

CONFISCATING THE PROCEEDS OF CRIME

Memorandum by the Commonwealth Secretariat and a paper prepared by
Mr. William Clifford, Director, Australian Institute of Criminology

In the paper which is attached, Mr. William Clifford, Director of the Australian Institute of Criminology, discusses the need to prevent an offender (especially the corporate or organised criminal) and his family, from enjoying the fruits of his crime. He suggests that it is one thing for crime to pay, but quite another for it to pay after it has been detected, and the offender prosecuted and sentenced. When this happened as it undoubtedly did in many Commonwealth jurisdictions, then the legal system fell into disrepute and the incentive to commit crime was increased even if a considerable risk of detention existed.

2. He accepts that it is difficult to separate the concept of the confiscation of stolen or illegally obtained property from the related and overlapping subjects of forfeiture, restitution and compensation, but suggests that there are lines of distinction. He recognises that once such property is confiscated problems arise of distinguishing between the conflicting claims of victims, but asserts that the need for the State to do all it can to dispossess the offender is clear.

3. Mr. Clifford then discusses informal and formal compensation systems and the new approach in some jurisdictions to restitution. While it was difficult to distill from the mass of statutory provisions in force relating to restitution, the precise sections which touched upon the confiscation of illegally obtained property, there was little doubt that it was provided for in a number of ways. Against this concern reflected in legislation, it was both striking and surprising that offenders were still so often able to benefit from their illegal activities.

4. Mr. Clifford reviews the international dimensions of the problem created by the transnational nature of much modern crime, and puts forward for consideration a range of options available both at domestic and international level that might be employed to help reduce the material advantages gained from crime. He concludes with suggestions for collective Commonwealth and international measures primarily designed for dealing with illegal enrichment from organised, corporate or drug related crime.

CONFISCATING THE PROCEEDS OF CRIME

by William Clifford, Director, Australian Institute of Criminology

Introduction

There is accumulating evidence that crime pays—and that it pays more now than it ever did in the past. This disturbing observation is supported by far more than the fabulous life styles of organised criminals, the amounts converted by corporate offenders, the corruption swelling foreign bank accounts, the increasingly grave risks which people are willing to take for the enormous profits to be made in the illegal drug traffic or the continuing media celebration of the Great Train Robber disporting himself on a Latin American beach. Much more significant are the declining rates of detection by the police, the fact that Interpol acknowledges its failure to trace more than a fraction of the drug smuggling; the knowledge that some of the larger corporations can continue to make huge illegal profits, even whilst protracting the proceedings against them; the vast disproportion between the value of property stolen and property recovered by the police¹; the extent to which funds illegally obtained are financing the take-over of legitimate enterprises; and, above all, the enormous burden of higher prices and increased taxation needed to make good the losses incurred by vandalism, shop lifting, stealing from work, medical or welfare frauds and, indeed, to make up for the widening spread of that youthful irresponsibility and unprincipled acquisitiveness which criminal justice services alone cannot be expected to prevent.

This report is concerned with only one aspect of the preventative measures required to deal with this parlous situation, namely the need to ensure that the ill-gotten gains of convicted offenders cannot be enjoyed by himself or his family either whilst he is under-going sentence or after his release. Clearly it is one thing for crime to pay, but quite another for it to pay *after* it has been detected and the offender prosecuted. If this does happen—as unquestionably it does in many parts of the Commonwealth at the present time—then the legal system falls into further disrepute and the incentive to commit crime is increased even though there may be a great risk of detection. Where fines are inadequate, they may become a form of licence to conduct an illicit trade. Where the amounts illegally obtained exceed by millions what the offender could possibly earn legitimately in a life-time, they are sometimes worth the imprisonment which can be awarded. In fact this paper is chiefly concerned not with the cases usually coming before the magistrates courts where the damage or loss is countable in a few hundred or a few thousand dollars: it is mainly concerned with the large scale operator who has accumulated huge

amounts—usually already invested in real estate, stocks, bonds and other businesses before his arrest.

Unfortunately English Common Law has been built upon the kind of principles which protect possession more than ownership and these are the very principles behind which such an offender can shelter his illegal proceeds once he is before the court.

There was a time when a person convicted of an offence automatically lost his legal rights. At common law, the person sentenced for a felony was in a state of attainder which signified the loss of his property². However, this automatic loss of property was mitigated over the years. With legislation similar to that of the the U.K. Forfeiture Act of 1870, the confiscation of a prisoner's property was brought to an end. But what exactly was the prisoner's property? If it consisted of only stolen property, he could still lose it by an order for restitution and/or he could be sued for it by the victim in a civil court. There was always the question of property identification and the victim might be disadvantaged by his property not being sufficiently labelled and identified. A clever offender could convey unlabelled property to a third party or spend the proceeds: as a man of straw he could be sued in vain by his victim. A third party who had bought in *marché ouverte* would challenge ownership: and as soon as wives could hold property separately they could be the third party themselves—whether or not the property was identifiable.

For centuries the victim lacked effective redress. Crime being a breach of the King's Peace, the convicted offender paid his fine to the Crown or served his sentence in H.M. Prisons. The victim had no claim on that fine or on the proceeds (if any) from the prisoner's labour. This is still the case, although for sixteen years or so there have been provisions in Commonwealth countries for victims of violence to be compensated from public funds, i.e. by the taxpayer rather than the offender. American and European countries have also followed this pattern for victims of violent offences. New Zealand has recently expanded this to economic loss or damage.

Needless to say, if over any period of time, the fine was overtaken by inflation, that is if wages and prices rose whilst the fines remained unchanged, then the penalty might be worth paying if the illegal proceeds were substantial. Since there was also the possibility of not being caught at all, the inducements were enhanced. Much the same could be said about the length of imprisonment, though here the proceeds would have to be attractive indeed to justify the risk of a prison sentence. For many people they were: and the whole issue has been greatly affected by the rapid

¹ E.g. see Norman Fowler M.P. *The Cost of Crime*, London: Conservative Political Centre which quotes Metropolitan police figures for 1971 showing only one eighth of property recovered—and less if thefts of motor vehicles be excluded. Also quoted is the *Security Gazette* showing that in 1971 in the U.K. generally property and money totalling £74 million stolen but only £14 million ever recovered.

² It was this provision which gave Henry VIII the opportunity to make homosexuality a capital offence, accuse the abbots of those powerful monasteries likely to oppose him of this offence and so confiscate their land and property for redistribution to his supporters.

urbanisation of recent years. At one time, the offender would find it difficult to dispense his ill-gotten gains in a community aware of his circumstances and likely to be curious about his affluence. Nowadays, in the anonymity of the towns, to turn a corner is to become a stranger, so that it is the mere possession (i.e. not the source) of wealth which brings prestige. In a big city wealthy people are taken for granted. No-one is inclined to ask questions if the spender is generous.

Confiscation and related measures

Unfortunately the separating of the offender from his illegally obtained property is mixed with a variety of other issues both public and private attaching to the questions of restitution and compensation. Usually the situation cannot be restored to what it was before the crime and the offender is to be punished anyway. If the damage or loss was small it is possible to obtain recompense but where the loss was great it may be unrealistic to expect some offenders to pay. That is why the state has intervened with compensation to some victims. But this would be a grossly unjust way of dealing with the enormous proceeds of organised or corporate crime. There could be no question of the general public having to make payments to victims whilst the offender kept his loot hidden to be enjoyed later.

It is difficult to separate the confiscation of stolen or illegally obtained property from the related and overlapping subjects of forfeiture, restitution and compensation. Yet there are lines of distinction. Forfeiture generally has been historically wider than the confiscation only of those goods illegally obtained³. All the offender's property was taken. Moreover, forfeiture alone could be unjust if it merely enriched the state and ignored the claims of the victims of the crime. Restitution could mean that the illegally obtained property would be restored or its value abstracted for the benefit of the victims: but restitution does not necessarily mean the confiscation of the property stolen or wrongfully obtained and a restitution order could go too far for effective implementation or not so far enough if it is hoped to recover the property illegally obtained. If in the hands of a third person, then it is really a question of the extent of compensation for the wrong—a related but rather different question to the confiscation issue.

Sometimes, in legal terminology, the term "restitution" is a synonym for the word "confiscation" as used in this paper. Then "compensation" means payments made to the victim by the state and often the word "damages" is borrowed from civil law to indicate payments by the offender to the victim other than the return of the specific property taken or illegally obtained.

³ N.B. Since the older concept of forfeiture as extending to any or all property held by a felon has been abolished by Statutes in many parts of the Commonwealth, the word "forfeiture" has frequently been used to refer only to the required surrender of property illegally obtained. Defined in this way it is similar to "confiscation" as discussed here.

Basic to these related concepts is the comment made by the Law Reform Commission of Canada in 1974—

"Doesn't it seem to be a rejection of commonsense that a convicted offender is rarely made to pay for the damage he has done? Isn't it surprising that the victim generally gets nothing for his loss".⁴

This has become an issue with emotional and political overtones in some countries where efforts are sometimes being made to specifically legislate for victims' interests to take precedence over the offenders'.⁵ Focusing only on the victim's interests, however, can be just as odd as thinking only of the offender's interests. Where, for example, the victim is a huge corporation or a bank and the offender was in provable need at the time of the offence, it would be unjust to prosecute these victim's interests as necessarily prior to those of this type of offender. Yet when this situation is reversed and a corporation has been guilty of dispossessing or damaging thousands of wage earners and even pensioners, the indiscriminating support of these victims seems both logical and just. But discrimination might be necessary where a fraudulent company deliberately raises credit and then goes bankrupt. Consumers defrauded should not get less consideration than the firms that have extended credit. There exists on the one hand the need to protect the general public as well as business associates. On the other hand firms extending credit in good faith can become so easily victimised that the business confidence on which the economy depends may be eroded. All such factors are relevant. And to be just to all with a claim, the extent of insurance for loss has to be taken into account.

Actually the whole issue of the extent to which victims of property crimes should be compensated is raised in a working paper of the Canadian Law Reform Commission. Whilst the Commission favours compensation for victims of personal assault it is opposed to claims for property losses. It points out that property crimes are the most numerous and that such an enormous extension of claims would be publicly onerous—the loss from property offences in Canada (excluding auto-theft) being in the region of \$96 million. If offences against corporations and cases where the offender could make restitution are excluded it would still have a bill for \$40 million dollars for the taxpayer. Moreover there would be scope for fraudulently inflated claims, the reporting of offences would be double or treble what it is now because of the hope of compensation and the reality of all such claims of loss would be difficult for the police to cope with. For such reasons the Commission opposed compensation for property losses. It

⁴ Law Reform Commission of Canada "Restitution and Compensation" Working Paper No. 5: 1974.

⁵ Cf. The U.K. National Victims' Association founded in 1972. Also the White Cross Society for promoting victims' interests in Germany and the organisation for Victims Aid in the U.S., Europe, Canada and Australia which include and sometimes grow out of Rape Centres. See the Bill introduced in 1977 in Illinois giving priority to victims interests—described below.

qualified this however by saying that property crimes such as breaking and entering (and presumably robbery) should be regarded as crimes of violence.⁶

There is no doubt that this argument can be distinguished from the objective of this paper which is to deal with the need to prevent the offender—especially the corporate or organised criminal, from enjoying his crime. Doubtless once such property had been confiscated by the state there might well be problems of distinguishing between the conflicting claims of victims, but the need for the state to do whatever is necessary to dispossess the offender would seem to be clear.

Informal compensation

Where victims have not been compensated, it has not always meant that the legal provisions for restitution were not in the statutes: but simply that these provisions were not working effectively to right the wrong. Yet there are countries in which, at an informal level, or in relation to minor offences, the principle of restitution works very well. In some of the Commonwealth countries, customary courts, religious courts, or local informal tribunals are still used to settle disputes and deal with minor crime. In such courts or at such hearings the offender may be required to compensate his victim. In some situations, this type of remedy may amount to a kind of diversionary procedure to relieve the formal courts of unnecessary litigation. Sometimes only the failure to pay compensation leads to formal proceedings: conversely, if compensation is paid, it cancels the risk of a formal prosecution in the higher courts. There are even situations in which the compensation to be paid may be exemplary or punitive—with the intention of discouraging others who might be tempted.

In this same connection it should be borne in mind that many of the Civil Law countries give wide discretion to a cadre of public prosecutors to sift the cases brought by the police and to settle to the satisfaction of the victim and the public, in so far as possible, any cases which need not, in their opinion take up the time of the courts. These interviews with the prosecutor amount to settlement hearings: and satisfying the victim and the public frequently involves the offender making good the damage he has done. In Japan he probably has to write out an apology too!

A distinction has to be drawn between the reconciliation of offender and victim which may have little to do with the concept of crime and the punishment of an act or omission prohibited by the community. Restitution or compensation may not satisfy the public outrage aroused by a crime. Conversely, as already shown, the punishment of a crime may not satisfy the victim. Often these have been treated as quite separate issues not necessarily related: but where a crime has been committed, they are closely related. Even where informal procedures are available for settling matters out of court wherever

possible, the shadow of the court hovers to persuade the offender to pay. Though such informal procedures are now often advocated and are generally favoured, there have been periods of legal history when the negotiations for settlement would have been regarded as collusion. They would have been prohibited as amounting to the compounding of a felony. No private arrangement could be made with the offender not to lay information to the authorities. It is but a very short step from this to a recognised procedure for settling the disputes which could have arisen from crime.

Formal Compensation

Modern movements to help victims have generally followed the pattern of compensation by the state—usually on the grounds that there are practical difficulties about getting money out of the offender and that anyway the state must accept some responsibility for allowing the offence to take place at all. Thus the U.K. government decided upon a pattern of common law damages for victims of crimes of violence rather than an Industrial Injuries scheme. New Zealand's Criminal Injuries Compensation Act of 1963 had provision for the amounts paid in compensation by the State to be recovered from the offender but this has not proved very practicably. Yet New Zealand has allowed compensation to be claimed by the victim from the state for economic as well as personal injury.

The confiscation of the specific property obtained by crime is slightly different from compensation in that the property sought is that which is the subject of the crime. Making good the damage can go further or not so far. With the restitution of the specific property taken or damaged all victims may be treated equally, whether they be individuals deserving of sympathy or large corporations or even governments. Compensation going beyond the precise property taken or damaged is different, of course, since, as already indicated, this changes in perspective when the victim is a public or private authority covered by insurance or already compensated by the on-costing which is a normal business procedure anyway.

Confiscation not usually distinguished

In the scholarly literature reviewed for this paper, it was interesting to see that hardly any material was available on the specific question of the confiscation of illegally acquired property. This is remarkable because—it is a provision common to a great many legal systems.⁷ Moreover it is a subject not merely of ancient concern but touched upon by some famous writers of earlier ages in this field. For example Herbert Spencer suggested that prison work and the prisoners income should be the means of making restitution. He thought that the offender should be held in prison until the damage was repaired. Raffaele Garofalo (1852-1934), one of the pioneers of criminology, thought that the property of a solvent offender should be confiscated and restitution

6 "Community Participation in Sentencing", Law Reform Commission of Canada: 1976 Minister of Supply and Services, Canada: Working Papers—Compensation. pp. 17-23.

7 Cf. S.4 of U.K. Forfeiture Act 1870 as affected by Criminal Law Act 1967. S.8 of Criminal Damage Act 1971 and S.1 of Criminal Justice Act 1921.

made from this. If an offender was insolvent he should become a state workman.⁸

It is also interesting to see that where anything had been written on the confiscation of such property, it was mixed up with the subjects of compensation or restitution which as already shown are at once wider and yet narrower. No less significant is the fact that the literature which deals with restitution (with or without compensation) deals with it as either—

- a a retributive tool designed to balance the scales— as a means of justice by making sure that what was lost is regained, or an equal amount restored;
- b as a therapeutic instrument helping the offender to become re-integrated into the community—or perhaps as a means of restoring the harmony between the offender and victim which the offence had broken to the detriment of the community.

In other words, however viewed, the studies of restitution had in focus the individual offender committing the conventional crimes. The unconventional offender and the special situation he creates had apparently been given little attention. This rather casual interest in the organised or corporate offender hiding his untold loot is not easy to understand, since there are the celebrated examples of racketeers in the United States being imprisoned before the Second World War, not for their more serious crimes, but for serious tax evasions. The effort was made to get at them through the profits made on bootlegged liquor and other forms of organised crime. It might also have been expected that as a facet of the surging interest in corporate, company and white collar crime, the subject of confiscation would have attracted rather more attention than it has so far.

Restitution—a new approach

On restitution itself, a whole new library has developed as countries have turned back to this traditional way of dealing with the crime that modern criminal justice systems seem incapable of controlling. The U.S.A. held its first National Symposium on Restitution in 1975 and a second one in 1977. The U.S. Law Enforcement Assistance Administration has given massive financial support to a variety of different restitution programmes in the States of California, Colorado, Connecticut, Maine, Georgia, and Oregon. Forty formal restitution projects were traced by the Minnesota Department of Corrections three years ago and there are probably many more now. These take various legal and administrative forms.

In California restitution is required as a condition of probation and a special Release and Restitution Board is created which runs special work centres to which prisoners can be released on parole if they negotiate with victims the amounts to be paid off by their work. It should perhaps be noted that negotiations for the payments to be made to victims may have the services of a mediator, so that the amount the offender actually works to pay, though it cannot be more than the stated loss, may well be less.

Illinois had a 1977 Bill before the State Congress formulating as public policy the principle that a higher priority will be given to restitution and the restoration of the victim than to rehabilitation of the offender. Georgia has Adjustment and Restitution Centres in seven or more cities, where again offenders on probation work off the restitution.⁹ In many cases in the U.S., restitution centres are run by the probation and parole systems.

Curiously enough, in the light of such federally aided special hostel or workshop projects outside the prisons, the 1978 study of their spread across the U.S.A. observed that it had not been able to find a single prison where the inmates were making restitution to victims from their earnings.¹⁰ The sugar of early release had, therefore, been needed to sweeten the pill of working for the victim.

Between 1962 and 1963 the U.S. Department of Health funded a study by an associate professor of Sociology at the University of Ohio. 819 persons convicted of murder, assault or violent theft who were received by Florida Correctional institutions were surveyed. In none of the cases had restitutions or compensation been made by the offender. In only 88 cases was a positive or negative attitude to restitution detected. It appeared that the overwhelming majority of those committing murder did wish to make some kind of reparation. Those convicted of aggravated assault were much less inclined to help the victim. A large proportion regarded their debt as being only to the state. The robbers and burglars were only about 50 per cent in favour of recognising an obligation to the victim.¹¹

Perhaps the very fact that restitution does not recommend itself to such considerable numbers of offenders, that they are so often prepared to be indifferent to their victims is sufficient to recommend a policy of aid to the victims by the offender to those who are responsible for determining penalties.

In 1974 the U.K. Home Office Research Unit in cooperation with Chief Constables and Justices clerks conducted a national survey on the use of compensation orders in magistrates courts.¹² This did not separate out the extent to which property illegally obtained was specified by the compensation orders but the property which was the subject of the charge would obviously have been of immediate concern—as would be damage caused by the offender.

This showed that, excluding those property offences which did not result in loss or damage there was a significant difference between the 90 per cent of persons convicted of criminal damages who were ordered to pay compensation and the 60 per cent of

8 R. Garofalo "Criminology", 1914.

9 Steve Chesney, Joe Hudson and John McLagen "A New Look at Restitution: Recent Legislation Programs and Research".

10 Ibid p. 354.

11 Stephen Schafer "Restitution to Victims of Crime—An Old Correctional Aim Modernised", *Minnesota Law Review*: 1965: Vol. 50: DEC pp. 250-251.

12 See P. Softley "Compensation Orders in Magistrates' Courts" Home Office Research Study No. 43: H.M.S.O.: 1978.

those convicted of burglary, theft and obtaining by deception who were ordered to pay compensation. The study speculated that maybe the property stolen had often been recovered or that magistrates were reluctant to order compensation where they had also imprisoned but this is unknown and it is certainly odd that up to 40 per cent of persons guilty of dishonesty escaped compensation orders. Only 9 per cent of the persons convicted of wounding or assault were ordered to compensate.

The Howard League for Penal Reform in England has drawn attention to the fact that in 1974/5 the Criminal Injuries Compensation Board paid out about £5 million to only 12,500 applicants though in 1974 there were 77,250 violent crimes known to the police. Even allowing for the victims ineligible to aid this still seemed to the League to be "disquietingly small".¹³

The study suggested that the unemployed were less likely to be asked to pay compensation than the employed—except where they had caused damage. The amounts of compensation ordered were small (over 60 per cent no more than £25 and 90 per cent less than £100) yet 25 per cent of the orders had not been paid in a period of 18 months from the time of the order and only 8 per cent of those ordered to pay were committed to prison in default. Of this 8 per cent, nearly a half were already serving prison sentences and the study confirms the U.S. study of prisoners attitudes already quoted above in that there was a correlation between the length of the criminal record and the extent of non-payment¹⁴ offenders over 21 were less likely to have paid than those under 21 and urban dwellers had a higher record of non-payment.

The greater problem is of course the offender who had made a large amount out of his crime and whose case would be heard in the higher courts. No similar survey has been made of the position in such cases but experience indicates that authorities have been relatively unsuccessful in helping victims by laying hands on such ill-gotten gains.

Apposite to this discussion are Articles 110-111 of the 1938 *Código de Defensa Social* of Cuba. At that time in that country every offence created a civil obligation and the court hearing the criminal charge had the responsibility for determining to whom the civil responsibility was owed and the amount. In every case the civil responsibility included

1. *restitutio in integrum*
2. reparation of the material damage
3. reparation of the moral damage
4. indemnification for all expenses and losses

The moral responsibility could include a public apology to the victim, an obligatory marriage of the offender to the injured party in appropriate circumstances (or a suitable financial compensation to

avoid the marriage), recognition of any children born (e.g. as a result of rape) except where this conflicted with a husband's rights, compensation by providing a dowry for a woman whose matrimonial prospects had been reduced by the offence etc.¹⁵

Also a third party deriving benefit from the offence could become civilly liable where he could not be charged with a crime. And an Indemnity Fund was established into which all the earnings from the prisoners compulsory labour was paid. This Indemnity Fund carried as a first charge the compensation of victims: the balance met other charges and anything left could go to the prisoner himself or his family.¹⁶

Gratifying as this older Cuban law might be to the most single minded of victim-interest campaigners because of its emphasis on making the offender repay—and suitable as it is for exacting full accountability from those organised or corporate offenders who have victimised ordinary people, it has problems attached: it will be apparent that when it is applied to property crimes where the victim is rich and the offender poor the law itself seems to be squeezing the last ounce from an already deprived minority. Sometimes therefore it is not so much the justice of the legislation but the justice of its administration which is important.

Confiscation in law

As part of the preparation for this paper the Australian Federal Department of the Attorney-General was asked to make a computer search for legal provisions dealing with the possible confiscation of illegally obtained property. For reasons already given the word "confiscation" was not coded and the nearest key word was "restitution". The computer read-out for "restitution" provided a list of no less than 150 statutes enacted by the Commonwealth Government alone in which clauses had been inserted to allow for some form of restitution.¹⁷ This did not include of course the separate and no less voluminous legislation existing for each of the different States of Australia: if these had also been surveyed it might well be conservatively imagined that 800 or more Australian statutes might have been discovered with relevant provisions. Of course it is only possible to say that a proportion of this total would be dealing specifically with the confiscation of illegally obtained property—or with an obligation for its value to be paid to the state or the victim.

The range of subjects covered by the statutes providing for restitution (in the computer read-out) was vast and varied from the Australian Antarctic Territory Act to the Crimes Act; from the Income Tax Assessment Act to the Social Services Act; and from the Life Insurance Act to the Fisheries Act, the list extended.

¹³ The Howard League for Penal Reform "Making Amends" A Discussion Paper, Chichester Sussex: Barry Rose (Publishers) Ltd: 1977. p. 18.

¹⁴ P. Softley. H.M.S.O. op. cit.

¹⁵ Stephen Schafer *Compensation and Restitution to Victims of Crime*, Montclair, New Jersey: Patterson Smith: 1970 p. 66 and segg.

¹⁶ Ibid.

¹⁷ Excluding Interpretations Acts.

There would seem little reason to suppose that the subject of restitution is less well covered by the laws of other Commonwealth countries. There are probably thousands of legal enactments to provide for restitution. This being so there can be no complaint that restitution has not received adequate *legal* attention. And although it is difficult to distill from all this the precise sections touching upon the confiscation of illegally obtained property there is little doubt that it is provided for in a variety of ways.

Against this substantial background of legal concern the evidence that offenders are so often able to benefit from their illegal activities is both striking and surprising. If there is any conclusion to be drawn it is surely that legislation still does not cover the need, that the law is not working in practice, that the courts cannot adequately implement the intentions of legislators—or perhaps that the legislation is too loosely drafted or deficient in the enforcement procedures available for making the confiscation of wrongfully obtained property an inevitable and automatic consequence of arrest and conviction.

In India the civil nature of the victims remedies used to be indicated by the provision that where an offence was both a crime and a tort only civil courts could entertain suits for damages. Pakistani courts had power to pay prosecution expenses or award compensation out of fines but this was not much used.

Perhaps, needless to say, the situation is far more complicated and less effective when it becomes international. The transnational nature of much modern crime reduces the efficiency of purely national laws. Proceeds of crime can be placed beyond the reach of the authorities which convict the offender. Mobile offenders operate within and between countries. They can be careful to avoid being caught with the goods on them. They may pay for offences to be committed by the nationals of another country to whom payment can be made in foreign banks. One offender employed by foreign organised criminals, who also operated casino's, used to take a holiday abroad every year. He would play the casinos and he always won—making it impossible for the winnings to be identified as proceeds of crime. This international aspect is developed further below.

The real issue in cases of drugs or corporate crime or extensive corruption is however the possibility of the courts or the authorities being able to confiscate the property which is in the possession of the offender in the sense that it is within his control but which is not amenable to the usual provisions of the law.

The possibilities

It may be presumed that the subject of confiscation of illegally obtained property turns on the fact that the body of the offender is at the disposal of the court, subject of course to his inalienable human rights. He has been convicted of an offence. He still holds the proceeds of the offence, his only right to such property being his possession of it at the time he

is before the court. Such possession may be difficult to substantiate legally but for the purposes of this part of the paper it may be assumed that, whoever may claim legal ownership or possession, the goods are effectively within the control of the offender and difficult for the courts to reach.

(a) Contempt of Court

If both the goods and the offender are within the same national borders it is legally possible for the offender to be held in custody *until* the goods have been surrendered. In this connection it is apposite that the fine as it is known today really began as a way by which the offender could buy himself out of custody. As long as the offender is held, he cannot enjoy the benefit of his crime: and even if he is happy to sacrifice himself whilst his family or friends enjoy the proceeds there is a human limit to this self sacrifice as the years go by.

To effect this the device of contempt of court could be employed. If the goods in question were not placed at the disposal of the court when the hearings began the accused could be committed for contempt. Obviously if the goods proved to have been innocently obtained and the accused is eventually acquitted, the control of the goods in question could be returned to him. Whilst the court has control of the property in question it should be possible for any necessary interim obligations to be met from the assets e.g. payments of rent, mortgages, school fees etc.

Since guilt is not yet established this is a necessary provision and where such funds or property are large the services of the public trustee could be used to administer estates during periods of trial. Any reduction in the value of illegally obtained property occasioned by this payment of on going expenses during the court hearing could be recovered as compensation or restitution by court order when the accused has been guilty.

Four difficulties arise with this procedure. The first appertains to the identification of the property concerned. There will always be difficulty drawing precise lines of distinction between property which is suspected of having been illegally obtained and that which is unquestionably legitimate. This is a familiar problem in law however and each legislature will have its own way of drawing the lines necessary. Secondly, the retention in custody could be regarded as unjust especially if it dragged on for months or years. Moreover there could be defiant persons accused who would go on hunger strikes or, using wealth outside, organise petitions for protection against an unyielding court. The media would be attracted by the conflict of wills. These are problems which already attach to the use of custody for contempt of court: and their resolution in the circumstances of possible illegally obtained property would be dictated partly by the importance of the case and partly by the value of the property in question.

Thirdly there would always be a need to avoid the injustice of rich persons being able to produce an amount equivalent to the property in question and

the poorer person unable to produce an amount equal to funds taken and spent.

Finally the length of the incarceration could be a problem if it dragged on interminably. The time an accused is held in custody for not surrendering his property could extend beyond the limits of any sentence of imprisonment provided by law for the offence of which he is accused. This could be a matter left to the discretion of the courts. After all the obduracy of an accused could be an indication of his inability to protect the property once it comes under the control of the court: it may be an indication of the weakness of his case so that in custody he is merely serving time he would be likely to serve alongside the loss of the property he is now protecting. When the period in custody goes on for longer than any sentence provided the courts could weigh the interests of the accused against those of the victims of the alleged offence—and make a decision accordingly i.e. to continue the custody or to regard the period already held in custody as purging the contempt and making it reasonable to proceed with the case even though the property was not produced. There would still be other remedies if the accused is found guilty as shown below.

(b) *Restitution*

As shown remedies involving restitution already exist but they are difficult to enforce. Extension of sentence or denial of parole could be ways of persuading the offender to meet the restitution requirements. Sentences could be extended conditionally upon restitution not being paid where the illegally obtained resources are known to exist: or contempt of court orders could apply after a sentence has been served where the restitution has not been made though the means are known to be available.

But once the property to be restored has been identified it should be possible to legalise a seizure by the police if necessary for restoration to its rightful owner(s). Where this cannot be done it is generally because the property concerned has been conveyed to a third person—either by open sale or by simply putting the property or account in the name of another person.

Of course, there will be occasions in which such a third person might become liable to a charge of criminally receiving i.e. if he or she can be shown to have known that the property received was stolen or illegally obtained: this could well apply to a spouse or relative who might have been just holding the property for the offender. Yet, even with such criminal proceedings against third parties, the actual property is not always recovered. Where this is because a purchaser bought the property in good faith there are familiar and quite reasonable civil procedures for determining ownership: but these are never satisfactory unless the offender can be obliged to compensate the party which fails in such an action. After all it is his action which creates the dispute as to ownership: it is his action which generated the double claim: fairness would seem to require that he should be responsible for making good the loss he has sustained.

Whether the offender can work to provide this kind of compensation is now the concern of the restitution schemes already discussed above. One way to oblige an offender to pay off the compensation awarded could be by community work orders. Here if earnings cannot be collected to pay off the debt both spare time and labour can be invested by the offender in paying off his obligation. It would also keep him out of prison where this is advisable. A variation of this could be work outside whilst on a probation order. But when prison is unavoidable as a sentence logic as well as justice would seem to require that labour *inside* the prisons could be tied to this kind of compensation. Indeed the lengths of sentences could be reasonably adjusted to the time required to work off the compensation necessary. This is not quite as easy as it seems because if carried too far it elevates compensation to the central position in sentencing. This would not always work. For example a person sentenced for planting a bomb which did not explode in a public place, would, on a criterion of compensation alone, expect to receive a very light sentence. He would have caused little damage if any. On the other hand a corporate offender (who did not still have his ill gotten wealth) could be sentenced to work for the rest of his life and would still not be able to earn enough to compensate his victims. For such reasons compensation, whilst important, cannot be the sole criterion for determining the length of sentences. There is no reason however why it could not be given more attention than it has received to date.

Where an order for restitution or compensation has been made against an offender it should be possible for it to be registered for enforcement in other states so that an offender cannot easily avoid it by crossing borders. Similar provisions already exist within Commonwealth legislation¹⁸ but the net could be drawn closer by an extension of such legislation to countries where it does not currently apply. Sometimes restitution or compensation orders in criminal cases have not been included in provisions for the inter-state enforcement of civil judgments.

Lord Hailsham the Lord Chancellor, speaking to the U.K. Magistrates Association at Blenheim in 1979 said

“Incidentally I wonder whether enough attention is being paid to your powers to make appropriate and realistic orders for civil compensation . . . of course in all these cases of financial orders there is the problem of enforcement. I wonder whether Benches cannot make a fuller study of the methods of enforcement open to them”.

The Queensland Criminal Code contains various general provisions for the making of restitution orders. But until Section 685 A was inserted in the Criminal Code in 1977 (providing that restitution must be ordered within a limited time and the penalty for non-payment within that limited time is imprisonment) there was no power of restitution given to judges in criminal cases. Occasionally, but with

18 E.G. Cyprus: Maintenance Orders (Facilities for Enforcement) Law (Cap. 16).

doubtful legality, restitution was made a condition of a probation order.

Where the property from which restitution is expected to be paid is immobile it could be obligatorily mortgaged to the state. The deeds could be held or marked in such a way that it would not be possible for it to be alienated or otherwise mortgaged except by the state. Immobile property could be publicised in such a way that dealings in it would be difficult. Earnings could become subject to a penalty tax which could also be used to compensate victims. The movements of those having control of such property could be restricted by the state until the court was satisfied that they were not likely to dispose of property. Publicity given to such cases would make it more difficult for people to deal with such persons without knowledge that the goods were suspect i.e. without becoming liable to such charges as receiving or unlawful detention.

In the cases where the restitution has not been paid off though a sentence has been served it seems possible that there could be much more use made of the legal garnishing of monthly or weekly earnings. Rights to pensions or holidays could be postponed to the prior claims of victims in serious cases.

Where corporate offenders have bank accounts within reach of the authorities it should be possible to freeze accounts until restitution has been made or promised. The accounts could be unfrozen only to the amount required to be paid to victims—then completely unfrozen when the amount has actually been paid.

In general providing both offender and property are within the borders of one country there are possibilities of ensuring that the offender cannot enjoy the proceeds of his crime. Some of the remedies may be administrative rather than legal. There was a time in Cyprus for instance when an application for a passport was always referred to the Department of Social Welfare to ensure that wives and children—or other dependants were not being left a charge on the state. A passport could not be issued if the social welfare department was not satisfied that it would not soon be called upon to support dependants. A similar control of the movement of prisoners failing to pay required compensation or restitution would in effect limit the extent of use of illegally obtained property.

In some Commonwealth countries where anti-corruption agencies have been established, these organisations have been empowered to require suspected persons to account for assets which appear to be in excess of anything legitimately earned. The burden of proof is in such cases laid upon the accused. Similarly, it should be possible when trying to ensure that the culprit does not enjoy his illegal profits to require him to account for property held; this could be extended to relatives or associates suspected of holding property for him. To extend this, there are various ways of making sure that property other than liquid assets cannot be traded or used to generate further profit.

One of the problems of such controls has always been the extra work which the following up of such orders made for the police; but, as shown, if handled in a wider perspective the resources of probation, welfare, taxation, and other departments could be used. It may be expected that as the controls over property extend the offenders with the most illegally obtained property and therefore with the means to protect it legally will have the best advice on making representations or appeals. Such work could be entrusted to existing administrative tribunals or else a special court for dealing with cases of compensation, restitution and/or confiscation—and the orders restricting the movement or the trading connected with these.

International complications

With modern extensions of corporate crime and the drug traffic, it can no longer be expected that the illegally obtained property will always be within the borders of the country within which the suspect is arrested. Numbered bank accounts in foreign countries are now famous. It is frequently suggested that by some secret agreement with Switzerland the United States have found a way of tracing off-shore placings of profits by the organised criminal groups in the United States, but there is no confirmation of what may only be a rumour. Politics make it likely that long before a break-through is obtained on an exchange of information on the placing of profits from crime there will have to be first an exchange of information on national resources transferred abroad by the leaders of regimes that have been overthrown! It has to be acknowledged therefore that facilities are available to most of the larger operators in organised or corporate crime to transfer wrongfully obtained assets out of the jurisdiction of Commonwealth courts.

Extradition proceedings are usually available to recover the fugitive offender and the indications are that the 1966 Commonwealth Scheme for the Rendition of Fugitive Offenders is working reasonably well¹⁹. There have been additions to the number of returnable offences over the years—some of these being included as a consequence of international agreements²⁰. Professor Shearer suggests that the list of returnable offences in the Commonwealth Scheme could be improved with a generic item for all offences established under international conventions to which the requesting and requested parts of the Commonwealth are partners.

Yet there are still problems with extradition in the Commonwealth and even more when it is brought into a general international perspective. There are some serious offences not included, political issues intrude

¹⁹ See paper prepared for Barbados Conference of Commonwealth Law Ministers by Professor I.A. Shearer on this subject.

²⁰ E.G. Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1973.

and the procedures are often protracted and uncertain. Above all there are no extradition agreements at all between some countries—sometimes even when these are neighbouring countries. Much more problematic is the return of expatriated illegally obtained property. Therefore, when there are to be amendments to the Commonwealth Scheme on Fugitive Offenders it may be as well to consider the generalisation of the provisions of the Australian Extradition (Commonwealth Countries) Act of 1966 which allow the Attorney General to direct that any property considered to be proceeds of the crime or “articles associated with it” should be surrendered with the fugitive. If such provisions could also become part of extradition agreements with non-Commonwealth countries the net could be tightened—at least as regards property seized with the offender.

Significant here would be the interpretation of the words “found to be in possession of the proceeds of his extradition crime or articles associated with it”. Does this extend to funds held in banks, deeds of ownership of immovable property, the possession of stocks and bonds? As far as can be ascertained the precise boundaries have not yet been fully interpreted. If construed only to relate to property on the person of the offender when arrested this may not go far enough. If more widely interpreted this provision could be very valuable indeed as a way in which Commonwealth countries could follow the loot: and if, as suggested it became part of most extradition agreements it would greatly narrow the scope for evasion now available to offenders who are getting their illegal gains out of their own countries.

Other measures will be required however, some of them already discussed at the national level. If courts have a power within their own countries to freeze accounts, garnish earnings, hold in contempt or extend sentences until the illegal profits are disgorged such powers could be extended to improve the ways of dealing with extradition cases.

Success achieved by Commonwealth countries in tightening the net will drive future offenders to other countries both for their own protection and the protection of their illegal property. Therefore there is an ultimate need for United Nations conventions. These take time but the success of Commonwealth countries will make it possible eventually to extend the controls to other regional organisations e.g. Organisation of Africa Unity, Council of Europe, and the groupings of Asia and Pacific States. As these too prove the controls valuable, the prospect of a more exclusive U.N. convention will be enhanced.

Collective rather than individual measures

One of the problems encountered by governments attempting to deal with organised or corporate crime is that the legal systems have generally been devised to deal with specific offences committed by specific persons. This by definition has made it almost impossible for criminal justice systems to cope with the situation presented by organisations which can continue to operate despite charges brought against individual members. Corporations, whether legitimate or of organised criminals, have a life beyond that of any of their members and they can survive legal actions against a large number of their members.

It is important to remember that, despite the great publicity given to the praiseworthy attempts by the FBI to deal with gangsters in the United States—and despite the success that attended their efforts to imprison people like Al Capone for tax violations—this period of organised crime in the United States was the most significant. It was significant not because of the success of the authorities, but because of the success which attended the efforts made by the organised criminals to develop new and better systems of management and a better portfolio of legitimate, as well as illegitimate, investments. In fact during the time when it appeared that the authorities were successfully suppressing organised crime, it was really expanding.

For many years, therefore, it has been the concern of legislators, criminologists and specialists in this field to devise measures to deal with collective bodies. Some of the progress in this field has been within the civil law in dealing with corporate bodies, anti-trust legislation etc. but since 1977 the United States has broken new ground with its RICO legislation. A federal law designed to deal with “Racketeer Influenced and Corrupt Organisations” has been introduced, which allows a State to deal not only with individual contraventions of the law but with patterns of behaviour, so that all the members of a suspect organisation can be brought to trial. They can be tried collectively and their criminality can be viewed collectively. This legislation also provides for the court to order the proceeds of crime to be taken over by the court and disposed of. In this way already a very large entertainment establishment in Las Vegas has been confiscated and ordered to be sold.

The cases under this law are still very few and experience of its operation is still being gathered but clearly it is a form of approach to corporate offenders which needs to be given the most serious consideration by criminal justice authorities anywhere in the world.