

Crime of misuse of bank funds

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Abstract:

The intervention of the criminal legislator in the field of banking operations has become an urgent necessity to deter all unlawful practices by bank managers, particularly those that harm bank funds. In this regard, the Algerian legislation has defined the crime of misuse of bank funds in order to protect the financial integrity of the institution from any abuse by the management. It punishes any manager who exploits bank funds for personal gain. The importance of this issue stems from the criminal protection of bank funds, which serve as a general guarantee for creditors and depositors. Since banks are fundamental pillars of the economy, the protection of their funds will strengthen economic projects. In addition, the crime of misappropriation of bank funds is considered a white-collar crime that affects the national economy and impedes banking transactions. Based on this, the central question of the study revolves around the adequacy and effectiveness of legal provisions on the crime of misuse of bank funds in curbing the excesses of bank managers.

Keywords: Bank funds, crime, misuse.

Introduction

Bank funds play an important role in maintaining the stability of banking activities and serve as a fundamental guarantee of their continuity. They also act as a safety valve to protect the funds of depositors and creditors. However, these funds are often vulnerable to unlawful conduct by bank managers and administrators. This situation has prompted most legal systems to intervene to combat such behavior that threatens the financial integrity of banks, whether through embezzlement,

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misappropriation, or misuse of bank funds. The latter behavior has been criminalized by Algerian legislation through Article 131 of the Money and Credit Law. How adequate and effective are the legal provisions on the crime of misuse of bank funds in limiting the excesses of bank managers?

In order to address all aspects of this issue, I have chosen a descriptive methodology to study all manifestations of the crime of misuse of bank funds. In the first section, the concept of this crime, including its definition and differentiation from similar crimes, will be highlighted. The second section focuses on its elements and the sanctions imposed on the perpetrators.

Section One: Defining the Crime of Misuse of Bank Funds and Distinguishing It from Similar Crimes

Understanding the crime of misuse of bank funds requires addressing its definition (First Subsection) and then distinguishing it from some similar crimes (Second Subsection).

First subsection:

Definition of the crime of misuse of bank funds

The Algerian legislator does not provide a definition of the crime of misuse of bank funds in the Money and Credit Law; instead, it outlines the acts that constitute this crime. According to Article 131 of the Currency and Credit Law, issued under Decree (03/11):

“Whoever intentionally and in bad faith uses the property or funds of the institution in a manner contrary to the interests of the institution for his personal benefit or for the benefit of another company or institution in which he has a direct or indirect interest, shall be punished by imprisonment of one to ten years and a fine of five million (DZD 5,000,000) to ten million (DZD 10,000,000), without prejudice to more severe penalties. The same penalties shall apply to the president, members of the board of directors or general managers of a bank or financial institution who, intentionally and in bad faith, use the powers or voting rights

granted to them in a manner contrary to the interests of the institution, for personal gain or for the benefit of another company or institution in which they have a direct or indirect interest”.

From this text, the crime of misuse of bank funds can be defined as any use of bank funds by its managers in bad faith, contrary to the interests of the bank, aimed at achieving personal objectives or favoring another company or institution in which they have direct or indirect interests.

Second Subsection: Distinguishing the Crime of Misuse of Bank Funds from Similar Crimes

The crime of misuse of bank funds intersects with similar crimes such as embezzlement and breach of trust. To clarify the characteristics of this crime more precisely, it is beneficial to compare it with analogous offenses.

First branch: Distinguishing the Crime of Misappropriation of Bank Funds from Breach of Trust

The crime of misappropriation of bank funds can be distinguished from the crime of breach of trust by identifying the differences and similarities between them as follows:

First: Differences

1. Nature of the offender:

The crime of breach of trust includes all bank employees, including staff, while the crime of misapplication of bank funds is specifically aimed at managers.

2. Essential elements:

The delivery of a deposit is an essential element of the crime of breach of trust. In contrast, the essential element of the crime of misapplication of bank funds is the misapplication itself, as described above.

3. Criminal participation:

In the crime of misuse of bank funds, the possibility of criminal collaboration among the offenders specified in Article 131 of the Currency and Credit Law is

conceivable. However, breach of trust is usually committed by a single person, namely the trustee.

4. Punishment:

The Algerian legislator has provided for a lighter penalty for breach of trust compared to the crime of misuse of bank funds.

5. Requirement of damage: The crime of breach of trust requires causing damage to the deposit by intentionally converting the incomplete possession into full possession, acting as if the trustee were the owner, knowing that his possession is temporary based on a trust agreement and that his actions will cause damage. The crime of misapplication of bank funds, on the other hand, does not require actual harm; the legislature is concerned with the act itself, not the result¹.

Second Subsection: Similarities and Differences between the Crime of Misuse of Bank Funds and Other Crimes

Second: Similarities

The crime of misuse of bank funds is similar to the crime of breach of trust in that the interest violated is the financial integrity of the bank. Moreover, the material element of the crime of misapplication of bank funds overlaps with that of breach of trust, since the acts of misappropriation and embezzlement required for breach of trust are part of the misapplication described in the crime of misapplication of bank funds.

In this context, French jurisprudence recognizes the overlap between the elements of the two crimes. For example, in a decision of the Paris Court of Appeal of May 31, 1983, the court considered as a breach of trust the actions of a company director who failed to demand commissions and rent due from another company. This decision was later overturned by the French Court of Cassation, which held that although these actions were covered by the provisions on breach of trust, the

¹- Ahmed Bousquia, *The Concise Law of Special Criminal Law*, Volume II, 15th Edition, Dar Houma, p. 217.
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manager's conduct was subject to the specific provisions on misuse of company funds¹.

Second Branch: Distinguishing the Crime of Misuse of Bank Funds from Embezzlement

The crime of misuse of bank funds differs from embezzlement in several aspects, while also sharing some similarities.

First: Differences

1. Scope of the Act:

The crime of misuse of bank funds encompasses a broader range of actions compared to embezzlement. It involves any act performed on bank funds, whereas embezzlement specifically targets one element of the bank's financial assets.

Second: Similarities

1. Motive:

Both crimes stem from the greed of employees and managers, with their intent directed toward unlawfully acquiring funds.

2. Requirement of Specific Role:

Each crime necessitates a specific role for the offender. Embezzlement requires that the perpetrator be an employee, and this role is essential for the crime's existence². Similarly, the crime of misuse of bank funds mandates that the offender be a bank manager.

3. Protected Interest:

Both crimes aim to protect the financial integrity of the bank, justifying their criminalization.

Section Two: Elements of the crime of misappropriation of bank funds and penalties for offenders

¹- Cass. Crim 24 April 1984, *Revue des Sociétés*, 1985, p. 153.

²- Brahimi Faisal, *The Crime of Embezzlement of Public and Private Funds*, article published in the *Journal of Rights and Human Sciences*, Issue 14, p. 101.

The imposition of penalties for the crime of misappropriation of bank funds can only take place after the existence of both the material and moral elements of the crime have been established. If these elements are proven, Algerian legislation has established a series of penalties applicable to bank managers and administrators.

First Subsection: Elements of the Crime of Misuse of Bank Funds

The crime of misuse of bank funds, like other crimes, cannot occur without the presence of a physical act performed by the perpetrator in the form of external actions. The mere existence of the material element is not sufficient; the intent of the perpetrator to commit the crime must also be present.

First Branch: The Material Element of the Crime of Misuse of Bank Funds

According to Article 131 of the Currency and Credit Law, the president, board members, or general managers of the bank are penalized for misuse of bank funds if they utilize any of the bank's funds. The misuse in banking law is practically realized by obtaining bank funds through any means, such as loans or overdraft accounts for personal benefit. The material element of misuse includes two components:

First Paragraph: Use of Bank Property or Funds

This section will address the concept of usage and the subject of usage.

1. Concept of Usage:

The Algerian legislator does not define the term "usage," but legal scholars have described it as "the act of using something." This implies the use of property owned by the company—and consequently the bank—in a way that contradicts its interests for purely personal purposes, such as signing commercial documents or leasing premises¹.

2. Subject of Usage

¹- A. Médina, Abuse of Corporate Assets: Prevention, Detection, Prosecution, Dalloz, 2001, p. 31.
P. Dupont Delestrait, Criminal Law of Companies, Dalloz, 2nd Edition, 1980, p. 264.
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The subject of usage refers to the assets and properties of the bank, encompassing all of the bank's assets, both movable and immovable, as well as intangible assets. This includes money, real estate, movable property, inventory, debts owed to the bank, and its rights, trademarks, and patents¹. Furthermore, granting loans without adequate guarantees to clients or legal entities that affect the bank's creditworthiness also constitutes misuse of bank funds.

Usage encompasses the benefits derived from loans, advances, vehicles, housing, and even the unauthorized use of company equipment—thus implicating the bank².

Financial rights are defined as “all financial rights, regardless of their type or subject, as long as they have financial value.”³ These are expressed as assets because they can be evaluated in monetary terms and fall within the realm of transactions. They include:⁴

1- Real Rights: Direct powers granted by law to a specific person over a defined object, enabling the rights holder to exercise their legal right without the mediation of another person.

2- Intellectual Rights: Rights protected by law for an individual over his or her intellectual, creative, or literary production of any kind.

3- Personal Rights: Legally established abilities for one person over another, obligating them to perform or refrain from performing an act or providing something.

Second Paragraph: Misuse contrary to the Bank's interests There is no specific definition of the Bank's interests, and the determination of this concept varies

¹- Ahmed Bousquia, *The Concise Law of Special Criminal Law (Crimes of Corruption, Finance, Business, and Forgery)*, Volume II, 4th Edition, Dar Houma, 2006, pp. 170-173.

²- Jean Paul Antocrina, Philippe Collin, François Langlart, *Criminal Liability of Executives and Managers in the Business World*, Dalloz, 1996, p. 39.

³- Ishaq Ibrahim Mansour, "The Theory of Law and Rights and Its Applications in Algerian Laws". University Publications, Algeria, 1987, p. 250.

⁴- Ishaq Ibrahim Mansour, "The Theory of Law and Rights and Its Applications in Algerian Laws". University Publications, Algeria, 1987, p. 250.

depending on the perspective taken towards the Bank. However, it is generally accepted that the Bank's interests are not only focused on the protection of shareholders' interests, but also on the protection of its financial integrity and the interests of third parties with whom it contracts¹.

The essence of a violation of the bank's interests is when the manager puts his personal interests ahead of those of the bank. In this context, if we apply the crime of misappropriation of company funds to banks, there are two opposing theories regarding the meaning of the company's interests. The first is the contractual theory, which holds that the corporation is a contract that intertwines the interests of the corporation with those of its shareholders, since the corporation was not originally established to serve any interests other than those of the shareholders. The second is the institutional theory, which views the company as a legal system whose interests are of paramount importance, independent of the interests of the shareholders, based on the notion that the company's interests are different from those of its shareholders².

The prevailing view among these theories is that the crime of misappropriation of corporate funds - and, by extension, bank funds - protects not only the interests of shareholders but also the financial integrity of the company and third parties, a position supported by the French Court of Cassation in its decision of March 21, 1979³.

It is important to note that the judge has the sole authority to assess whether an act is contrary to the interests of the company - and, by extension, the bank - based on the damage caused to it. An act is considered harmful to the bank's interests as

¹- Same source, p. 297.

²- Hanaa Al-Nuwi, The Crime of Abuse in Using Company Funds in Algerian Legislation, article published in the Legal Forum Journal, Issue 6, p. 338.

³- Jacques Nester, Christine Blanchard, Sébastien, Commercial Companies, S.A. Edition, 1997. Cited in: Hanaa Al-Nuwi, Previous Reference, Footnote 21, p. 338.

determined by the judge, even if the harm itself is not a condition for establishing the crime¹.

In our opinion, this type of crime does not require actual damage in order to be committed; the crime is committed even if, for example, the bank manager returns the funds in question.

Furthermore, it is noteworthy that the Algerian legislator specifies in the Money and Credit Law that the perpetrator of the crime of misuse of bank funds must hold a specific position, either as president, board member or general manager of the bank. If this crime is committed by a person without this special status, then the crime does not exist in this context. The legislator requires that the perpetrator be a manager within the company - and by extension, the bank - that is exposed to the crime. For example, if an employee misuses company funds against the interests of the company, the applicable penalties are those stipulated in the Criminal Code, depending on the classification of the act (felony or misdemeanor)².

In cases where a bank is liquidated, the actions of the liquidator become relevant³. Although the Algerian legislator does not explicitly establish the liability of the liquidator for the crime of misappropriation of bank funds in the Money and Credit Law, Article 840 of the Commercial Code deals with the criminal liability of a liquidator of a joint-stock company. This article states:

A liquidator who, in bad faith, uses the funds or assets of the company being liquidated, knowing that this is contrary to the interests of the company, for personal purposes or for the benefit of another company or institution in which he has a direct or indirect interest, shall be punished by imprisonment for one to five years and a fine of DZD 20,000 to DZD 200,000, or by one of these penalties

¹- Ahmed Bousquia, Previous Reference, p. 170.

²- Reda Ben Khedda, *An Attempt in Corporate Criminal Law (Foundations and Details)*. Dar Salam, Rabat, 2010, p. 351.

³- Abdallah Suleiman, *Commentary on the Algerian Penal Code, General Section*, University Publications, Algeria, 1996, p. 444.

only.” Since a bank is considered a joint-stock company, this provision can be applied to the liquidator of the bank if he commits the crime of misuse of bank funds.

Second Branch: The Moral Element of the Crime of Misuse of Bank Funds

The crime of misuse of bank funds necessitates the presence of general criminal intent, which includes knowledge and will. This intent is evident when the manager’s will is directed toward using bank funds in a manner contrary to the bank’s interests, fully aware of their actions. Additionally, the crime requires the presence of specific criminal intent, which can be inferred from Article 131 of the Currency and Credit Law. This article clarifies that mere negligence or lack of caution in managing the bank is not sufficient; the specific intent involves the manager using the institution’s property to achieve personal interests or to favor another company or institution in which they have direct or indirect interests.

Notably, the Algerian legislator has broadened the definition of personal interest for bank managers, allowing for both direct and indirect interests, such as favoritism towards another company

Second Subsection: Penalties for the Crime of Misuse of Bank Funds

Penalties serve to reflect the enforcement of the law within a state. The mere criminalization of illegal acts is ineffective if it is not accompanied by sanctions that deter potential offenders. In connection with the crime of misappropriation of bank funds, primary and supplementary penalties apply to presidents, board members or general managers of banks who commit this crime.

First branch: Primary penalties

A penalty is considered primary if it is imposed by the judge alone, without additional penalties. Among the primary penalties applicable to bank managers, we can note the following

1. Life imprisonment:

Life imprisonment is characterized as a severe punishment without gradation, imposed for the most serious crimes. The Algerian legislator has provided for life imprisonment in Article 133 of the Money and Credit Code, together with a fine of between DZD 20,000,000 and DZD 50,000,000 if the value of the funds involved in the crime is DZD 10,000,000 or more.

2. Imprisonment:

Imprisonment refers to the confinement of the convicted person in a central or public prison for the duration of the sentence imposed¹. In this regard, the Algerian legislator has established a penalty of one to ten years' imprisonment and a fine of five to ten million DZD for the crime of misuse of bank funds.

Third Subsection: Penalty of Fine

The Algerian legislator has imposed a fine as a penalty for the crime of misuse of bank funds, with the amount ranging from 5,000,000 DZD to 10,000,000 DZD.

Second Branch: Supplementary Penalties

Supplementary penalties include deprivation of certain rights. This form of punishment results in the loss of certain rights, most of which are public rights, while some are private rights. The Algerian legislator, in article 14 of law no. 06-23 amending and supplementing the Penal Code, has authorized judges to impose such deprivations when sentencing a person for a banking offense classified as a misdemeanor. This deprivation may affect one or more of the rights listed in article 9 bis 1 of the same law, for a maximum period of five years.

The banking crimes for which the Algerian legislator has provided for the deprivation of rights in the Money and Credit Law, in addition to those listed in the Penal Code, include the crimes of embezzlement, misappropriation or unlawful retention, as well as the crime of misuse of bank funds. The legislator allows the court to impose, in addition to the primary penalty, the deprivation of one or more rights specified in Article 14 of the Criminal Code. The court may

¹- Abdallah Suleiman, Previous Reference, p. 213.
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also impose a ban on leaving the country for a minimum of one year and a maximum of five years¹.

Conclusion:

The crime of misuse of bank funds is one of the most significant forms of financial corruption in the banking sector, impacting the financial integrity of banks and, consequently, the rights of creditors and clients, particularly depositors. Therefore, it is the duty of the president, board members, and general managers of banks to act in the bank's best interests with complete honesty and integrity, safeguarding its rights and considering its interests. The funds under their control are a trust, and they are responsible if they misuse them contrary to the bank's interests. To protect these funds, the Algerian legislator established Article 131 of the Currency and Credit Law to deter any bank official from misusing the funds entrusted to them.

The main findings of this study can be summarized as follows:

1. The rationale for criminalizing acts of misuse of bank funds stems from the desire of the criminal legislator to protect the bank's assets, which serve as a general guarantee for its creditors and customers.
2. The crime of misuse of bank funds undermines confidence in banking institutions as economic entities, reduces investment opportunities and threatens economic stability.
3. The legislator has not limited itself to the general provisions of the Criminal Code on breach of trust, but has criminalized all acts constituting misuse of bank funds through specific provisions of the Law on Currency and Credit.
4. In addition to imprisonment, the Algerian legislator has relied on fines that directly affect the financial status of bank managers.
5. The Algerian legislator has imposed stricter penalties for the crime of misuse of bank funds when committed by its managers compared to similar crimes under

¹- Abdallah Suleiman, Previous Reference, p. 118.
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company law. For example, Article 800/4 of the Commercial Code provides for lighter penalties for company managers, ranging from one to five years of imprisonment and fines from DZD 20,000 to DZD 200,000, or one of these penalties alone.

In conclusion, this study recommends the need to codify this type of crime in a unified law, given its specificity and the different provisions applicable to it, which often differ from those outlined in the Criminal Code. This applies both to the elements of these crimes and to the determination of the penalties or the provisions on criminal responsibility.

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