

Unexplained Wealth Orders in the Criminal Finances Bill: a suitable measure to tackle unaccountable wealth in the UK?

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This paper outlines the Criminal Finances Bill's proposal to introduce Unexplained Wealth Orders ("UWO") in the United Kingdom as a civil measure to deal with unaccountable wealth. The rationale of this proposal will be considered balanced against the alternative of creating a criminal offence of illicit enrichment. It is suggested that UWO are an appropriate response to unexplained wealth.

The Criminal Finances Bill was introduced to Parliament in October 2016 and contains various measures which ought to have a positive effect in the United Kingdom's ("UK") fight against economic crime. The Bill is before Parliament and is timely in light of the first global Anti-Corruption Summit convened in London in May 2016. The Bill re-emphasises the deterrent function of law by its accentuation that crime is becoming increasingly less profitable – at least in the UK. Given that the UK is one of the world's major financial centres, it is exposed to risk of abuse by foreign corrupt officials and those involved in serious crime to layer and conceal assets funded by criminality.

UWO are civil measures, not criminal. They would allow enforcement agencies to obtain an order against an individual whose assets appear disproportionate to their known income. The individual is defined under Part I as a politically exposed person ("PEP"), or someone involved in serious crime as defined in Schedule 1 of the Serious Crime Act 2007. The former means someone holding foreign public office. Family and close associates of the individual fall within the scope of the order. Its purpose is to place a rebuttable presumption on the asset holder that the assets in question were funded by criminality – to which the individual can obviate by providing an explanation as to the legitimate source of the asset. The order freezes the assets in question for a period of time which affords enforcement agencies more time for evidence gathering. The asset may be a single asset or collection of assets, and the lower value threshold is £50,000.

Evidence gathering is a challenging process, particularly when the asset or individual originates from a foreign jurisdiction. Mutual assistance and co-operation is an evident challenge in fighting economic crime, so the ability to freeze assets and extend the moratorium to engage in this task is particularly welcome.

The next issue worthy of consideration is the extent to which UWO are, *prima facie*, consistent with the recommendations of Article 20 of the United Nations Convention Against Corruption ("UNCAC") – or, whether the UK should create a criminal offence of illicit enrichment. Article 20 stipulates that signatories should consider creating legislation and other measures to establish a criminal offence of illicit enrichment. The Convention defines this as a significant increase of the assets of a public official that they cannot reasonably explain in relation to their lawful income. Many countries already criminalise it^[1]. In many ways, illicit enrichment and UWO are tautological regimes. However, on closer examination, it is clear that creating a criminal offence in the UK should be eschewed in favour of the Bill's UWO proposal.

First, in the absence of provisions for extraterritoriality, illicit enrichment appears to focus upon domestic public officials, if one follows Article 20's framing. Yet, there are various disclosure obligations already placed on UK public officials – such as the Register of Members' Financial Interests for Members of Parliament. The obvious pitfall is that Article 20 seems far narrower in scope and application than UWO, given UWO concern not only



domestic public officials but also PEPs, their family members, close associates and those involved in serious crime.

The second concern with illicit enrichment criminalisation relates to procedure. Article 20, as an exemplification of supranational sentiment, encourages nations to utilise the criminal law to deal with public officials who cannot provide a legitimate explanation for their apparent disproportionate wealth. Therefore, the prosecution may have an easier task of proving beyond reasonable doubt that the asset in question was obtained using criminal proceeds – rather than proving that the individual is guilty of a criminal offence of bribery, as an example. Given the well-documented challenges in convicting corruption-based offences – criminalising illicit enrichment would serve convenience, yet rest on dubious procedural grounds.

The third issue strikes at the very core of criminal justice and the rule of law. Illicit enrichment would reverse the burden of proof onto the defendant to prove his innocence in a criminal matter. Consequently, human rights may be infringed and due process undermined. The offence would eradicate the presumption of innocence, a hallmark of Article 6 of the European Convention on Human Rights: the right to a fair trial. Presuming innocence, rather than guilt, is enshrined in English law because, while rebuttable, the presumption prevents the conviction of innocent people. As such, the prosecution's high burden of proof in a criminal trial is but one assurance that the defendant receives a fair trial. Blackstone's formulation that it is better to acquit a guilty man than convict an innocent one (Blackstone, 1765/2001) is apt. Moreover, Viscount Sankey L.C. in *Woolmington v. DPP* [1935] AC 462, 481 stated that the prosecution's duty is to prove the defendant's guilt, and this is the golden thread of English criminal justice. While it is acknowledged that reverse burden-shifting is sometimes permitted^[2], reversing it for illicit enrichment would stand inconsistent with foundational English criminal law principles.

The UNCAC contains qualified and non-mandatory provisions – and Article 20 is one such. In turn, the UK can reject implementing it if it stands inconsistent with its own laws and values. Consequently, it stipulates that countries may implement other measures consistent with the spirit of the recommendation. In this case, it is argued that UWO achieve this and, therefore, implement the recommendation to an extent. Importantly, UWO appear far more suitable and consistent with the UK's legal system than creating a criminal offence.

In its 2016 report on UWO^[3], Transparency International's task force concluded that burden-shifting in the civil context is more acceptable than in the criminal one. They advanced greater use of civil recovery mechanisms against assets, particularly because the civil regime is relatively under-developed at present and, in their view, not fit for purpose. Such a position is consistent with the recent European Court of Human Rights decision in *Gogitidze and Others v. Georgia* [2015] App. No. 36862/05 where the court has been slow to criticise reverse burdens in the civil context.

If the criminal law is perceived to be disproportionate in terms of burden-shifting, infringing the presumption of innocence and undermining the trial process, or not defining what the prohibited conduct is, then UWO should be viewed as welcome. UWO appear a sensible approach, supported by cogent sentiment that burden-shifting is more acceptable in the civil context. It is critical for the UK to improve its enforcement efforts and asset-recovery record – and UWO ought to provide a more direct route to enforceability. UWO reflect a robust stance against economic misconduct and enacting them into legislation seems a move consistent with the spirit of Article 20. Attributing civil liability over property instead of criminal liability over the person ought to better protect the fundamental rights our system seeks to uphold. UWO are a proportionate response so as not to invoke the powers of the

criminal law which may create a wave of appeals given the fundamental concerns about due process and rights' infringement.

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Notes

1. See, Article 189-1 Criminal Code, Lithuania; Article 267 Criminal Code, Romania; Article 286 Criminal Code, Argentina; and Article 13 Prevention of Corruption Act 1988, India.
2. For example, under a defence of diminished responsibility.
3. Transparency International "Empowering the UK to Recover Corrupt Assets: Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery" (March 2016).

References

Blackstone, W. (1765/2001), in Morrison, W. (Ed.), *Blackstone's Commentaries on the Laws of England*, Vol. 4, Routledge-Cavendish, London.

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