

NAVIGATING TRANSNATIONAL FINANCIAL CRIMES: PRESUMPTION OF INNOCENCE, RIGHT TO SILENCE, AND BURDEN OF PROOF DEMYSTIFIED

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Abstract

This article explores the complexities of the presumption of innocence, the right to silence, and the burden of proof in transnational financial crime. Using a qualitative methodology that combines comparative legal analysis and case study evaluations, the study examines how differing jurisdictional standards affect the rights of defendants facing such complex allegations. The research examines international jurisprudence and national legal frameworks to identify gaps and inconsistencies affecting defendants in these high-stakes cases. The objective is to highlight the challenges faced by individuals accused of financial crimes that traverse borders, often resulting in diminished protections due to varying legal standards, and to elucidate the challenges posed by transnational dynamics, where financial crimes often traverse multiple legal systems, leading to procedural inconsistencies that can undermine fundamental rights. It reveals that in the context of transnational financial crimes, the presumption of innocence is frequently compromised by investigative practices that favour expedited legal processes over individual rights. This article recommends the development of harmonised guidelines for cross-border financial investigations and the implementation of procedural safeguards to protect the rights of the accused, ultimately contributing to a more just and effective global legal framework for combating financial crimes. It also recommends the establishment of standardised international guidelines to reinforce these critical legal safeguards. Such measures aim to harmonise legal protections across borders, ensuring that the presumption of innocence

and the right to silence are upheld, thus fostering fairness and justice in the prosecution of transnational financial crimes.

Keywords: Transnational financial crime, Presumption of innocence, Right to silence, Burden of proof

1.0 INTRODUCTION

Historically, financial crimes were typically confined within national borders, governed by local laws and regulations. However, the increasing interconnectedness of global economies in the late 20th century created a conducive environment for financial criminality. The rise of multinational corporations and the deregulation of markets allowed for greater financial transactions that could easily span multiple jurisdictions. High-profile scandals, such as the Enron scandal in the United States¹ and the Siemens bribery case in Germany,² highlighted the need for stronger regulatory frameworks to combat financial crimes.

Transnational financial crimes are illegal economic activities such as money laundering, online scams, corruption, tax evasion, illicit financial flows, bribery, and financial fraud that cross national borders and exploit differences in international legal systems.³ They are crimes that often involve complex schemes designed to defraud individuals, corporations, or governments, and the crimes often involve sophisticated methods to obscure illegal activities. One of the significant legal and regulatory challenges in addressing transnational financial crimes is the varying legal standards and regulatory

¹ Markham, Jerry W. *A financial history of modern US corporate scandals: From Enron to reform*. Routledge, 2015.

² Sidhu, Karl. *Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal*, German Law Journal 10.8, 2009 pp. 1343-1354.

³ Richards James R. *Transnational criminal organizations, cybercrime, and money laundering: a handbook for law enforcement officers, auditors, and financial investigators*, CRC press, 1998.

frameworks across jurisdictions. This lack of uniformity creates safe havens for criminals, making enforcement efforts difficult. Countries differ in their definitions of criminal behaviour, evidential requirements, and procedural safeguards, resulting in inconsistencies that can impede justice.⁴

2.0 FUNDAMENTAL LEGAL PRINCIPLES

i. Right to Silence

Closely associated with the presumption of innocence is the right of a defendant to remain silent. The right to silence constitutes an important procedural guarantee designed to protect individuals from compelled self-incrimination and oppressive investigative practices.⁵ This right is available either during investigation or in court. Where the accused exercises this right, the prosecution is still bound, as the party on which the onus lies, to prove its case beyond reasonable doubt. There is a judicially recognised caveat to this general law: if at the trial the prosecution calls credible evidence which in the end remains unrebutted, the court is entitled to accept it unless rebutted by the defendant.⁶ The Court recognises that the State, with its vast investigative and prosecutorial resources, should bear the responsibility of proving criminal allegations without compelling the accused to contribute to his own conviction.⁷ The right therefore reinforces the presumption of innocence and strengthens the requirement that guilt must be proved beyond doubt through credible evidence adduced by the prosecution rather than through coercion,

⁴ Takib L, Ewatomilade KA, Salami ST, Faith OY, Enioluwa BE. *A Comparative Analysis of the Exclusionary Rule of Evidence in the Criminal Justice Systems of Nigeria and the United States of America*. Available at SSRN 5903282, 2025.

⁵ The Constitution op.cit., ss. 35(2), 36(11).

⁶ *Utteh v State*(1992) 2 NWLR (Pt. 223) 257, 274

⁷ Mike Redmayne, *The Law of Evidence and the Criminal Trial* (Oxford University Press, 2015) 101–105.

intimidation, or compelled confessions.⁸ Hence, as a general principle of law, the prosecution has the burden of proving its case against the accused beyond reasonable doubt.⁹

ii. Presumption of Innocence

This is universally recognised and considered a fundamental requirement for criminal justice.¹⁰ Its significance stems from the understanding that the consequences of criminal conviction for defendants are often severe and far-reaching, including psychological trauma, social degradation, deprivation of liberty, loss of reputation, economic hardship, and, in some jurisdictions, the deprivation of life itself.¹¹ Sequel to this internationally recognised possibilities, criminal justice systems have traditionally placed the legal burden of proof in criminal litigation squarely on the prosecution to establish every element of an alleged offence beyond reasonable doubt.¹² This basic criminal legal principle resonates in the legal maxim, *Melius est ut decem nocentes evadant, quam unus innocens damnetur*, nine guilty persons to go free than for one innocent person to be sent to his grave.¹³ Therefore, and based on this international jurisprudence, when there is doubt in any criminal litigation, the doubt must be resolved in favour of the defendant, as it would be better for nine guilty persons to go free than for one innocent man to be convicted; otherwise, the trial would amount to a miscarriage of justice.¹⁴

⁸ Saunders v United Kingdom (1997) 23 EHRR 313, paras 68–69.

⁹ Opeke v State (2021) 1 NWLR (Pt. 1758) 570, 596

¹⁰ Kunal Ambasta, 'Woolmington 's Long Shadow: The Dissipation of the Presumption of Innocence Under the Indian Evidence Act, 1872', (2025), 30:1, *The International Journal of Evidence & Proof*, 3-22, 3

¹¹ Andrew Choo, *The Privilege Against Self-Incrimination and Criminal Justice* (Hart Publishing 2013) 18–22.

¹² *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL) 481–482.

¹³ *Fulani v. State* (2019) 1 NWLR (Pt. 1653) 237, 255; *Ogudo v. State* (2011) 18 NWLR (Pt. 1278).

¹⁴ *Sale v. State*, (2016) 3 NWLR (Pt. 1499) 392, 423

iii. Burden of Proof

The concept of burden of proof is entrenched in constitutional law and it is a derivative of International Criminal Law that constitutes one of the most fundamental concepts in criminal jurisprudence.¹⁵ It serves as a procedural safeguard against arbitrary conviction and operates as a critical mechanism for preserving the balance between the coercive powers of the State and the liberties of the individual. The Latin maxim *incumbit probatio qui dicit non qui negat* was developed from Roman jurisprudence, and it means (the burden of proving a fact rests on the party who asserts the affirmative of the issue and not upon the party who denies it).¹⁶ The allocation of the burden of proof in criminal proceedings is a calculated procedural principle that reflects deeply rooted constitutional values concerning fairness, justice, and the protection of human dignity.¹⁷

3.0 TRANSNATIONAL FINANCIAL CRIME LEGISLATION IN NIGERIA

i. Constitution of the Federal Republic of Nigeria, 1999

The constitutional entrenchment of the presumption of innocence and the right to remain silent (two entwined constitutional concepts that serve the same functions), as guaranteed under sections 35(2) and 36(5) of the Constitution,¹⁸ establishes a clear normative constitutional rule that the prosecution bears the burden of proving criminal guilt beyond reasonable doubt.¹⁹ However, modern Nigerian financial crime legislation increasingly contains provisions that appear to modify or qualify this principle through statutory presumptions, evidential

¹⁵ Ojeabulu N, Oyanda OT, Chukwuebuka NO, Olakunle RA. *An Examination of the Nigerian Criminal Justice Prosecutorial Regime*. Available at SSRN 5909444. 2025.

¹⁶ *Omisore v Aregbesola* (2015) 15 NWLR (Pt. 1482) 205, 272-273

¹⁷ Section 36(5) Constitution of the Federal Republic of Nigeria 1999 (as amended).

¹⁸ *Op.cit.*

¹⁹ Constitution *op.cit.* 36(5)

reversals, and asset-based liability mechanisms.²⁰ This development raises fundamental constitutional questions regarding the compatibility of such provisions with the entrenched guarantees of fair trial rights vis-à-vis the presumption of innocence and right to remain silent.²¹

ii. Code of Conduct Bureau and Tribunal Act

Under this Act, public officers are constitutionally mandated to declare their assets upon assumption, at some interval, and more importantly, while exiting public office. The Code of Conduct Bureau and Tribunal Act (CCB/T Act)²² requires the defendant to explain his wealth. The CCB/T operates concurrently with the Fifth Schedule of the 1999 Constitution of the Federal Republic of Nigeria, thereby creating a framework that targets public officers who are involved in transnational asset concealment. Under this Act, any post-declaration asset that cannot be reasonably linked to official salaries, allowances, or verified private business dealings is legally presumed to have been acquired in breach of the Code of Conduct, placing the immediate burden on the officer to rebut the presumption.

iii. Independent Corrupt Practices and Other Related Offences Act 2000

This Act²³ is the precursor of the shared evidential burden of proof in TFC in Nigeria. The most explicit codification of the presumption of illicit enrichment is found under Section 44 of the ICPC Act.²⁴ The

²⁰ Money Laundering (Prevention and Prohibition) Act 2022; Cybercrimes (Prohibition, Prevention, etc.) Act 2015; Terrorism (Prevention and Prohibition) Act 2022.

²¹ Adetunji Adeoye Johnson, 'A Comparative Analysis of the Control of Financial Crime from the Perspective of the UK, the USA and Nigeria', (2016), A Thesis Submitted for the Degree of Doctor of Philosophy in Law Institute of Advanced Legal Studies University of London.

²² Code of Conduct Bureau and Tribunal Act, Cap C15, Laws of the Federation of Nigeria (LFN) 2004

²³ Independent Corrupt Practices and Other Related Offences Act: , 2000

²⁴ Section 44, Independent Corrupt Practice and Other Related Offences Act, 2000.

statute explicitly mandates that where, in the course of a trial, it is proved that an accused person owns property or wealth disproportionate to their known lawful income, a statutory presumption triggers automatically. In any criminal litigation brought under the ICPC Act, the court is bound to presume that the property was acquired illegally through corrupt enrichment unless the defendant in charge can satisfactorily account for the wealth. This mechanism drastically reduces the evidentiary hurdles historically encountered when prosecuting transnational asset-recovery cases, as the state does not need to identify the specific illicit state contract or bribe that funded a foreign asset.²⁵

iv. Economic and Financial Crimes Commission Act

The presumption of illicit wealth is incorporated into the Economic and Financial Crimes Commission (EFCC) Act,²⁶ designed to be utilised for special evidential purposes, i.e., inference geared toward the freezing and ultimate forfeiture of economic assets. The Act gives the trial court the power to take into account whether an accused person possesses pecuniary resources or properties that do not match their verified legal revenue streams.²⁷ If the defendant fails to account for this excess wealth, though it would not itself amount to conclusive proof of corruption, the court is legally permitted to treat this failure as independent corroborative evidence or a distinct basis to order an interim or permanent forfeiture of those assets, categorising them as the "proceeds of economic crime.

iv. Money Laundering (Prevention and Prohibition) Act

This Act represents one of the most significant statutory frameworks affecting the allocation of the burden of proof in financial crime prosecutions. The Act criminalises a wide range of financial activities

²⁵ Ibid, s.44(2).

²⁶ Economic and Financial Crimes Commission (Establishment) Act, No. 1, 2004.

²⁷ Section 19(5) of the EFCC Act.

and introduces compliance obligations for individuals and corporate entities.²⁸ The statutory provisions that permit courts to draw presumptions regarding possession, ownership, and knowledge of illicit proceeds based on surrounding circumstances are of particular relevance to this discourse.²⁹

Section 23 of the Money Laundering (Prevention and Prohibition) Act³⁰ requires an accused person to provide explanations for certain financial transactions or the possession of assets reasonably suspected to be proceeds of crime. Section 23 of the Act is a pragmatic evidentiary tool that aligns unexplained wealth with international anti-corruption standards and provides courts with circumstantial indicators necessary to corroborate witness testimony in complex financial crime trials.³¹ This provision risks undermining the presumption of innocence guaranteed under Nigerian constitutional law as articulated in *Woolmington v DPP*,³² thereby raising concerns about judicial discretion and potential abuse. The key factor in the legal operation of section 23 of the Money Laundering Act is that a person who cannot explain how he came to anything under his possession may be presumed to have come to it legally or illegally. This position is sound in logic and common sense.

In explaining this position of law, the balance between the right to protect society from crime and the need to afford the defendant all his available rights, particularly the right to remain silent, is the focal

²⁸ Money Laundering (Prevention and Prohibition) Act 2022.

²⁹ *Ibid.*, s. 7-18

³⁰ *Ibid.*, especially section 23 therein

³¹ Akogwu Agada, An Appraisal of the Legal Framework for Combating Money Laundering in Nigeria (unpublished PhD thesis, University of Nigeria Nsukka, 2019) 45–47; United Nations Convention Against Corruption, adopted 31 October 2003, UN Doc A/58/422, art 20.

³² (1935) 104 LJKB 433

point in the case of *Igabele v. State*, where the court held that³³ an accused person has the constitutional right to remain silent and leave the trial to the prosecution to prove the charge against him.

v. Cybercrimes Act and Evidential Presumptions

The increasing sophistication of cyber-enabled crimes has necessitated the adoption of innovative legislative mechanisms aimed at overcoming the evidential challenges associated with the investigation and prosecution of offences committed through information and communication technologies. In Nigeria, the principal legislation in this regard, the Cybercrimes Prohibition Act,³⁴ was moulded into a law which seeks to combat a wide range of cyber-related offences, including computer fraud, identity theft, phishing, cyberstalking, electronic forgery, and other forms of technology-facilitated criminality. Given the clandestine and transnational nature of such offences, the Act incorporates certain evidential presumptions intended to enhance the effectiveness of law enforcement agencies in establishing criminal responsibility. Mainly, the Act establishes a comprehensive legal, regulatory, and institutional framework for the prohibition, prevention, detection, investigation, prosecution, and punishment of cybercrimes in Nigeria.³⁵ The provision is predicated on the legislative assumption that cybercrime, like other economic and financial crimes, frequently manifests in the acquisition of wealth that bears no reasonable relationship to the lawful earnings of the offender.³⁶

³³ (2006) 6 NWLR (Pt. 975) 100, 133.

³⁴ Cybercrimes (Prohibition, Prevention, etc.) Act, 2015

³⁵ See Cybercrimes (Prohibition, Prevention, etc.) Act 2015 (as amended), s. 1(a) of the Act.

³⁶ *Ibid.*

4.0 BURDEN OF PROOF IN ASSET FORFEITURE PROCEEDINGS

Under the Economic and Financial Crimes Commission (Establishment) Act and related statutes.³⁷ These provisions allow for interim and final forfeiture of assets suspected to be proceeds of unlawful activity, sometimes even before criminal conviction. The courts have characterised forfeiture proceedings as civil or in rem in nature; their practical consequences are often punitive.³⁸ The deprivation of property without prior conviction raises important constitutional questions about whether such proceedings indirectly circumvent the presumption of innocence. However, civil forfeiture is independent of any criminal case. Consequently, the forfeiture action may be filed before indictment, after indictment, or even if there is no indictment at all. Likewise, civil forfeiture.³⁹

The Supreme Court has acknowledged that civil forfeiture proceedings are distinct from criminal prosecutions; however, it has also recognised that such proceedings must still comply with constitutional safeguards.⁴⁰ It had been judicially observed that the Advanced Fee Fraud and Other Related Offences Act⁴¹ introduced the concept of non-conviction-based forfeiture, also known as civil forfeiture, of proceeds of unlawful activity into Nigerian legal jurisprudence.⁴²

In essence, the philosophy underpinning civil forfeiture is fundamentally directed at depriving offenders of the proceeds and instrumentalities of unlawful conduct rather than punishing the offender through the forfeiture of legitimately acquired property. Civil forfeiture proceedings are therefore predicated upon the property itself

³⁷ Economic and Financial Crimes Commission (Establishment) Act 2004.

³⁸ *EFCC v Odigie* (2013) LPELR-20354 (CA).

³⁹ *Melrose General Services Ltd. v. E.F.C.C.* (2025) 1 NWLR (Pt. 1972) 1

⁴⁰ *Adeleke v State* (2014) 13 NWLR (Pt 1423) 146.

⁴¹ Section 17, Advanced Fee Fraud and Other Related Offences Act, 2016.

⁴² *Melrose General Services Ltd. v. E.F.C.C., op.cit.*, 154-155

and not the personal culpability of its owner. As an action in rem, civil forfeiture is distinguishable from criminal confiscation proceedings, which are generally directed against a convicted person and often follow the freezing or restraint of assets pending the conclusion of criminal proceedings.

The international legal framework similarly recognises criminal forfeiture as a critical tool in the fight against corruption, money laundering, terrorism financing, and transnational organised crime. The United Nations Convention against Corruption (UNCAC) and other international instruments encourage States to adopt effective measures for the identification, tracing, freezing, seizure, confiscation, and forfeiture of the proceeds and instrumentalities of crime. In Nigeria, this philosophy is reflected in various statutory enactments, including the Proceeds of Crime (Recovery and Management) Act 2022, which strengthens conviction-based confiscation procedures by ensuring that offenders are deprived of the benefits derived from unlawful activities.⁴³

4.1 Burden of Proof under the Terrorism (Prevention and Prohibition) Act

The emergence and persistence of terrorism in Nigeria, particularly the activities of the terrorist group Boko Haram and its splinter factions, have posed significant threats to national security, territorial integrity, and public safety.⁴⁴ The devastating consequences of terrorist attacks, including loss of lives, destruction of property, displacement of communities, and disruption of economic activities, prompted the

⁴³ Proceeds of Crime (Recovery and Management) Act 2022, s 1(1)(d); United Nations Convention against Corruption, adopted 31 October 2003, entered into force 14 December 2005, arts 31 and 54.

⁴⁴ Ojo J. S. *Governing “ungoverned spaces” in the foliage of conspiracy: Toward (re) ordering terrorism, from Boko Haram insurgency, Fulani Militancy to Banditry in Northern Nigeria*. *African Security*. 2020 January 2;13(1):77-110.

enactment of the Terrorism (Prevention and Prohibition) Act.⁴⁵ The Act represents Nigeria's comprehensive legislative response to terrorism and terrorist financing, while also fulfilling the country's international obligations under various counter-terrorism conventions and the recommendations of the Financial Action Task Force (FATF).⁴⁶

A major feature of the TPPA is the expansion of the investigative and surveillance powers available to law enforcement and regulatory agencies in combating terrorist financing.⁴⁷ The Act authorises the identification, tracing, freezing, seizure, and forfeiture of assets suspected to be connected with terrorist activities. It also imposes extensive reporting obligations on financial institutions, designated non-financial businesses and professions, and other entities that may facilitate financial transactions. Through these mechanisms, the Act seeks to disrupt the financial networks that sustain terrorist organisations by preventing access to funds, property, and economic resources.⁴⁸

One of the most controversial aspects of modern counter-terrorism legislation is the extent to which it departs from the traditional criminal law model that requires the prosecution to establish guilt beyond reasonable doubt. Terrorism financing offences are often characterised by secrecy, international financial networks, covert transactions, and the use of intermediaries. Consequently, legislators have increasingly adopted evidential presumptions and preventive measures designed to overcome the difficulties associated with

⁴⁵ Terrorism (Prevention and Prohibition) Act (TPPA), 2022.

⁴⁶ Terrorism (Prevention and Prohibition) Act, 2022, Laws of the Federation of Nigeria 2022, s.2; see also Financial Action Task Force (FATF), International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (FATF Recommendations, updated 2023).

⁴⁷ TPPA, op.cit., ss 4-5.

⁴⁸ *Ibid.*, s. 11

proving the commission of terrorism-related offences. While these measures may enhance enforcement effectiveness, they simultaneously raise concerns regarding the continued vitality of the constitutional presumption of innocence.

Terrorism financing investigations frequently involve circumstances in which substantial assets, financial transactions, or associations with designated terrorist organisations become the focal point of prosecutorial attention. In such situations, the practical burden often shifts to the suspect to explain the source, purpose, or legitimacy of the assets in question. Although the legal burden may formally remain with the prosecution, the evidential burden imposed upon the accused can be substantial. This distinction between legal and evidential burdens is important because a measure that appears procedurally neutral may, in practice, compel an accused person to disprove allegations before the prosecution has discharged its constitutional obligations.⁴⁹

5.0 CONSTITUTIONAL TENSION AND JUDICIAL RESPONSIBILITY

The central constitutional issue arising from these legislative frameworks pertaining to reverse onus provisions in financial crime litigation is whether they impermissibly reshape the placement of the burden of proof in substance, even where they are formally described as evidential or procedural mechanisms in the light of section 36(5) of the Constitution. The provisions of the Constitution which guarantee every accused person the right to be presumed innocent until proven guilty are definite and fundamental; thus, the distinction between legal and evidential burdens becomes critical in this context. Nigerian courts

⁴⁹ Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell, 2002) 94–95.

have repeatedly affirmed that the prosecution bears the legal burden of proof throughout criminal proceedings.⁵⁰

The case of *Civil Service Commission v. Amuta*.⁵¹ is a pivotal module in this reflection. In this critical matter, the apex court established the constitutional baseline when the Court reiterated that the constitutional presumption of innocence remains sacrosanct. The state cannot simply point to an individual's affluent lifestyle and demand a defense. The prosecution must first discharge its initial burden by bringing hard, credible evidence to establish a solid *prima facie* case. The state must lay the factual foundation before any statutory shift can occur.

In the landmark decision of the Court in *Jonathan v. F. R. N.*,⁵² addressing non-conviction-based asset forfeiture, a core weapon in countering transnational illicit financial flows, the Supreme Court firmly validated reverse onus mechanisms. The court held that where the EFCC or any anti-graft agency successfully proves that massive sums of money or premium real estate are completely disproportionate to the defendant's known earnings, a legitimate "reasonable suspicion" is activated. At that precise juncture, shifting the evidential burden to the property owner to prove a legal source does not infringe upon Section 36(5) of the Constitution. If the defendant remains silent or fails to provide a satisfactory answer, the legal presumption of unlawfulness holds anchoring on the socio-legal axiom that though the prosecution is bound to prove its case beyond reasonable doubt but accused runs a risk in remaining silent; he is obliged to make his defence to the charge if his remaining silent will result in his being convicted on the case made against him by the prosecution.⁵³

⁵⁰ *Kakih v. P.D.P* (2014) 15 NWLR (Pt. 1430) 374

⁵¹ (2017) LPELR-42266 (SC).

⁵² (2019) LPELR-46994 (SC).

⁵³ *Ahmed v. Nigerian Army* (2011) 1 NWLR (Pt. 1227) 89, 118.

Basically, the main purpose of the Nigerian financial crime legislation is to combat sophisticated transnational crimes. This national effort has included several provisions that raise serious constitutional questions regarding the presumption of innocence. The increasing use of statutory presumptions, asset forfeiture mechanisms, and evidential reversals creates a structural tension between effective law enforcement and constitutional safeguards.

6.0 COMPARATIVE JURISPRUDENCE ON THE BURDEN OF PROOF IN FINANCIAL CRIME PROSECUTIONS

The courts across major jurisdictions have consistently emphasised that any departure from the orthodox rule in *Woolmington v DPP* must be carefully justified and proportionate, so as not to undermine the essence of the presumption of innocence.⁵⁴

The majority of jurisdictions across the world are crafting legal mechanisms through legislative apparatuses that require a person suspected of holding illicit wealth to explain the legitimacy of their assets. Comparative examination of three jurisdictions: the United Kingdom, the People's Republic of China, and the United States of America, each of which has adopted a distinctive approach to what is variously termed the "reverse burden," "reverse onus," or "shared burden" of proof in financial crime litigation are explained below.

i. United Kingdom: Statutory Presumptions and Judicial Restraint

In the United Kingdom, the common law rule established in *Woolmington v DPP* remains the foundational principle governing the burden of proof in criminal trials.⁵⁵ However, Parliament has enacted several statutory provisions that create exceptions in the form of

⁵⁴*Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL).

⁵⁵*Op.cit.*

evidential burden or legal requirements placed upon defendants, particularly in the regulatory and financial crime environment. For example, provisions under the Proceeds of Crime Act 2002 (POCA) allow courts to make assumptions regarding criminal benefit and available assets once certain conditions are met.⁵⁶ Similarly, in strict liability offences involving possession of unexplained property or controlled goods, statutes sometimes require defendants to provide explanations for possession once a *prima facie* case has been established by the prosecution.⁵⁷

However, in interpreting and applying such provisions, the House of Lords and Supreme Court have consistently applied narrow enforcement protocols to ensure that the application is compatible with Article 6(2) of the European Convention on Human Rights. Thus, in *R v Lambert*,⁵⁸ the court held that statutory provisions imposing a legal burden on the accused should, where possible, be read as imposing only an evidential burden to avoid violating the presumption of innocence. This interpretative approach reflects a strong judicial commitment to constitutional conformity and proportionality without jettisoning a clear statutory provision.

The case of *National Crime Agency v Baker*⁵⁹ is instructive as it introduced the doctrine of ‘reasonable grounds for suspicion’ of illicit wealth. The NCA had obtained UWOs in respect of three London properties with an aggregate value of approximately £80 million, linked to members of the family of the former President of Kazakhstan. Mrs Justice Lang, sitting in the High Court, discharged the orders after finding that the NCA had failed to establish reasonable grounds for suspicion and had made material non-disclosures in its *ex*

⁵⁶ Proceeds of Crime Act 2002 (UK), Part 2

⁵⁷ Ashworth and Redmayne, *op.cit.*, 79

⁵⁸ *R v Lambert* [2002] 2 AC 545

⁵⁹ *National Crime Agency v Baker* [2020] EWHC 822 (Admin).

parte application. The constitutional dimension of the UWO has attracted considerable academic commentary.

ii. People's Republic of China: Criminalisation of Unexplained Wealth

The Criminal Law of the People's Republic of China criminalises the possession of property or expenditure that "obviously exceeds" the lawful earnings and means of livelihood of a public or civil servant or person employed in public services.⁶⁰ Article 395 of the Chinese penal instrument creates strict liability for the illicit enrichment offence. The law does not require proof of a predicate corrupt act, but rather targets the *status* of possessing unexplained wealth.⁶¹ In Chinese criminal law, generally the burden of proof decides who must prove their case in court. Typically, the prosecution must establish a defendant's guilt, but in some cases, the defence may also have to present evidence to support their claims.⁶²

The main feature of the Chinese shared burden is that the prosecution is saddled with the burden to prove that the focal person, suspect, or defendant has direct access to public funds and that his wealth and assets are reasonably beyond his known means of earning. The standard of proof for this discrepancy depends on whether the illicit enrichment law is criminal or civil. In addition, the extent to which the state must demonstrate a person's income over the relevant period varies according to the wording of the specific law. For instance, Hong Kong's law only requires proof of the total "official emoluments" a person received during the relevant time, while India's law goes

⁶⁰ Criminal Law of the People's Republic of China (1997, as amended), art 395.

¹⁵ *Ibid.* Article 395

⁶¹ A Dornbierer (n 13) 45; World Bank, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* (World Bank 2012) 45.

⁶² Prevention of Bribery Ordinance 1971 (China - Hong Kong), s. 10

further, requiring the state to establish all of the person's "known sources of income."⁶³

The constitutional and human rights implications of Article 395 have received limited domestic judicial scrutiny, reflecting the absence of an independent constitutional court and the subordination of the judiciary to Party leadership. The provision has, however, been examined in the context of China's international obligations under the United Nations Convention against Corruption ("UNCAC").⁶⁴ Article 20 of UNCAC encourages States Parties to consider establishing illicit enrichment as a criminal offence, though it does not mandate such an offence and expressly preserves the requirement of domestic constitutional compliance. China ratified UNCAC in 2006, and Article 395 is frequently cited as evidence of China's compliance with this aspect of the Convention.⁶⁵

iii. United States of America: Civil Asset Forfeiture and the Burden of Innocence

The United States has systemically developed a unique approach to unexplained wealth through the mechanism of civil asset forfeiture. Unlike the criminal offence model of China or the investigative order model of the United Kingdom, American civil forfeiture operates *in rem* that is, against the property itself, which is treated as the defendant.²⁷ The USA federal statute⁶⁶ permits the civil forfeiture of property that constitutes or is derived from proceeds traceable to specified unlawful activity.⁶⁷ Crucially, the government need not

⁶³ Dornbierer, *op.cit.* 95

⁶⁴ United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41.

⁶⁵ National People's Congress, 'Decision on Ratifying the United Nations Convention against Corruption' (2006).

⁶⁶ 18 U.S.C. § 981.

⁶⁷ United States of America v. \$124,700 in U.S. Currency, 458 F.3d 822 (8th Cir. 2006),[1]

obtain a criminal conviction against the owner; it need only establish, by a preponderance of the evidence that the property is subject to forfeiture.⁶⁸ Once the government does this, the burden shifts to the claimant to prove, by a preponderance of the evidence, that they are an "innocent owner", that is, that they did not know of the conduct giving rise to the forfeiture or that they did all that could reasonably be expected to prevent the proscribed use of the property.⁶⁹

The constitutional status of this reverse burden has been the subject of extensive litigation in the case of *United States v. Ursery*; the Court held that civil forfeiture does not constitute punishment for double jeopardy purposes, reinforcing the doctrinal separation between civil and criminal proceedings.⁷⁰ Also, the Supreme Court in *United States v. Bajakajian*⁷¹ held that the Excessive Fines Clause of the Eighth Amendment applies to civil in *rem* forfeiture proceedings, thereby importing a proportionality requirement that limits the government's power to confiscate property proved to be disproportionate to the offence.

It should be noted that the United States of America has not adopted a true unexplained wealth order like the United Kingdom or Australia. The constitutional culture of the United States, with its robust protections for property rights and its suspicion of governmental overreach, has proved resistant to mechanisms that would require individuals to account for the provenance of their wealth in the absence of a predicate offence.⁷² The Civil Asset Forfeiture Reform

⁶⁸*Ibid.*, § 983(c)(1).

⁶⁹ *Ibid.*, § 983(d)(2).

⁷⁰ *United States v. Ursery*, 518 US 267 (1996).

⁷¹ *United States v. Bajakajian*, 524 US 321 (1998).

⁷² Caleb Nelson, 'The Constitutionality of Civil Forfeiture', (2016), *The Yale University Journal*, 2446-2518, 2447

Act ("CAFRA")⁷³ introduced modest protections, including the availability of counsel for indigent claimants and a requirement that the government bears the burden of proving the forfeitability of property by a preponderance of the evidence (rather than merely probable cause).⁷⁴

7.0 CONCLUSION

The statutory burden of proof in transnational financial crime litigation represents a significant, and arguably necessary, departure from classical criminal procedure. The concealment of illicit wealth through complex corporate structures, the cross-border movement of proceeds, and the inherent difficulties of proving the predicate offence in financial crime cases have rendered traditional burdens of proof inadequate. Yet this departure is not without cost. The presumption of innocence, the privilege against self-incrimination, and the property right are fundamental protections that are attenuated, if not abrogated, by reverse burden provisions. The challenge for legislators and courts is to craft mechanisms that are effective against the sophisticated techniques of money laundering and corruption while preserving the essential safeguards of a liberal legal order. The experience of the United Kingdom, China, and the United States suggests that there is no single optimal model, but rather a range of approaches that reflect different legal traditions, constitutional cultures, and policy priorities. What is clear is that the trend toward burden-shifting in financial crime litigation is likely to continue, and that the doctrinal and constitutional questions it raises will remain at the forefront of criminal justice scholarship for years to come.

8.0 RECOMMENDATIONS

- i. In light of the complexities associated with transnational financial crime litigation and the apparent shift in the burden of proof, it is

⁷³ Civil Asset Forfeiture Reform Act 2000.

⁷⁴ Civil Asset Forfeiture Reform Act 2000, Pub L No 106-185, 114 Stat 202.

crucial for legislators and legal practitioners to undertake a thorough review and reform of existing legal frameworks. Governments should conduct comprehensive reviews of existing laws related to financial crimes to balance the need for effective prosecution with the protection of fundamental rights. This may include reassessing the scope of reverse burden provisions to ensure that they are applied judiciously.

- ii. Developing targeted legal frameworks that specifically address the intricacies of transnational financial crimes is essential. Such frameworks should allow for flexibility in evidentiary standards while maintaining the integrity of the presumption of innocence, ensuring that the legal process is fair. Encourage the development of tailored legal frameworks that consider the specific complexities of transnational financial crimes, allowing for flexibility in evidentiary standards while upholding the integrity of the presumption of innocence.
- iii. Supporting this, enhanced training for judges and legal practitioners is vital. Legal professionals must be adequately equipped to navigate the complexities of corporate structures and cross-border elements in financial crime cases. While safeguarding defendants' rights. Judges and legal practitioners should be provided with adequate training on the implications of shifting burdens of proof in financial crime cases, ensuring they are equipped to navigate the nuances of corporate structures and cross-border elements while safeguarding defendants' rights.
- iv. Safeguards must be established to ensure that defendants retain access to due process. This could involve heightened evidentiary standards for the prosecution or procedural safeguards to challenge the validity of evidence obtained under reverse-burden provisions. Moreover, it is imperative to strengthen due process protections within the legal system, ensuring that defendants have the right to

challenge the validity of evidence obtained through reverse-burden provisions.

- v. To foster a more coordinated approach to prosecuting transnational financial crimes, international cooperation is essential. This means creating common standards while respecting the legal traditions and constitutional cultures of different jurisdictions, as illustrated by the experiences of the United Kingdom, China, and the United States.
- vi. Increasing public awareness around the complexities of financial crime litigation and associated legal rights, thereby promoting an informed citizenry that understands the implications of burden shifting and its impact on justice. Educated individuals can better understand their rights as defendants and the broader implications of such legal changes for justice.
- vii. Encourage academic and policy research into best practices for transnational financial crime legislation, specifically focusing on how to balance effective enforcement against the rights of defendants. Also, engaging legal scholars, human rights advocates, and financial crime experts in advisory committees can foster continuous discussions on these evolving legal principles.

Together, these recommendations aim to create a legal landscape capable of effectively combating transnational financial crimes while safeguarding the essential principles of justice and rights for individuals.