



# THE NEW TYRANNY OF GLOBAL, EUROPEAN AND BRITISH STATE CONTROL OF FINANCIAL TRANSACTIONS



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## INTRODUCTION

During the past ten years, there has been a revolutionary — but largely unnoticed — change in the relationship between the British banks and their customers. Traditionally, a bank in the United Kingdom had an implied contractual obligation not to disclose information concerning the affairs of a customer. This obligation extended to all facts about a customer known to or discovered by the bank, and not merely to the state of his account.

The obligation was qualified in various ways, the most important of which for this discussion was compulsion of law. By s.7 of the Bankers' Books Evidence Act 1879 — amended by the Banking Act 1979 — a party could by court order inspect and copy entries in a banker's books. This allowed the Police to gain access to a suspected person's records, but only after charges had been laid. If other disclosures were made to the Police, they were not strictly lawful; and they were very seldom made.

By s.17 of the Taxes Management Act 1972, a bank was further obliged to inform the Inland Revenue of interest paid to a customer above a certain level.

Beyond these exceptions, there was total banking confidentiality in this country.

## MONEY LAUNDERING

During the 1980s, however, governments all over the world began to intensify the "War on Drugs". Starting with the 1913 Harrison Act in the United States, this has gradually expanded to an international prohibition of the production, sale and use of most mood altering substances.

This "War" has not been a success. The prohibited substances are in high demand; and high demand has meant high prices that make it very profitable to transport and sell them in quite small quantities. Nobody knows for sure what proportion of drug imports are stopped by HM Customs and Excise, but I am told it may be as low as three per cent — and this is an island, where the control of imports is far easier than for landlocked countries. And so effort since the 1980s has increasingly expanded from merely trying to stop the production and sale of drugs to trying to stop profits from the trade from being reinvested.

These profits may be very large. In 1989, the Financial Action Task Force of the European Community estimated that

sales of cocaine, heroin and cannabis amount to approximately \$122 billion per year in the United States and Europe; of which 50 to 70% or as

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FOR LIFE, LIBERTY AND PROPERTY

much as \$85 billion per year could be available for laundering and investment.<sup>1</sup>

Writing in the United States, E. Nadelmann has argued that

insofar as criminals ... act as they do for the money, the best deterrent and punishment is to confiscate their incentive. A second rationale is that, while the higher level and more powerful criminals rarely come into contact with the illicit goods, such as drugs, from which they derive their profits, they do come into contact with the proceeds from the sale of these goods. That contact often provides a 'paper trail' or other evidence, which constitutes the only connection with a violation of the law. A third rationale is that confiscating the proceeds of criminal activities is a good way to make law enforcement pay for itself.<sup>2</sup>

In 1988 came the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This was an international treaty to prevent the laundering of drug money.

### THE MONEY LAUNDERING DIRECTIVE

Then in 1990 came a Council of Europe Directive on money laundering. This was followed in 1991 by the Council Directive on Prevention of Use of the Financial System for the Purposes of Money Laundering, a law made by the European Community. This Directive orders the Member States of the Community to create a number of criminal offences connected with drugs and money laundering in general.

Most importantly, "money laundering" is defined by Article 1 of the Money Laundering Directive as:

[T]he conversion or transfer of property, knowing that such property is derived from a serious crime, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in committing such an offence or offences to evade the legal consequences of his action, and

the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from a serious crime.

I will briefly pause here to explain the legal status of this Directive under British law.

The European Union is a trading bloc of fifteen Member States. It is regulated by a number of treaties, the most important of these being the Treaty of Rome 1957 and the Treaty of Maastricht 1991. To enforce the terms of these Treaties, it is able to make three kinds of laws:

— A *Regulation* becomes part of the domestic law of each Member State automatically, without regard to the wishes of any government or legislature;

— A *Directive* becomes part of the domestic law of each Member State only after it has been incorporated by the relevant legislation;

— A *Decision* is a particular command or judgment, and it affects only those for whom it is made.

The Money Laundering Directive is a law of the second kind. As such, it is intentionally unspecific. It only takes effect when made specific in the domestic laws of each Member State.

So I will now look at how the Directive is applied in Britain.

### THE CONTROL OF MONEY LAUNDERING IN THE UK

The laws against money laundering in this country are contained mostly in the Criminal Justice Act 1993 and the Money Laundering Regulations 1993 — which both give effect to the European Union's Money Laundering Directive. Apart from this, there are sections of the Police and Criminal Evidence Act 1984, the Drug Trafficking Offences Act 1986, the Criminal Justice Act 1987, the Criminal Justice Act 1988, The Companies Act 1989, and the Prevention of Terrorism (Temporary Provisions) Act 1989, together with numerous statutory instruments and "voluntary" codes imposed by the Bank of England.

These laws have entirely altered the old state of affairs. A bank today is obliged to disclose information virtually on demand to the Police, the Inland Revenue, the Department of Trade and Industry, and the Serious Fraud Office, to name only the most frequent applicants.

Further, the banks and other financial institutions must report all "suspicious transactions". These include the making of cash deposits larger than £10,000, or numerous deposits and withdrawals of cash, using night safes to make large cash deposits. Failure to report is a criminal offence, and on conviction, a bank or other financial official can be jailed for a maximum of five years. In many cases, usually connected with drugs or terrorism, it is for an accused official to prove he had no reason to suspect that a transaction was irregular. If it can be proved that he actively assisted to hide a transaction, he faces a maximum of 14 years' imprisonment.

Still further, even if no suspicious transactions can be proved, a senior manager can face a fine or two years' imprisonment, or both, for failing to put adequate safeguards in place.<sup>3</sup> This requires every financial institution to appoint a "money laundering reporting officer", to make and maintain regular contact with the authorities. Apart from this, financial staff are encouraged

to make anonymous reports to the National Criminal Intelligence Service.<sup>4</sup>

In addition, “financial institution” is defined not merely as bank, building society, insurance company, and so forth, but also as solicitor, accountant, estate agent, auctioneer, antique dealer and general shop-keeper, and casino. Anyone who receives large sums of money from the public is covered.<sup>5</sup>

These provisions breach the previously fundamental rule of Common Law — that every accused person is innocent until proven guilty. They also turn just about every member of staff in every financial institution into a part-time policeman.

Thus the sudden mass of paperwork required to open a bank account in this country. The traditional two references are no longer enough. It is necessary to produce passports, driving licences, and so forth, to establish full proof of identity. Identity numbers from these documents are kept on file for future inspection.

Such safeguards as exist in the modern legislation are to protect the banks, not their customers. They relieve the banks from civil liability to their customers for any disclosure of information to the authorities, or for not informing their customers of any such disclosure.<sup>6</sup>

All these regulations are intended for the detection and prevention of serious crimes, few of which — terrorism aside — are connected with attacks on life or property. But their extension, to allow an inspection and supervision of everyone, can be expected to follow as a matter of course. This is the opinion of Dr Michael Levi, Reader in Criminology at the University of Wales. He says:

It appears ... as if the foundations of the international finance-police state are being laid. In six years [to 1989], the UK has moved from a legal position in which bank account details could be revealed only after the account holders had been charged, to one in which routine interchanges — court-authorized or not — take place between banks and a plethora of police and regulatory agencies.<sup>7</sup>

### THE EFFECT OF SUCH LAWS

”Those with nothing to hide have nothing to fear” — this is the standard cry whenever objections are made to the growth of state inspection. Why should we be so worried about letting the authorities have access to our financial records? Assuming we are not drug dealers or terrorists or whatever, how can such powers be used to harm us?

The reply to all this is simple, and increasingly obvious. Even assuming the “War on Drugs” is worth fighting, there is no evidence that these laws will bring victory any closer. Let a criminal gather a large enough pile of cash, and there will always be some

means available of laundering it. Bank officials are corruptible — if not here, then certainly in other countries. American power and determination are still great enough to force most governments to go through the motions of passing money laundering legislation. But it cannot obtain uniform enforcement. So long as there are countries like Thailand, where different notions of privacy and dignity prevail, the means will remain — if at a price — of converting dirty cash into nice, clean share certificates and real property.

We are moving towards the abolition of cash transactions. Downward alterations, combined with inflation, will eventually reduce the present effective limit of £10,000, to force all but the most trivial purchases through the banking system. Long before then, however, the partly autonomous development of “digital cash” will have turned banknotes into museum exhibits. Then, it will in theory be possible to monitor every transaction, and thereby stop the sale of drugs and laundering of its proceeds at every point. The practice, I am sure, will be different. Where a trade this lucrative is concerned, human ingenuity will always find a way through or round the law.

This being said, the real victims will be us, the honest public. The enforcement of the money laundering laws will impose a total, if largely invisible, control over our lives.

**First**, there is an indirect control of the kind already possible. To be watched is in large measure to be deterred. Most of us desire the approbation of others — or, at worst, wish to avoid their condemnation. We therefore prefer to do in private many things which, though perfectly legal, might lower us in the opinion of others. The gathering and storing of information on us for commercial purposes is already far advanced. If ever they wanted, the Police could use their existing powers to learn from my bank or the record shops that I like classical music. Before the end of the century, they will be able to learn what I buy every Friday evening at my local Asda supermarket.

In the same way, my general practitioner might be able to learn if I buy cigarettes, or alcohol, or foods containing lots of cholesterol. After all, the National Health Service is short of money, and it must establish orders of priority for treatment. Already, smokers are sometimes denied access to treatment. As soon as it becomes possible to check if we are telling the truth about our lifestyles, I take it for granted that the power will be demanded and given.

The effect of knowing that our purchases are being — or simply can be — monitored will tend most of us to an obsessive conformity. It will produce a secular variety of Calvinism, where every life is made into a play — with not God as the audience, but our doctors and bosses and political masters.

**Second**, the final abolition of cash will allow direct controls. Cash has the advantage not only of anonymity, but also of fungibility — it can be used to make any payment. If I wanted, for example, I could draw out the money reserved for my next gas bill, and spend it all on silk underclothes. “Digital cash” allows all manner of purchases to be blocked or limited. It clears the way to lifestyle engineering on a scale that our present health activists can scarcely imagine. Pregnant women can be prevented from buying alcohol. Smokers can be put on a tapering ration of cigarettes. We can all be prevented from gambling away — or perhaps failing to save — more than a certain share of our incomes. With regard to our own earnings, we can be reduced to the status of an under-age heir faced with a set of mean and inflexible trustees.

To deny that any of this will happen is at best to lack imagination. If history shows anything, it is that any power that becomes cheaply available will be taken and used by the authorities. No matter how ghastly or absurd, there has never yet been an exercise of power beyond plausible justification.

## CONCLUSION

So far, the debate over illicit drugs has largely been a matter of arguing for or against the right to do with ourselves as we please. The making of laws against money laundering have turned it into an argument for or against the survival of our civilisation. People may continue to believe — against the best evidence — that the individual taking of drugs leads to a general social demoralisation. But they must now also decide which is the greatest evil — to leave drugs alone, or to push the war against them to its logical conclusion.

## NOTES

1. Quoted by William C. Gilmore, in *International Efforts to Combat Money Laundering*, Grotius Publications Limited, Cambridge, 1992, p. ix.
2. E. Nadelmann, “Unlaundering Dirty Money Abroad: US Foreign Policy and Financial Secrecy Jurisdictions”, *Inter-American Law Review*, No. 18 (1986), pp. 33-34; quoted in Gilmore, *op. cit.*, pp. ix-x.
3. Source: Paul Durman, “Bankers face jail over laundering: Institutions will need systems to deal with suspicious transactions”, *Independent*, 28th October 1993; also Dan Atkinson, “20/20: Liberty lost in the wash”, *Guardian*, London and Manchester, 22nd August 1992.

See also Michael Curtis and Christy Sinclair, “Law Times: Obligated to act on suspicion”, *Times*, London, 25th August 1992:

To avoid potential difficulties in proving knowledge of the money’s origins, the EC directive requires the legislation to say this ‘may be inferred from objective factual circumstances’. But what of the defendant who was insufficiently worldly to recognise the indicators?

4. See: Paul Durman, “Bankers face jail over laundering: Institutions will need systems to deal with suspicious transactions”, *Independent*, London, 28th October 1993:

Reports of suspicious transactions made to the National Criminal Intelligence Service have risen from 1,981 in 1990 to 11,300 in 1992.

See also an interview by Ian Watson (“City: The Bank’s fraudbuster”, *Sunday Telegraph*, London, 20th June 1993) of Ian Watt, who heads the Confidential Inquiries Unit at the bank of England:

Money Laundering: ‘We receive a number of anonymous calls and suggestions of malpractice in connection to money laundering and all these have to be looked at seriously,’ he says. ... Watt’s unit acts as a conduit to the NCIS.

5. Michael Curtis and Christy Sinclair, “Law Times: Obligated to act on suspicion”, *Times*, London, 25th August 1992.
6. *Barclay’s Bank v Taylor; Trustee Savings bank of Wales and Border v Taylor* [1989] 1 WLR 1066. Banks are no longer under any contractual obligation to inform their customers that a production order has been made, or to say what has been produced. In *R v Southwark Crown Court, ex parte Customs and Excise* and *R v Southwark Crown Court, ex parte Bank of Credit and Commerce International SA* [1989] 3 WLR 1054, it was held by the Divisional Court of the Queen’s Bench, and upheld by the Court of Appeal, that a Circuit Judge had no authority to prevent the handing over of General Noriega’s banking details by the British to the American authorities. The ambiguous protections contained in the 1980s legislation were resolved in favour of the authorities, there being a paramount public interest in an efficient prosecution of the “war against drugs”.
7. Michael Levi, “The Regulation of Money Laundering: The Death of Banking Secrecy in the UK”, *The British Journal of Criminology*, vol. 31 (2), 1991, pp. 122-23.

Things in America may be still worse. According to Mitch Radcliffe of Digital Media (available at [dmedia@netcom.com](mailto:dmedia@netcom.com)) President Clinton is considering an executive order to allow the Internal Revenue Service to monitor individual bank accounts, and automatically collect taxes based on the results. This will be presented as saving people the trouble of filing their tax returns. Though asked to comment on this rumour the White House has apparently not yet done so.

For how these various regulations are applied, see Margaret Stone, “Money: Is it time to bring back the identity card again?”, *Daily Mail*, London, 25th May 1994:

The Government has put building societies and banks in the frontline in the fight against drug trafficking, and it is now an offence for them not to make rigorous identification checks on anyone wanting to save or borrow money. Mortgages can be used to launder money if crooks take out a big loan and then use illegal cash to repay it quickly.

See also Liz Dolan, “Why the Halifax wouldn’t play with the bingo caller”, *Times*, London, 18th June 1994:

Julio Bruno, a Spanish national who has lived and worked in Britain since last September, was branded a possible money launderer when he tried to open an Instant Xtra Plus account at his local branch of the Halifax Building Society in Croydon this month.

Mr Bruno says that all he wanted was a safe place for £1,000 cash and a cheque for £500 from the Inland Revenue, but his unwitting ignorance of tougher rules on opening accounts set off alarm bells with the building society. The cash was from his accumulated salary. His employer pays all employees in cash and his landlord advised him to open a building society account because he was worried about burglars. ‘They gave me the money back over the counter,’ he said. ‘The place was full of customers staring at me. I felt really embarrassed and insulted. I am sure the other customers thought I had tried to pass off counterfeit money, or something.’