaque and fragmented. Journalists wanting to investigate illicit financial flows will have to learn the language of global finance, law and accounting in order to analyze and describe leaks such as the Panama Papers and Paradise Papers.

Understanding concepts and language, understanding the difference between structure and substance, connecting the dots and avoiding

12 Quote attributed to Lee Sheppard, Tax Analysts, August 2012 on Tax Justice Network topics. <https://www.taxjustice.net/topics/corporate-tax/transfer-pricing/>

mistakes might be important, but will not in themselves lead to good or true stories on illicit financial flows. To tell stories of illicit financial flows journalists must be able to imagine the causes and consequences of financial flows, tax havens and so forth. As any storyteller will tell you, a good story needs to have something at stake (Rabiger, 2016). The storyteller needs to *imagine* the consequences of illicit financial flows.

The storytellers of *Aftenposten*, for example, envision how illicit financial flows cause corruption, undermine tax systems, drain local economies of resources, erode democracies, impede public access to hospitals and social services, make it possible for authoritarian leaders to amass wealth being invested in more or less private security forces and in the end destabilize democracies. These and similar ideas of what is at stake are informed by economic theories and theories drawn from the social sciences.

What can journalism education gain from these experiences?

Telling good stories requires some ability to understand and interpret theories of economics and other disciplines outside journalism. This would seem to be a strong argument in favor of the view that journalism education should build on expertise from the established disciplines of economics, social sciences, history, and so forth. As Newton has argued, knowledge-based journalism courses could well be taught by journalism educators along with courses taught by educators from other fields (e.g. business, economics, law, science).¹³ Some training in economics or business would, in the case of the Panama Papers, Paradise Papers and the like, have placed the investigative journalists in a stronger position to be able to make independent judgements, instead of relying too much on external experts. It is helpful to have some prior knowledge of concepts and theories.

However, there are limitations to what established disciplines like economics can teach investigative journalists. Surprisingly few economists

¹³ See Dunn.

conduct critical investigations into illicit financial flows.¹⁴ The majority of economists have traditionally been geared towards larger quantitative studies identifying patterns and structures, and building models.¹⁵ Therefore, the discipline of economics to a large extent depends on investigative journalists and whistleblowers to investigate illicit financial flows. We need not overestimate what the established disciplines can do for journalism education.

Another way of interpreting the experiences of these investigative journalists is to see these team-based investigations as a form of Problem-Based Learning (PBL). Problem-Based Learning is driven by challenging, open-ended problems with no one ‘right’ answer (David, 2014). Problem-Based Learning is becoming increasingly popular in higher education. It is a teaching method that employs real-world problems as vehicles “to promote student learning of concepts and principles, as opposed to direct presentation of facts and concepts”.¹⁶ The philosophy of PBL is that learning can be considered a “constructive, self-directed, collaborative and contextual” activity (Yew, 2016). Thus, students are asked to solve problems in collaborative settings, and develop skills for self-learning through practice and reflection.

As seen above, teams of journalists working on leaks such as the Panama Papers and other similar investigations have been involved in learning by solving problems as they arise. Sometimes problems have been solved by reading or searching online or by interviewing experts. In the Nordic countries, this has been the traditional model for journalists’ learning.

This method of learning has a number of benefits. Some studies indicate that students learn more and better when using PBL (Wood, 2008). For journalists in particular learning about society includes economics, the social sciences and similar topics. Doing journalism by solving practical problems could have the benefit of broadening the student’s horizons

14 Professor Kalle Moene, Interview 7.9.2018, and Professor Tina Søreide, interview 7.9.2018.

15 There are of course important exceptions to the rule, for instance Gabriel Zucman and Annette Alstadsæter.

16 The Center for Innovation in Teaching & Learning (CITL), Problem-Based Learning (PBL), [http://citl.illinois.edu/citl-101/teaching-learning/resources/teaching-strategies/problem-based-learning-\(pbl\)](http://citl.illinois.edu/citl-101/teaching-learning/resources/teaching-strategies/problem-based-learning-(pbl)) accessed 10.9.2019.

of knowledge in multiple relevant areas (Meadows, 1997). As Aghalaryan argues, journalists need to know how to learn many different things. However, as critics of PBL have argued, investigating to solve problems, finding new information and connecting the dots, will not necessarily lead to insight into the theories needed to imagine and understand the causes and consequences of a problem (Boud, 2013).

Education and interdisciplinarity

The experiences outlined above invite reflections on interdisciplinarity in journalism education. Interdisciplinary education uses and integrates methods and analytical frameworks from several academic disciplines to investigate a topic. Interdisciplinary learning works best if “professionals from different disciplines work together to serve a common purpose, and to help students make the connections between different disciplines or subject areas” (Appleby, 2018). The teams of journalists put in place in South Africa, Norway and elsewhere comprised journalists with knowledge of and experiences from different fields and disciplines. Furthermore, the teams were enhanced by drawing on experts from various disciplines. In the process, the journalists learned concepts and ideas from economics, law, auditing, accounting and other disciplines, even producing informal dictionaries in the process. These experiences resonate with existing literature on interdisciplinary research processes, and can be reflected in at least two different kinds of collaboration. A report from the Norwegian Research Council highlights the difficulties of doing truly interdisciplinary projects and outlines: “The key to success is a team of researchers each of whom possesses sufficient familiarity with the others’ disciplinary backgrounds” (Snodgrass, 2003). “The greatest challenge for a multidisciplinary team is to find a common language with which to frame the actual concepts and phenomena under investigation.” We have seen that the familiarity with the others’ backgrounds needed to find a common language is not always present. Sometimes journalists have had to leave the evaluation of information in the hands of experts from other disciplines. Outside experts have decided whether or not a piece of information is newsworthy or not, while journalists have focused on digging

up information and telling stories. In such cases, the research resembles more the definition of multidisciplinary research: “research in which several disciplines are used in parallel to elucidate comparable problems” (Norges forskningsråd, 2003).

In other cases, journalists have themselves had to become experts on issues, such as transfer pricing and the arm’s length principle in order to investigate corruption or illicit financial flows. In these cases, “the theory and/or methods of several sciences are integrated into the same study and analysis” and could be seen as models for developing real interdisciplinarity in journalism.

The debate on what journalism education should be, shows us that an almost unlimited number of interest groups and disciplines believe journalism education must dedicate more time to studying particular issues or epistemologies. It is of course impossible for journalism students to live up to all expectations. Concerning finance and economics, however, the journalists investigating illicit financial flows will encounter a particular set of challenges. The models and theories require more than a basic understanding of mathematics. These skills need to be developed gradually, step by step, and it takes years to reach the required level. Very few journalism programs offer in-depth courses in mathematics, statistics or even economics. Without such skills, it is difficult to tell good and true stories about the causes and consequences of corruption or illicit financial flows.

Conclusion

The purpose of this study has been to use the experiences of investigative journalists taking part in cross-border cooperation in order to reflect on journalism education. What can journalist educators learn from journalists around the world investigating illicit financial flows? The study is thus set within a broader debate about what journalism education is and should be. On the one hand, we find proponents of a model in which journalism education draws on experts from disciplines such as history, law, economics and social science to teach students a broad range of subjects taken from established disciplines. On the other hand, there is a

model where journalists learn mainly by doing journalism. We have here compared the last model to Problem-Based Learning (PBL).

For all the journalists interviewed here, their investigations have been learning processes. In particular, they have had to learn concepts, language, analytical frameworks and theories from economics, finance and accounting. Most fruitfully then, the study can be used to reflect on the possibility of integrating fields such as economics, finance and accounting into journalism education.

Influenced by studies of interdisciplinarity, we distinguish between (at least) three levels of interdisciplinarity depending on the depth of integration (Shiou, 2014): cross-disciplinarity happens when a team works in a parallel or sequential manner, from a disciplinary-specific basis to address a common problem; interdisciplinary research happens when a team works jointly but from a disciplinary-specific basis to address a common problem; trans-disciplinary research can be said to be when a team works jointly using a shared conceptual framework drawing upon disciplinary specific theories, concepts and approaches to address a common problem, and makes inquiries on the disciplinary integration of creativity.

More than revisiting the debate on practice and theory in journalism education, we wish to contribute to moving the debate forward by asking how journalism education can use critical self-reflection to prepare students for ongoing changes in society, the economy and technology. Moreover, could cross-border cooperation on investigations help journalism break the national mold?

Rather than providing clear-cut answers to these questions, the study has illuminated the challenges and paradoxes educators must consider when designing future curriculums for journalism education. First, considering the growing importance of Problem-Based Learning methods, the journalists interviewed here demonstrate the promise of teams learning together while investigating and solving problems as they arise. However, there are limitations to the usefulness of PBL when it comes to understanding economic or financial theories. It is doubtful that PBL will be a very effective method for learning the mathematics needed to understand economic theories. It would be helpful if journalism education

could include at least basic instruction in economics and finance. When journalists lack an understanding of the theories and concepts of economics and finance, they become dependent on outside experts to make judgments. To uphold the autonomy of journalism, journalists need deeper insight into the concepts, language, methodological frameworks, and theories of economics and finance.

However, there are also limitations to the usefulness of economics and finance for investigative journalists. Few economists conduct investigations of corruption or illicit financial flows of the type investigative journalists have done. Methodologies and analytical frameworks for the critical investigation of possible cases of corruption and illicit financial flows thus cannot merely be imported from other disciplines. In the investigations studied here, it was necessary to develop innovative conceptual frameworks drawing upon disciplinary specific theories, concepts and approaches to address a common problem.

Many journalism courses today emphasize storytelling as particularly important for journalism students. The journalists interviewed here use a variety of techniques from visualization to drawing and making informal dictionaries, in order to make complex information available to the audience. Nevertheless there are limits to what the focus on telling good stories can do. Without proper understanding of the theories underpinning economics and finance, it becomes impossible to imagine what the story is about, and what is at stake. Storytelling techniques will not help journalists tell the right stories if they are not supported by basic insights into theories.

Moving journalism education ahead from the debate on theory and practice means considering these and other limitations to existing disciplines and methodologies for teaching when designing education for journalists that combine critical self-reflection with the ambition to develop trans-disciplinary conceptual frameworks and approaches to investigative journalism.

So, finally, could cross-border cooperation help journalism break the national mold? So far, the evidence would suggest not. Even when journalists work in truly global networks investigating a problem of global reach, and the economic and financial theories and conceptual frameworks are

global, the vast majority of stories seek to bring the problem home by finding national angles. As we have seen here, this is probably not because journalists are blind to the importance of the global aspects of the stories they tell. However, political debates are still firmly placed within the confinement of states. When journalists tell stories that affect ongoing political processes, they spark public debate triggering more stories. When the stories are on international or global issues, however, they are more often about faceless systemic issues. Global capital tends to be faceless, abstract, like ‘an invisible hand’, almost like a natural law. When international stories do have a face, it is most likely the face of some far-away dictator or some distant celebrity. In both cases, there seems little the readers can do to fix the problems described in the articles.

Investigative journalism thrives when journalists can hold power to account. It remains to be seen if journalism or journalism education manages to break the national mold as long as most readers and viewers feel powerless, confronted with the hard realities of global capital.

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