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Committee on the Forfeiture of Assets in Criminal Offences of the Howard League of Penal Reform

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ABSTRACT

The profits of illicit drug trafficking have attracted world-wide attention. In 1980, a decision of the House of Lords in the United Kingdom ruled that the English criminal courts had no power to forfeit such profits even though earned by convicted defendants. This lacuna in the law aroused considerable criticism and the Howard League of Penal Reform established an independent committee to propose reforms. Its report will be published shortly. This article discusses some of the issues which the Committee faced, particularly the delicate balance between the interest of the State in ensuring that crime does not pay and a commitment to due process before financial punishments are imposed.

Introduction

"No-one shall profit by his own wrong" is a statement of principle with which few would quibble. As its alternative name, "unjust enrichment", indicates, it is a principle which underlies the law of restitution. But the law of restitution is a part of the civil, or non-criminal, branch of English law. It is invoked by victims as a means of redressing private wrongs. This is appropriate where the victim's loss matches the offender's gain, such as in ordinary cases of theft. It is less appropriate, however, and gives rise to some judicial squirming, in cases where the wrongdoer has made a profit which is considerably greater than the victim's loss. On the one hand, there is the urge to prevent the defendant from profiting by his own wrongdoing. On the other hand, there is the sense that the plaintiff is seeking an undeserved windfall benefit. English civil courts have faced the same dilemma when either money or property has been transferred under illegal contracts. The choice in this civil context is either to allow the transferees to keep their ill-gotten gains or to aid unmeritorious plaintiffs in recovering property with which they voluntarily parted and for which they received the expected remuneration. St. Thomas Aquinas, after agonizing over the same problem, decided that the solution to the dilemma was to deprive both parties of the

property, which should then be devoted to pious causes. If the use of drug proceeds for the saying of masses is unappealing in our secular society, their possible forfeiture to the State is a topic which has generated world-wide interest.

Decision of the House of Lords

In the United Kingdom, interest in forfeiture was provoked by a decision in 1980 of the House of Lords, the highest Court of Appeal in the country. The defendants were convicted of conspiracies to manufacture and sell large quantities of lysergic acid diethylamide (LSD). Some of the proceeds were discovered by the police. They had been paid into bank accounts, used to purchase land in the United Kingdom and other European countries, or invested in gold bars and placed in safety deposit boxes. The trial judge ordered that the entire property should be forfeited to the State. The House of Lords ruled that there was no legal authority to do this since the statute only gave the court the right to seize the drugs, their accoutrements (that is, stills and other paraphernalia for making the drugs) and, possibly, the actual cash handed over in exchange for the drugs. One reason which prompted this interpretation was that Parliament had clearly not provided for the host of wider problems which broader confiscatory powers would have entailed. There was no guidance in the statute concerning either the extent to which the purchase money could be traced into other proceeds or the rights of third parties.

This legal situation was unsatisfactory. It is true that instead of forfeiting the proceeds *in specie*, the trial judge could have imposed a fine equivalent to their value, for there is no upper limit on the amount of a fine which a Crown Court judge can impose. Non-payment of a fine, however, can, at most, lead to imprisonment for one year. For defendants receiving long sentences concurrently with a fine, this sanction was a wholly ineffective incentive to pay.

The Howard League of Penal Reform: establishment of an independent committee

The decision of the Court of Appeal disturbed the Howard League of Penal Reform. A research and pressure group for reform of sentencing and penal policy, the Howard League was worried that judges would impose longer prison sentences if they could not be sure that defendants would be effectively deprived of the proceeds of their offences. Consequently, it set up an independent committee to examine the problems associated with forfeiture and to consider the whole panoply of powers to make monetary and proprietary orders that were available to criminal courts. The committee

[1] consists of two High Court judges, a Queen's Counsel, a solicitor, an accountant, a senior police officer, a Member of Parliament and former probation officer, a professor of criminology and the author of this paper. It is not Government-sponsored, although a representative from the Home Office has attended its meetings.

Confiscatory powers

The committee has looked at models for confiscatory powers developed by such countries as Australia and the United States of America. In the United States, confiscatory powers have been linked with the fight against organized crime. The Racketeer Influenced and Corrupt Organization Statute [2], for instance, is equally concerned with purging legitimate businesses of illicit funds and confiscating the proceeds of offences from defendants. On occasion, these goals have conflicted with one another. Can the proceeds of racketeering be confiscated if they have been invested in illegal businesses? The courts have said yes. Can the proceeds of crime be confiscated if they have not been associated at all with other businesses? The hesitant answer has been no. The United States authorities have also had to consider the position of innocent third parties. An analysis has been made of the following three broad respects in which such persons could be involved: as a purchaser of the proceeds from the offender; as a person with a co-equal share in the property, such as a business partner or spouse; and as a person with a superior title, such as the owner of goods hired or stolen by the offender and then used in the course of the offence. The rights of innocent third parties depend in part on the theory behind confiscation. Does the State acquire the entire property in the goods including the interest of owners of stolen or hired goods, or only the interests of the defendants? Does confiscation take effect at the time of the wrongdoing, thus disabling subsequent purchasers from acquiring title, or only when the court order is made? United States law provides different answers, according to whether the confiscation follows a conviction (criminal forfeiture) or results from proceedings against the goods themselves. The latter is described as civil forfeiture, although its effects are transparently penal for those whose rights are lost.

Australian law is notable for the elaborate procedures set out in its customs legislation for the valuation of the profits of drug trafficking. A series of presumptions can be made, based on the increase in value of the defendant's total assets over the period that he is proved to have been engaged in illegal transactions. The onus is then placed on the defendant who must prove that he earned such money lawfully. In this respect, Australian law resembles the Hong Kong Bribery Ordinance which places a similar responsibility on government officials who appear to be living above their means.

Questions of procedure

Questions of procedure, such as the procedure in quantifying profits and procedures to ensure that profits are still available for confiscation after a trial, have assumed considerable importance in the discussions of the Committee. The English Court of Appeal recently ruled that the police could obtain an order from a civil court to freeze certain assets pending a criminal trial for fraud, at least if there were reasonable grounds for believing that such assets belonged to the victim of the offence. If the courts were to be given the power to confiscate the proceeds of drug offences, for example, should they also be empowered to freeze assets, accounts and even businesses, if persuaded that such proceeds might be confiscatable? Such power is a potentially much wider one and could seriously damage the financial position of a defendant who at this pre-trial stage is presumed to be innocent. In the English civil law, where such pre-trial freezing orders are regularly made, the plaintiff must undertake to pay compensation if his claim is not substantiated at the trial. The unwillingness of the Government to consider payment of compensation to acquitted defendants who have lost their liberty pending a trial suggests that this aspect of civil law precedent would not be readily followed. In addition to long-term financial consequences, pre-trial freezing orders may also reflect upon the innocence of the defendant, at least if the judge imposing the injunction has had to consider the weight of the evidence against the defendant. Courts in the United States of America are divided on whether the desirability of preserving assets which might be the subject of a post-conviction order should outweigh this risk.

Need for international co-operation

Without international co-operation, neither pre-trial measures nor post-conviction orders can be really effective against sophisticated defendants accused of large-scale racketeering. It verges on the platitudinous to say that international co-operation is essential for investigation, tracing proceeds and enforcing court orders. Despite a traditional and understandable reluctance to permit domestic courts to be used to enforce the penal sanctions of another sovereign State, extradition arrangements show that this tradition is not unyielding. In the LJD case, which led the Howard League to establish the Committee, some of the proceeds had been traced to Switzerland, where the cantonal government laid claim to them under the provisions of local law which provides for the forfeiture of property acquired in breach of Swiss criminal law or that of any other country. Canada has a similar provision.

A modern disciple of St. Thomas Aquinas might ask whether the nascent competition for illegal gains might not be quenched by finding some internationally acceptable "pious use" to which they could be devoted instead.

References

1. *The Profits of Crime*, Report of the Committee on Forfeiture of Assets in Criminal Offences (London, Heinemann Educational Books), forthcoming.
2. Racketeer Influenced and Corrupt Organization Statute, passed by the Congress of the United States under the Organized Crime Control Act (Washington, D. C., 1970).