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The Problematic of the Burden of Proof and the Presumption of Innocence in Money Laundering Offences: A Study under Algerian Law and International Conventions

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الملخص:
تناولت الدراسة إشكالية عبء الإثبات وقرينة البراءة في جرائم تبييض الأموال، مبيّنة سعي المشرع الجزائري للتوفيق بين مبدأ البراءة المفترضة كحق دستوري، والالتزامات الدولية لمكافحة هذه الجرائم، خاصة عبر إلزام المتهم بتبرير مصدر الأموال المشبوهة. وقد عكس القانون 23-01 المعدل للقانون 05-01 هذا التوجه، من خلال إقرار إمكانية مصادرة الأموال حتى دون حكم بالإدانة، وتكريس استقلال جريمة التبييض عن الجريمة الأصلية، بما يعكس تحولًا في فلسفة الإثبات نحو مرونة قضائية تراعي طبيعة الجريمة وتعقيدها. غير أن هذا التعديل، رغم هدفه في تعزيز فعالية المكافحة، أثار غموضًا حول الجهة التي تتحمل عبء الإثبات في هذه الجريمة.
الكلمات المفتاحية: عبئ الاثبات؛ قرينة البراءة؛ تبيض الأموال؛ مصادرة الأموال.

Abstract:

The study addressed the issue of the burden of proof and the presumption of innocence in money laundering crimes, highlighting the Algerian legislature's efforts to reconcile the principle of presumed innocence as a constitutional right with international obligations to combat such crimes, particularly by requiring the accused to justify the source of suspicious funds. Law 23-01, which amended Law 05-01, reflected this approach by establishing the possibility of confiscating funds even without a conviction and establishing the independence of the crime of money laundering from the original crime, reflecting a shift in the philosophy of proof towards judicial flexibility that takes into account the nature and complexity of the crime. However, despite its aim of enhancing the effectiveness of the fight against money laundering, this amendment has raised uncertainty about which party bears the burden of proof in such cases.
Key words: burden of proof, presumption of innocence, money laundering, smart contracts.

Introduction:

The phenomenon of money laundering represents a paradigmatic shift in modern criminal architecture. It is no longer a peripheral financial infraction but a structural threat that exploits the globalized economy and technological sophistication. The primary challenge lies in the 'Dual Nature' of the crime: it is both a derivative offense and an autonomous criminal act, which creates a sophisticated legal labyrinth for investigators.

Algeria, recognizing the existential threat posed by these illicit flows, has consistently updated its legislative framework, most notably through Law No. 23-01 of February 7, 2023. This law signifies more than just a domestic penalty update; it represents Algeria's integration into the global strategy against financial opacity. However, the core of the judicial struggle remains the 'Evidentiary Burden'. In many instances, the prosecution is faced with the 'Probatio Diabolica'—the devil's proof—where the sheer complexity of financial layering makes it impossible to link specific funds to a specific predicate crime.

This has triggered a fundamental debate regarding the implementation of Article 31, Paragraph 8 of the UNCAC. The international community increasingly views the 'Reversal of the Burden of Proof' not as an infringement on human rights, but as a proportionate response to the unique nature of financial crimes. Yet, this creates a profound constitutional friction within the Algerian legal system. The Presumption of Innocence, enshrined as a cornerstone of justice, clashes with the urgent need for Judicial Efficiency.

This conflict raises a multifaceted question: Can the Algerian judicial system evolve from a 'Reactive' model of proof—where the state must prove everything—to a 'Proactive' model where the possession of unexplained wealth becomes a legal presumption of guilt? Reconciling these diametrically opposed values is the central challenge for contemporary Algerian legal doctrine.

Study problem:

To what extent has the Algerian legislature reconciled respect for the principle of presumption of innocence as a constitutional and universal principle with its international obligations, which push towards placing the burden of proving the legitimacy of the source of funds in money laundering crimes on the individual? In light of Law No. 23-01, which amends and supplements Law No. 05-01 on the prevention and combating of money laundering and terrorist financing?

1- The legal basis for the burden of proof of the source of funds in money laundering offences

Money laundering is one of the crimes that has been introduced into various legislations, including Algerian legislation, as it has developed alongside technological, financial and economic developments and increased wealth. This has led those who have obtained money from illegal activities to deposit and integrate it into the economic cycle and then work to accumulate it in order to conceal its illegal source. This has prompted the international community and international organisations to enact national legislation and international agreements to prevent and combat money laundering, including in Algeria.

1.1- Constitutional and international enshrinement of the principle of presumption of innocence:

Referring to the provisions of the Algerian Constitution, we find the legal basis for placing the burden of proof on the prosecuting authority. This obligation finds its legal basis in Article 41 of the constitutional amendment issued on 30 December 2020, which recognises the principle of presumption of innocence, stating that every person ‘is presumed innocent until proven guilty by a regular court of law,[1]’ a principle recognised by numerous international conventions, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights[2].

In this context, we find the text of paragraph (2) of Article 14 of the International Covenant on Civil and Political Rights, which states: ‘Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.[3]’

The burden of proof incumbent upon the Public Prosecution, in its capacity as representative of the public prosecution, is not limited to proving the charge, but rather extends to include the elements of the crime and the conditions of liability, as this stems from its obligation to prove the truth, which is the same goal sought by the court through the trial proceedings, without placing the burden of proving innocence on the accused[4].

1.2- Legislative regulation relating to the principle of presumption of innocence:

The legislator began Law No. 17/07 by stipulating in its first article that "This law is based on the principles of legality, fair trial and respect for human dignity and rights, and takes into account in particular: - that every person is presumed innocent until proven guilty by a final court judgement ... that doubt shall in all cases be interpreted in favour of the accused.[5]"

If the accused is presumed innocent, the burden of proving the charge against him falls on the public prosecutor, as does the burden of establishing the evidence, while the accused has no positive role in the proof, so that his role is limited to discussing the evidence gathered against him, in order to refute it, prove the contrary, and dispel its relevance to him, without being compelled to present evidence of his innocence. Therefore, if he remains silent, this may not be used against him. In the context of Article 14 of the International Covenant on Civil and Political Rights of 1966, the accused may not be compelled to testify against himself or to confess to the charge, as this is considered a flagrant violation of the principle of innocence[6].

Although the Public Prosecution's obligation to prove the case is a procedural reality, this situation is not fixed and accepted in all cases. Rather, there are exceptional cases in which the burden of proof is transferred to the defendant, who may bear it if the evidence against him is consistent. The burden of proving the means of defence, so that he may argue the existence of a cause of permissibility or invoke the availability of a defence to criminal liability, such as insanity or coercion, or he may argue the existence of an excuse exempting him from punishment.

It is as if the legislator wants to settle the controversy surrounding the adoption of the rule of reversing the burden of proof by enshrining the principle of presumed innocence constitutionally and legislatively, despite the criticism directed at him in this regard, as it is considered a futile repetition[7].

The burden of proof on the public prosecutor's office, as the representative of the public prosecution, is not limited to proving the charge, but extends to proving the elements of the crime and the conditions of liability, because this stems from its obligation to prove the truth, which is the same goal that the court seeks through the trial proceedings without placing the burden of proving innocence on the defendant[8].

2- The specificity of proving the source of funds in money laundering offences

While the Algerian legislator has shown significant agility in aligning its criminal procedure with international standards—specifically by adopting Special Investigative Techniques (SITs) such as wiretapping, electronic surveillance, infiltration, and controlled deliveries—there remains a striking disconnect between these procedural advancements and the underlying rules of evidence. By integrating these mechanisms into the Code of Criminal Procedure (notably Article 65 bis 5), Algeria has successfully internalized the spirit of the 1988 Vienna Convention and the UNCAC, providing law enforcement with a sophisticated arsenal to penetrate the secrecy of organized crime and money laundering.

However, this 'procedural boldness' stops at the threshold of the Burden of Proof. Despite the explicit invitation from international conventions for member states to consider 'Reversing the Burden of Proof' (Onus Probandi)—requiring an offender to demonstrate the legitimate origin of alleged proceeds—Algerian law remains anchored in traditionalist doctrine. This refusal to adopt a 'Presumption of Illicit Origin' creates a systemic paradox: the state utilizes cutting-edge technology to track criminal assets, yet remains bound by a rigid interpretation of the Presumption of Innocence that places the entire evidentiary weight on the prosecution.

Consequently, the fight against financial crime in Algeria faces a 'structural bottleneck.' Without a legislative shift toward Non-Conviction Based Forfeiture (NCBF) or a 'Reverse Onus' mechanism for unexplained wealth, the sophisticated data gathered through surveillance often fails to secure a confiscation order. This legislative hesitation suggests a prioritization of constitutional safeguards over judicial efficiency, potentially allowing criminal capital to remain insulated from seizure despite the high-tech means used to identify it,

However, although there is no explicit provision reversing the burden of proof and placing it on the perpetrator rather than the public prosecutor, some provisions of Law No. 23-01, which amends and supplements the Law on the Prevention and Combating of Money Laundering and Terrorist Financing, suggest that this is possible, raising the question of reconciling the burden of proof on the accused with the guarantees enjoyed by the latter in accordance with the principles of fair trial enshrined in both the Constitution and Article 1 of the Code of Criminal Procedure[9].

2.1- The trend towards shifting the burden of proof in international agreements and some comparative legislation:

The principle of presumption of innocence is one of the cornerstones of national and international legal systems, stipulating that individuals are presumed innocent until proven guilty and that the burden of proof lies with the prosecution. However, the evolution of organised crime, particularly money laundering, has posed practical and legal challenges that have necessitated a review of traditional rules of evidence, given the complexity of these crimes and their reliance on sophisticated concealment techniques, which make them difficult to prove by traditional means.

International conventions, such as those of 1988, 2000 and 2003, have tended to allow a partial reversal of the burden of proof in financial crimes by requiring the accused to justify the source of suspicious funds when there are strong indications of their illegal nature, while preserving fundamental judicial principles. Some comparative legislation has adopted this approach to strengthen the effectiveness of crime fighting, while seeking not to compromise the defendant's right to a fair trial.

The presumption of innocence means that every person accused of a crime, no matter how serious, must be treated as innocent until proven guilty by a final court ruling. The purpose of the presumption of innocence is to ensure respect for human rights and fundamental freedoms in all judicial proceedings against the accused[10]. According to Article 11 of the Universal Declaration of Human Rights, ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.[11]’

The principle of justifying the source of funds is enshrined in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 2000 United Nations Convention against Transnational Organized Crime, and the 2003 United Nations Convention against Corruption. Algeria has been keen to actively engage in this international effort by ratifying the three conventions, confirming its commitment to strengthening international cooperation in the fight against financial crime.

Paragraph 7 of Article 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which is the primary reference in the fight against money laundering, stipulates the following: ‘Each Party may consider reversing the burden of proof of the alleged legitimacy of the source of proceeds or other property subject to confiscation, insofar as this measure is consistent with the principles of its domestic law and the nature of judicial and other proceedings.[12]’

Article 31, paragraph 8 of the **United Nations Convention against Corruption (UNCAC)** serves as a pivotal international mandate, encouraging States Parties to adopt a 'Reverse Onus' approach in asset recovery. By suggesting that offenders demonstrate the legitimate origin of their wealth, the Convention aims to dismantle the 'Probatio Diabolica' (the devil's proof)—the near-impossible task faced by prosecutors when trying to trace the illicit origins of laundered assets through labyrinthine financial systems.

However, the efficacy of this provision is contingent upon its alignment with the 'fundamental principles of domestic law.' In the Algerian context, this proviso has acted as a legal barrier rather than a bridge. While Algeria has fully embraced the Convention's 'procedural tools' (such as SITs under Article 65 bis 5), it has hesitated to implement its 'evidentiary philosophy.' This selective adoption creates a significant enforcement gap: the law provides the high-tech 'lens' to see the crime through surveillance, but lacks the 'legal lever' to confiscate the proceeds, as the burden of proof remains an insurmountable hurdle for the prosecution under traditional constitutional interpretations.[13]’

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Paragraph 7 of Article 12 of the United Nations Convention against Transnational Organised Crime of 2000 also stipulates the following: 'States Parties may consider requiring the offender to demonstrate the lawful source of alleged criminal proceeds or other property subject to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings[14]'.

As for the position of the Arab Anti-Corruption Convention, Article 6/7 states the following: 'States Parties may consider requiring the offender to demonstrate the legitimate source of alleged criminal proceeds or other property subject to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and the nature of judicial and other proceedings'[15].

From the above, it is clear that the three United Nations conventions (1988, 2000, 2003) and the Arab Anti-Corruption Convention have established the principle of shifting or partially reversing the burden of proof in certain cases, whereby the State Party is authorised to require the accused to prove the legitimacy of the source of the funds in question, provided that the fundamental principles of each State's domestic law are respected, These texts emphasise that this measure does not abolish the presumption of innocence, but rather limits it within a certain scope related to the higher public interest of combating organised crime and money laundering, where evidence is often hidden from the prosecuting authorities and difficult to uncover by traditional means.

It should be noted that Algeria's ratification of the three conventions without expressing any reservations on the relevant articles is a clear expression of its international commitment to accept the provisions contained therein and to work to incorporate them into its domestic legal system. This approach is reinforced by Article 154 of the Algerian Constitution, which recognises the primacy of international conventions ratified by the President of the Republic over national law[16].

2.2- The Algerian legislator's position on the burden of proof in money laundering offences:

If innocence is inherent in human beings, and this is one of the established principles in constitutions, criminal laws and international conventions, foremost among which is the Universal Declaration of Human Rights, which affirms that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law in a public trial at which they have had all the guarantees necessary for their defence.

However, transnational organised crime has imposed a new reality, whereby some jurists and criminal laws require the accused to prove their innocence, i.e. shifting the burden of proof from the prosecution to the accused in serious crimes, including organised crime in its various forms, as it is a crime that helps perpetrators to scatter evidence and distribute it among multiple countries, thereby preventing their arrest and criminal prosecution[17].

Referring to Article 2 of Law No. 05-01, amended by Law No. 23-01, in its last paragraph, it states that: 'The crime of money laundering is independent of the original crime, regardless of whether the perpetrator of the original crime has been convicted or not.[18]'

We should also mention that Article 11 of Law No. 23-01, which amends and supplements Article 34 bis 8 of Law No. 05-01, states that: 'If the original offence is not proven, the money laundering offence shall be prosecuted as the original offence.' This article enshrines an important principle in Algerian criminal policy, namely the independence of the crime of money laundering from the original crime.

Normally, it is assumed that the funds involved in money laundering are the proceeds of an original crime (such as drug trafficking, corruption, smuggling, etc.). However, this provision recognises that even if the original crime cannot be proven, either for procedural reasons or due to insufficient evidence, proof of the money laundering acts themselves is sufficient to prosecute the person for a separate crime.

This is understandable, given that the two crimes are independent in their elements. However, if the legislator intended to establish the crime of money laundering with its elements regardless of the original crime, this would inevitably affect the burden of proof in money laundering crimes, given that this crime requires that the money being laundered be the proceeds of a crime[19]. Article 34 bis 6 states: 'The competent judicial authority shall issue a ruling to confiscate the funds even in the absence of a conviction, if they constitute proceeds resulting from the commission of the crimes stipulated in this law.[20]'

It is clear that this text deviates from the traditional rule, which states that confiscation is a supplementary penalty to the original penalty. It should be noted that confiscation in money laundering offences applies not only to the proceeds of the original offence, but also to the funds used in money laundering, as well as the profits and benefits resulting from the laundering process.

Referring to the Customs Law, Article 3, paragraph 11 of the Customs Law states: The mission of the Customs Administration shall be, in particular, as follows:
'...-to combat money laundering and cross-border crime, in coordination with the competent authorities...[21]'.

The Algerian legislature has classified money laundering as a customs offence, as supported by Article 286 of the Customs Code, which states: 'Article 286: In all cases relating to seizure, the burden of proof that no offence has been committed shall lie with the person whose property has been seized.' This reflects the burden of proof, as Article 281 of the same law states that 'the judge may not acquit offenders on the basis of their intentions or reduce the fines imposed.[22]'

The Algerian legislature has classified money laundering as a customs offence, as supported by Article 286 of the Customs Code, which states: 'Article 286: In all cases relating to seizure, the burden of proof that no offence has been committed shall lie with the person whose property has been seized.' This reflects the burden of proof, as Article 281 of the same law states that 'the judge may not acquit offenders on the basis of their intentions or reduce the fines imposed.[23]'

There is no doubt that by approving confiscation even in the absence of a conviction, the legislator aims to achieve the dual benefit of punishing the offender and preventing criminal activity in the long term, or at least limiting the economic power of criminal groups and weakening them in order to curb their criminal activity[24].

Conclusion:

The analysis shows that Algerian lawmakers have attempted to strike a delicate balance between respecting the principle of presumption of innocence, as a constitutional principle and an internationally recognised human right, and fulfilling international obligations that urge the development of effective legal mechanisms to combat money laundering offences, primarily the possibility of requiring the accused to justify the source of suspicious funds.

Law No. 23-01, amending and supplementing Law No. 05-01, embodies this approach by providing for the possibility of confiscating funds even in the absence of a conviction, and by establishing the independence of the crime of money laundering from the original crime, reflecting a clear shift in the philosophy of proof, without explicitly reversing the burden of proof, but rather opening the door to flexible judicial discretion that takes into account the nature and complexity of the crime.

It can therefore be said that Algerian lawmakers sought to reconcile constitutional requirements with Algeria's international obligations by adopting a middle-ground approach that attempts to ensure the effectiveness of the fight while preserving, as far as possible – the guarantees of a fair trial, even if this balance is not without problems and judicial interpretations that may affect the rights of the defence in practice.

It can be said that the amendment introduced by Law No. 23-01, which amended and supplemented Law No. 05-01, although aimed at enhancing the effectiveness of the fight against money laundering, has created some ambiguity as to who bears the burden of proof in this crime. It provides for the possibility of ordering the confiscation of suspicious funds even in the absence of a conviction, and considers money laundering to be a crime in its own right, constituting grounds for initiating public proceedings even if the original crime has not been proven, as provided for in Article 34 bis 8.

This approach raises questions about the balance between respect for the presumption of innocence and the effectiveness of prosecution in complex financial crimes.

Results:

- Algerian lawmakers passed Law No. 23-01, amending and supplementing Law No. 05-01, which separates the crime of money laundering from the original crime, allowing for the prosecution of suspects even when the underlying criminal act cannot be proven (Article 34 bis 8).
- The new amendments enabled the judiciary to issue rulings confiscating suspicious funds without the need for a prior criminal conviction, reflecting a trend towards non-conviction-based confiscation as a deterrent against criminal gains (Article 34 bis 6).
- Despite the constitutional primacy of the presumption of innocence, the legislature has left the judiciary some discretion to require the accused to justify the source of suspicious funds, in line with the requirements of international conventions ratified without reservations.

- Challenges have arisen in determining the limits of the judge's discretion regarding the ‘strength and seriousness’ required in the evidence before shifting the burden of proof, which requires the development of clear judicial standards to ensure that the presumption of innocence is not compromised.

Suggestions:

- We recommend interpreting the current texts in a way that reconciles the need to enforce legal provisions to combat money laundering, given its serious nature, with the need to respect the rights of the defence, in particular the presumption of innocence.
- The burden of proof must be precisely defined to ensure that there is no shift towards a comprehensive reversal of the burden of proof that threatens the presumption of innocence.
- Judges must be given careful discretionary power in cases of suspicion, with the requirement of strong and serious evidence before obliging the accused to prove the legality of the source of the funds, in order to ensure the fairness of the proceedings.
- It is preferable to review the provisions that allow confiscation without a conviction, by establishing strict legal controls that prevent abuse and limit violations of individuals' property rights.

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