

# Burden of Proof and Presumption of Innocence in the Prosecution of Illicit Enrichment with Reference to the Jordanian Legislation

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## Abstract

It is recognized that the burden of proof in criminal justice is on the shoulder of the prosecution. Likewise, the presumption of innocence is a fundamental principle of human rights concerning fair trials, rights of person to remain silent and principle of innocence until proven guilty beyond reasonable doubts. However, the burden of proof can be shifted from the prosecutor to the defendant in some cases like in cases of money laundering, tax evasion, smuggling, terrorism and illicit enrichment. Hence, this article argues that the right of accused must be balanced against the right of society. This article found that some scholars and in some jurisdictions reject the shifting of onus of proof to the defendant to protect the fundamental provisions of human rights. This article also argues that the burden of proof should be understood as an instrument to curb corruption and deprive corruptors from the proceeds of crimes rather than the exaggeration the presumption of innocence.

**Keywords:** burden of proof; presumption of innocence; prosecution; illicit enrichment

## 1. Introduction

As a basic principle in all jurisdictions around the world, public prosecution is the competent authority to commence the prosecution process of any crime and is compelled to bear the burden of proof (Walton, 1988; Saadna, 2014). On the other side, presumption of innocence is deemed as a fundamental principle of human rights, which means: “the accused shall remain innocent until proven guilty beyond reasonable doubts” (Amnesty International, 2014).

Among corruption crimes, illicit enrichment is the most difficult to trace, because it symbolize the accumulation crops of other corruption crimes that had been committed during the term of service with utmost secrecy (Habershon and Trapnell, 2012). Therefore, the concept of illicit enrichment is based on the excessive wealth of public official which is not commensurate to the legal income (Henning, 2001). Accordingly, the public official should prove the legitimate source of such increase; otherwise, it shall be regarded an illicit enrichment (United Nations, 2009). Accordingly, in illicit enrichment case, the burden of proof shift to the public official to prove that the wealth comes from a legal sources (Chanda, 2004).

This new method in prosecution of corruption had been brought by the Inter American Convention Against Corruption (IACAC) 1996. Then, other international conventions adopted it, for example: United Nations Convention Against Corruption (UNCAC) 2003, African Union Convention of Preventing and Combating Corruption (AUCPCC) 2003, The Economic Community Organization of West African States (ECOWAS) 2001, The South African Development Community SADC Protocol (2005), and Arab League Convention against Corruption 2010 (The League of Arab States, 2010).

## 2. Burden of Proof in the Prosecution of Illicit Enrichment

### 2.1 Burden of Proof

text Basically, burden of proof or onus probandi in Latin means the necessity to prove the facts of disputes related to issues raised in a cause and based on two different views. The first one is the called “burden of persuasion” (Black, 1991), which does not accept replacing it from one to another and the second view is the “burden of going forward with evidence” which accept the burden to be shifted according to the stage of the trial (Boles, 2014).

Generally, in criminal case, the public prosecution should bear the burden of proof, because it represents the society as a plaintiff of the public action (Namor, 2013). More importantly, burden of proof in criminal proceedings concentrate on the elements of the crime, which must be proved by the public prosecutor beyond a reasonable doubt (Black, 1991).

On the other hand, the public prosecution is supported and empowered with legal authorities and law enforcement instruments to carry out this obligation effectively, whereas, the defendant does not have such power to perform this role (Saadna, 2014). Besides, balancing between the associated substantial interest of the society and the defendant’s interest to the criminal action is a core idea and based on “worthy of protection”, with emphasizing on the principle of “He who asserts must prove.” (Walton, 1988; Saadna, 2014).

Hence, the burden of proof is the core principle in the judicial systems all over the world (Kaplow, 2011), where it shall be carried out by the public prosecution (Amnesty International, 2014). Likewise, the Jordanian criminal system places this onus on the prosecutor's shoulder, since he is responsible to trigger the prosecution in accordance with the article 2 from the Criminal Procedures Law No.9 of 1961, which stipulates:

“The public prosecution shall have the competence to commence the prosecution. The public right claim may not be commenced by any other party except in the cases set out in the Law” (Jordanian Criminal Procedure Law, 1961). Therefore, the public prosecutor shall investigate crimes, collecting information and evidences, refer the accused to the competent courts in accordance with the article 8. Subsequent articles from the above-mentioned law provides: “1. Law enforcement officers (Judicial Police) (Jordanian Criminal Procedure Law, 1961 ) shall be in charge of investigating crimes, collecting evidence, and arresting and referring perpetrators to the courts which have the competence to punish them. 2. The tasks of law enforcement officers shall be undertaken by the public prosecutor, his assistants, and magistrate judges at the centers where the public prosecutor is not available, in accordance with the rules of the law. (Jordanian Criminal Procedure Law, 1961)” In this context, the article 17(1) (2) from the said law emphasizes on the rule of the public prosecutor through the following text -“1. The public prosecutor shall be responsible for investigating crimes and tracing the perpetrators thereof. 2. These tasks shall be also performed by the competent the public prosecutors according to the provisions of Article 5 of this Law” (Jordanian Criminal Procedure Law, 1961). Additionally, article 23 of the Act illustrates the key role of the public prosecutor as follows: “The public prosecutor shall conduct legal prosecution of crimes that comes to his knowledge either by himself or upon an order by the Minister of Justice, or any of his supervisors”. Based on these provisions, the procedures set forth by article 172 of the Act clarify the general principle of burden of proof in case if the defendant denies the accusation, thereupon, public prosecutor is then commences the case to demonstrate facts and evidences in a trial (Jordanian Criminal Procedure Law, 1961). Hence, the burden of proof in the criminal cases shall be carried out by the public prosecutor. Nevertheless, the Jordan criminal system shifts the burden of proof from the public authority to the accused in specific crimes including the illicit enrichment offence (Boles, 2014), where the public official is required to explain reasonably the significant increase on his/her wealth in relation to his/her lawful earnings during the performance of his functions (Fagan, 2013). On the contrary, some scholars argue that, the burden of proof remains on the public prosecution, as long the element of exploitation (the physical element of the crime) is proved by the prosecutor and demonstrate the causation with ill-gotten earnings (Al-Sayed, 2005). Therefore, al-Marsafawi (1981), Abdul Jaleel (2004), and al-Kholafi (1997) argue that the burden of proof in illicit enrichment offence does not entirely shift from the prosecution to the public official, but it is a way of balancing the burden between the prosecutor and the defendant. In this meaning, the Egyptian Court of Cassation had decided that the failure of proof is not sufficient to criminalize the accused in illicit enrichment cases based on the constitutional principle of “presumption of innocence”. For instance, it was held by the Court of Cassation in Egypt that if the conviction of illicit enrichment case is based on the failure of proof in accordance with article 2 of the Illicit Enrichment law no.62 of 1975, it is considered as against the principle of presumption of innocence as enshrined by article 67 of the Egyptian Constitution. Accordingly, if the accused failed to prove the origin of the significant increase of the wealth, which does not commensurate with the lawful sources of his wealth, this is not sufficient per se to come to a decision of criminalizing and convicting the accused, due to the deficiencies in ground of the judgment” (Case no. 30342 of 2000). Another decision for the Egyptian Cassation Court determines that the conviction of illicit enrichment should not base only upon the failure of proof of the legitimate resource, but mainly builds on the exploitation of public office, abuse of influence and position (Case no. 786 of 1972).

## 2.2 *Failure of Proof*

Illicit enrichment crime comprises of the following elements; a. Public official, b. increase of wealth, c. failure of proof, d. period of office, and e. the criminal intention (Boles, 2014). Henceforth, this article discusses the failure of proof in relationship with the burden of proof and presumption of innocence. According to the concept of this crime; the defendant should bear the burden of proof the legitimacy source of such increase occurred the wealth (Henning, 2001); otherwise, it shall be regarded an illicit enrichment (United Nations, 2009). Therefore, this notion shifts the burden of proof from the prosecutor to the public official (Chanda, 2004).

However, many countries which criminalize illicit enrichment adopted this method, entirely or partially but explicitly, in their legislations; especially in the developing countries because of lack proficiency and strength (Anita, 2007) due to the shortage of strong legal framework and lack of proficiency; for instance, Jordan (Muzila et al, 2011), Brazil, Colombia, Algeria, El Salvador, Egypt, Lebanon, Costa Rica, Guyana, Iraq, Lithuania, Yemen, and Argentina (United Nations, 2002). Whereas, most of the developed countries do not criminalize this offence, for example, the United States, Canada and the majority of west EU countries (Derencinovic, 2010). However, the Jordanian Illicit Enrichment law establishes a further requirement to identify the suspected wealth where the prosecution should prove the link between this increase and the exploitation position (Muzila et al, 2012).

However, failure of proof is one of the elements of the illicit enrichment offence (Zadoyan et al, 2014; Fagan, 2013), i.e. when the defendant (public official) fails to prove or explain the excessive of wealth in relation to the lawful sources and thus, presumed that he/she committed a corruption crime (Perdriel-Vaissiere, 2012; Chanda, 2004).

Practically, failure of proof is problematic and controversial issue (Kofele-Kale, 2006); due to many considerations (Perdriel-Vaissiere, 2012; Chanda, 2004). Firstly, the general principle put the burden of proof on the shoulder of the public prosecution, whereas the notion of illicit enrichment shifts this obligation to the defendant (public official) (Gantz, 1998, p12; Henning, 2001, p9; Hoggard, 2004, p5). Secondly, is the burden of proof part of prosecution processes, or an element of the crime, as in the case of illicit enrichment offence? (Chanda, 2004). Furthermore, some scholars argue that the fundamental principle in human rights is the presumption of innocence until proven guilty according to the law (Universal Declaration of Human Rights, 1948), meanwhile, the legal conception of illicit enrichment assumed guilt of the accused what is so-called as self-incrimination, until he/she proves his innocence (Kofele-Kale, 2006). Besides, other scholars argue, as long the presumption of innocence is rebuttable; the failure of proof should not be considered an element of illicit enrichment offence (Schroth, 2003). Quite to the contrary, other scholars argue that, creating the offence of illicit enrichment brings a new tool of presumption of law in which the defendant required to explain the legitimate source of the wealth (Chanda, 2004); therefore it can facilitate the investigation and the gathering of information (Perdriel-Vaissiere, 2012) as well as assisting the prosecution process in recovering the stolen asset. Consequently, it improves the integrity, accountability and raises the awareness on abuse of public office (Chanda, 2004). Hence, illicit enrichment is considered as an effective measure to overcome or solve the “secret nature” of the offence and the difficulty of prove, particularly in the corruption cases (Derencinovic, 2010). If the public official ought to explain the legal origin of his wealth, then the prosecution must prove the nexus between this increasing and the exploitation of public office (United Nation, 2006). However, in some exceptional situations and under some restrictions, the Jordanian legislator shifts the burden of proof from the prosecutor to the defendant; for example, in cases of money laundering, smuggling, tax evasion and illicit enrichment. The third important provision is related the confession which means: “a statement admitting or acknowledging all facts necessary for conviction of a crime [51]” (Black, 1991). Article 216 of the Criminal Procedures law provides: “2. If the accused confessed, the judge shall order to recording the accused confession as close as to the words he used. The court may content itself with his confession and then shall impose the penalty prescribed for his crime, unless the court decides otherwise”. Accordingly, confession comprises the following elements: (1) confession shall be made by the defendant himself in his free will (Al-Marsafawi, 1996; Salamah, 1998). (ii) the contents of confession should be attributed to the defendant himself (Al-Marsafawi, 1996). (iii) confession should related to the act/acts of crime he committed in explicit clear sentences and unequivocal or ambiguity (Ra’oof, 1985). (iv) confession must consistent with reality and facts (Namor, 2013). According to the CP law there are two kinds of confessions: (a) judicial confession which made by the defendant before the court. (b) Non-judicial confession: means a confession made by the defendant to non-judicial authority for example, article 159 of the Criminal Procedure Law provides: “The deposition made by the accused, suspect, or defendant in the absence of the prosecutor, in which he confesses of committing a crime shall be admissible only if the public prosecution provides an evidence on the circumstances under which the statement was made and the court is convinced that the accused, suspect, or defendant made such statement voluntarily.” Therefore, the judge, according to his self-conviction, may or may not accept the confession if legal conditions are not fulfilled, because confession like other evidences, they may be unreliable and inadmissible (Salamah, 1998) or in other words, subject to admissibility of evidence rules.

### 3. Presumption of Innocence

Initially, presumption of innocence means any person is innocence and should not be convicted unless if the public prosecutor bears the burden of proof to provide evidence on guilt beyond a reasonable doubt, that is to say, the defendant does not have to prove his innocence or bear the burden of proof.

Hence, presumption of innocence is one of the most important principles of human rights, and many of the international, regional and national legal documents provided this basic principle as human rights. For example, article 11(1) of the Universal Declaration on Human Rights (UDHR) provides: “Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” Likewise, article 6(2) from the European Commission on Human Rights (ECHR) provides- “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. As well, article 8(2) of the American Convention on Human Rights stipulates on the following fundamental principle: “2. Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law” (Organization of American States, 1978). Additionally, the Organization of African Unity (OAU, 1987) in the African Charter on Human and Peoples’ Rights, stipulates this basic principle in the article 7(1)(B) thereof provides- “Every individual shall have the right to have his cause heard.(a)... (b) the right to be presumed innocent until proved guilty by a competent court or tribunal.” Similarly, the Arab Charter on Human Rights under article 7 thereof provides to this major principle- “The accused shall be presumed innocent until proved guilty at a lawful trial in which he has enjoyed the guarantees necessary for his defence” (Mattar, 2013). In Jordan, this basic principle

has been mentioned in different legislation for example, article 101(4) from the Constitution of Jordan provides- “The accused is innocent until proven guilty by a final verdict.” Similarly, article 147 of the Criminal Procedures law provides “The accused shall remain innocent until proven guilty. The Egyptian Court of Cassation had adopted this conclusion in some of its decisions as follows “The accused (Abdul Hameed) was the former governor of Al-Jeeza governorate attained for himself and to his spouse Rajja' and his minor children Khaled and Waleed a significant increase on his wealth of 556790,876EGP , plus 22930,301USD, and 798 Sterling Pound, 50730 DEM.” In addition to that, he bought an apartment with the price which was less than the real price against the will of the owner, because the accused was the governor and compelled the owner to sell the apartment with a low price. The Court of Felonies found him guilty because all of the elements of illicit enrichment crime were available and the increase on wealth was due to the exploitation of his position as a governor, plus, he failed to prove the legitimate source of that increase. However, the Court of Cassation acquitted him based on the principle of presumption of innocence (Case no. 30342 of 2000). Accordingly, since the public prosecution alleges against any person of any crime, then it shall carry out the burden of proof on its own shoulder to prove beyond reasonable doubts that the accused person is guilty according to the law, otherwise, the accused person shall be presumed innocence, and he is not required to prove his innocence (Naughton, 2011).

#### **4. Conflict between Burden of Proof and Presumption of Innocence**

Initially, criminalization of illicit enrichment is based on shifting the burden of proof from the prosecution to the suspected person, where the accused is presumed to be innocent based on the principle of presumption of innocence (Lewis, 2012). Therefore, some scholars consider the shifting of the burden as some sort of infraction against the human rights (Wodage, 2014). In addition, such method also conflicts with the national constitutional provisions (Schroth, 2003). On the contrary, other scholars like Professor Rinat Kitai opposes the presumption of innocence, and consider it as not absolute principle, due to some limitations in relation to the followings- unfair compared with other legal presumptions; the status of accused himself, considerations relating to the legislative policy in the fight against certain crimes and balancing between the state and the individual rights (Kofele-Kale, 2006). However, much legislation adopted this procedural technique during the prosecution and trial of illicit enrichment to shift the onus of proof to the defendant because it is considered as an effective tool to curb corruption (Muzila et al, 2012). Moreover, there are strong considerations by the European Court of Human Rights to allow shifting the burden of proof to the defendant in few cases which are- (a) in the so-called strict liability offences, (b) in confiscation of pecuniary gain acquired by a criminal offence and (c) in criminal offences in which the burden of proof has been shifted to the defendant” (Derencinovic, 2010). In the case of Jordan, the presumption of innocence is implemented in line with the legal provisions as mentioned earlier. However, there are specific crimes, where the law shifts the burden of proof to the defendant, for example, article 4 of the Anti-Money Laundering Law and article 55A from the Income Tax Law. As well, the Jordanian Illicit Enrichment Law shifts partially the burden of proof to the subject person, but the prosecution has also to prove the exploitation of office or position and the defendant shall prove the legal source of the excess part of the wealth. Accordingly, the Illicit Enrichment Law considers the failure of proof as an element of illicit enrichment but not consider it as crucial one, unlike the international practices and concepts, whereby the absence of reasonable justification is considered as presumption of guilt on illicit enrichment cases (Muzila et al, 2012). According to the Jordanian Illicit Enrichment law, the failure of proof must combined with the element of exploitation. Article 4 of the said law highlights this issue in the following selective clauses “due to exploitation of his position, office.....if this increase does not commensurate with their financial resources, and the subject person fail to prove a legitimate source of the increase.” As such, the Jordanian Illicit Enrichment Law reallocates the burden of proof between the public prosecution and the public official. Interestingly, according to a respondent that “Such a distribution the roles in the trial of illicit enrichment (if any), will surely weaken the accusation due to the necessity to prove physical element of exploitation, whereby the defendant can easily elude the conviction, because both of two elements are interconnected”.

#### **5. Conclusion**

This article discusses the burden of proof in the prosecution of illicit enrichment, where the concept of illicit enrichment shifts the burden of proof from the public prosecution to the defendant in order to explain the lawful sources of excessive wealth or any part of it. Some jurisdictions reject this notion due to the conflict with the fundamental principles of human rights and constitutional provisions such as in the United States and Canada. As well, some scholars considered such shifting of proof infringe the basic principle of fair trials and it may be also subject to abuse and consequently causing bias in prosecution. It has been evidentiary that the burden of proof remains on the prosecution side. The illicit enrichment as one of corruption crimes normally associated with other serious crimes like money laundering, organized crimes and terrorism. As such, preserving public fund is a strong argument to justify the shift of burden of proof partly to the defendant to explain the nexus of



excessive wealth to legal sources, which eventually, does not constitute a violation against the presumption of innocence.

## References

- AbdulJaleel, Y. (2004). *The Provision of Illicit Enrichment According to Jurisprudence and Judiciary*. Egypt – Alexandria: Al-Maarif Institution.
- Al-Kholafi, I. (1997).. *Explanation of the Illicit Enrichment Law*. Egypt – Cairo: comet Library.
- Al-Marsafawi. (1996). *AL-Marsafawi in the Fundamentals of the Criminal Procedures*. Egypt – Alexandria: AL-Maarif Institution.
- Amnesty International. (2014). Fair Trial Manual, 2<sup>nd</sup> edition. (London, United Kingdom: Amnesty International)
- Black, H. C. (1991). Blacks Law Dictionary.
- Boles, J. R. (2014). Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations. *New York University Journal of Legislation and Public Policy*, 17(4).
- Chanda, P. (2003). Effectiveness of the World Bank's Anti-Corruption Efforts: Current Legal and Structural Obstacles and Uncertainties, *The. Denv. J. Int'l L. & Pol'y*, 32, 315.
- Derencinovic, D. (2010). Criminalization of illegal enrichment. *Free from Fear Magazine*, (4): 18-21.
- Habershon, A. and Trapnell, S. (2012). *Public office, private interests: Accountability through income and asset disclosure*. World Bank Publications.
- Henning, P. J. (2001). Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law. *Ariz. J. Int'l & Comp. L.*, 18, 793.
- Kaplow, L. (2012). Burden of proof. *The Yale Law Journal*, 738-859.
- Kofele-Kale, N. (2006). Change or the illusion of change: the war against official corruption in Africa. *Geo. Wash. Int'l L. Rev.* 38: 697.
- Mattar, M. Y. (2013). Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards. *Harv. Hum. Rts. J.*, 26, 91.
- Muzila et al. (2102). *On the Take Criminalizing Illicit Enrichment to Fight Corruption*, World Bank. Online at <http://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-9454-0.34>
- Namor, M.S. (2013). *The Criminal Procedures: Explanation the Criminal Procedures Law*. Second. Amman, Jordan: Dar AL-Thaqafa.
- Naughton, M. (2011). How the presumption of innocence renders the innocent vulnerable to wrongful convictions. *Irish Journal of Legal Studies Vol*, 2, 1.
- Perdriel-Vaissiere, M. (2012). The accumulation of unexplained wealth by public officials: making the offence of illicit enrichment enforceable. *U4 Brief*, (1):
- Ra'oof, U. (1985). *Principles of Criminal Procedures*. Sixteen. Egypt – Cairo: Dar al-jeel.
- Saadna, A. (2014). "Burden of Proof in the Algerian Law," University of Biskra Repository, 197-198.
- Salamah, M. M. (1998). *Criminal Procedures in the Egyptian Legislation*. Egypt – Cairo: Dar AL-Fikr AL-Rabi.
- Schroth, P. W. (2003). THE AFRICAN UNION AND THE NEW PAN-AFRICANISM: RUSHING TO ORGANIZE OR TIMELY SHIFT: National and International Constitutional Law Aspects of African Treaties and Laws Against Corruption. *Transnat'l L. & Contemp. Probs.*, 13, 83-771.
- United Nations (2011). Executive Summary: Jordan Legal System 86371, no. 86371.
- United Nations Convention against Corruption (2004).
- United Nations. (2002). "United Nation, Economic and Social Council." In *Implementation of the United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, 51297:1–14. Vienna, Austria.
- United Nations. (2009). "Technical Guide to the United Nations Convention Against Corruption." New York: United Nations
- Walton, D. N. (1988). Burden of proof. *Argumentation*, 2(2), 233-254.
- Wodage, W. Y. (2014). Criminalization of Possession of Unexplained Property and the Fight against Public Corruption. *Mizan L. Rev.*, 8, 45.