

# Burdens of Proof, Presumptions and Standards of Proof in Criminal Cases

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## Abstract

In jurisdictions that subscribe to adversarial mode of litigation, burdens and standards of proof have significant roles in the adjudication and determination of criminal cases. The operation of the principle of presumption of innocence in such jurisdictions determines issues of who bears what burden and the extent thereof. The Ethiopian criminal procedure system predominantly exhibits adversarial features, and there is the need for the comprehension and enforcement of the respective burdens and standards of proof borne by litigants. The constraints in clarity are more pronounced in those criminal law provisions that embrace some form of presumptions such as provisions on corruption offences. This note highlights how issues of burden and standard of proof are allocated as between prosecuting authorities and accused persons. Apart from explaining the nexus between the principle of presumption of innocence, burdens of proof and standards of proof, it indicates the implications of the operation of the principle of presumption of innocence upon the allocation of evidential and persuasive burdens of proof as between the state and the accused. It further outlines the effects of the various forms of presumptions upon the different kinds of burdens of proof.

## Key words

Burden of proof, standard of proof, easing of burden of proof, criminal cases, presumption of innocence

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## Introduction

Prosecution of corruption offences especially those involving possession of unexplained property in Ethiopia appear to be somewhat marred by confusions and dilemmas. Some court cases<sup>1</sup> demonstrate the nature and extent of problems

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<sup>1</sup> See for example, the *Workineh Kenbato & Amelework Dalie V. the SNNP Ethics & Anti-Corruption Commission* case (Cassation Division of the Federal Supreme Court, Cassation File No. 63014, Judgment given on Miazia 9, 2004 E.C). This is a case that involved prosecution of possession of unexplained property. It started at Hawasa City

pervading in this area of the criminal law. Limitations in comprehending the unique nature and varying forces of the different forms of presumptions upon the different kinds of burdens of proof arising in criminal trials complicate matters. Sometimes we witness contradictory decisions among the different hierarchies of courts in identical cases that bear similar issues and similar evidence. It is apparent that the term የማስረጃ ሽክም is employed in many legal proceedings, but often with less clarity. There are confusions regarding the interrelationship between burdens of proof and presumptions, and their interface with other issues such as the principle (right) of presumption of innocence.

This Note sets out to expound how issues of burden and standard of proof are allocated as between prosecuting authorities and accused persons in criminal trials in general. It explains the nexus between the principle of presumption of innocence, burdens of proof and standards of proof; it treats the implications of the principle of presumption of innocence upon the allocation of evidential and persuasive burdens of proof as between the state and the accused. It further outlines the effects of the various forms of presumptions upon the different kinds of burdens and standards of proof.

The first section of the note highlights the notion of burdens of proof and their operations in criminal trials. Section 2 considers the interaction that exists between the different kinds of presumptions and the various forms of burdens of proof. The third section addresses issues relating to standards of proof, followed by concluding remarks.

## **1. The Notion of Burdens of Proof and their Operations**

### **1.1 Overview**

Issues of burden and standard of proof are analyzed in the light of the material (*actus reus*) and moral (*mens rea*) elements of an offence in a charge. The analysis involves: (1) an examination of the allocation (distribution) of obligations to introduce evidence and to prove particular material and moral facts that establish an offence in a charge, and (2) a determination of the degree to which those facts must be proved.

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High Court. Then it went all through the Appellate and Cassation divisions of the Southern Nations, Nationalities and Peoples Regional State Supreme Court and then after reached to the Cassation Division of the Federal Supreme Court. After thoroughly reviewing and revoking the decisions of the regional courts, the Cassation Division of the Federal Supreme Court remanded this case again to the Hawasa City High Court for re-trial. This Division has given a binding interpretation of Art 419 (1) of the Criminal Code (2004). The interpretation has to do with burdens of proof standards of proof and presumptions.

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It is a legal truism that burdens of proof and standards of proof have meanings in relation to ‘facts in issue’ and ‘relevant facts’ in particular cases. There are no burdens of proof in the vacuum.<sup>2</sup> Likewise, standards of proof cannot be perceived in the vacuum- both burdens of proof and standards of proof do exist in relation to facts, more specifically, ‘facts in issue’ and/or ‘relevant facts’.<sup>3</sup>

Allocation of burdens of proof, the evidential and persuasive burdens in particular, is basically a substantive law matter.<sup>4</sup> Often, the legislative body (sometimes judges during legislative silence in a given common law-adversarial jurisdiction) determines, ahead of litigation, as to which party is under duty to lead evidence and also determines the party which bears the obligation to prove particular facts which may fall within the ‘facts in issue’ or other ‘relevant facts’. Such allocation of burdens of proof is made taking into account various factors and policy determinations. These include:<sup>5</sup>

- a) The natural tendency to place the burdens on the party desiring change,
- b) Special policy considerations such as those disfavouring certain defences,
- c) Convenience,
- d) Fairness, and
- e) The judicial estimate of the probabilities.

Apart from or in lieu of these, the pleading of parties may sometimes locate and determine as to which party bears one or another form of burden of proof. Above all, the principle of presumption of innocence, locates and determines, ahead of litigation, as to which party is under duty to lead evidence and as to

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<sup>2</sup> The notion of burdens of proof is properly raised in jurisdictions that adhere to the party-driven, common law- adversarial systems of procedure and evidentiary styles. It is equally important in continental law - inquisitorial (non-adversary) systems as there are no, strictly speaking, parties’ evidence and parties’ presentation of evidence. For further details on this issue and for better knowledge on the underlying distinctions between adversarial and inquisitorial (non-adversarial) systems read Mirjan Damaška (1973), ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’, 121 *U. Pa. L. Rev.*, at 506 ff; Ronald J. Allen (2012), ‘Burdens of Proof’, at 1- 24; available at: <<http://ssrn.com/abstract=2146184>> (Visited on 2 December 2013).

<sup>3</sup> Generally speaking, the ‘facts in issue’ in criminal proceedings are those *disputed issues of fact* which the prosecution must *prove* in order to succeed along with the *issues of fact*, if any, which the accused must show that there is some (admissible) evidence in support of his defence. On the other hand, ‘relevant facts’ are those other facts that are connected or have some relationship with facts in issue. (See Raymond Emson (2004), *Evidence*, 2<sup>nd</sup> Ed., at 7 & 421).

<sup>4</sup> Dennis, I. H. Dennis (2002), *The Law of Evidence*, 2<sup>nd</sup> ed., (Reprinted, 2004), at 371.

<sup>5</sup> See Stephen I. Dwyer, ‘Presumptions and Burden of Proof’, 21 *Loy. L. Rev.* (1975), at 380 (quoting McCormick).

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which party bears the obligation to prove the ‘facts in issue’ or other ‘relevant facts’ as may arise in each individual case.

## 1.2 The Notion, kinds and Operations of Burdens of Proof

The notion of “burden of Proof” is one of the most elusive terms in the law of evidence,<sup>6</sup> and it may be used in a number of different senses.<sup>7</sup> Depending on the context, it may refer to *evidential burden*, or it may denote *persuasive burden*, or it may signify *tactical burden*. In the literature, academic discourse and law-making, it is often employed indiscriminately without implying any one of these specific meanings. In such cases, one will be required to search for the particular meaning in which the term is employed in that particular context. As there are varieties of meanings of this term, it is more appropriate to use the expression ‘burdens of proof’ than simply to employ the singular term ‘burden of proof’. In the strictest legal parlance, however, *evidential* and *tactical* burdens of proof are not truly burdens of “proof”.<sup>8</sup>

In the sense of *evidential burden*, the term ‘burden of proof’ refers to the obligation of a party to a dispute to *lead evidence* to show his case. This is what is commonly referred to as ‘burden of adduction (production) of evidence’ or ‘burden of going forward with evidence’, or simply as ‘evidential burden’. A party that bears evidential burden is required to *point out* and to *present* or

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<sup>6</sup> Id, at 377; CRM Dlamini (2003), ‘The Burden of Proof: Its Role and Meaning’, 14 *Stellenbosch L. Rev.* at 68; Colin Tapper (1999), *Cross and Tapper on Evidence*, 9<sup>th</sup> ed., at 106.

<sup>7</sup> Tapper, *supra* note 6, at 106-108; A.A.S Zuckerman (1989), *The Principles of Criminal Evidence*, at 104-109; Emson, *supra* note 3, at 420-421; Dennis, *supra* note 4, at 369-373.

<sup>8</sup> These two do not envisage a duty of convincing of fact-finders about the truthfulness of one’s side of story in a case. Only the *legal burden of proof* (*persuasive burden*) stands to be the proper burden of *proof* deserving the name in judicial proceedings. There is yet another unfortunate circumstance in relation to the usage of the term “proof” both in law-making and in scholarly works. In its strict and proper sense the term “proof” refers to the process and *end result of evidence* and/or *other probative materials* (such as formal admission (*plea of guilt*), *judicial notice* and to some extent *presumptions*) upon the minds of decision-makers; yet, the word ‘proof’ is often used as a synonym of the term ‘evidence’. The Amharic equivalent for the proper sense of proof is ‘ጥገረገጥ/ጠገረገጥ’ while the equivalent of the term ‘evidence’ is ‘ጥስረጃ’. ‘Evidence’ is just one, actually the basic one, of probative materials (device) that help proving facts under investigation. This input (means) must be distinguished from the process and end product- state of factual persuasion, i.e., the degree of conviction created in the mind of the judge by the force of evidence and/or other probative device, or state of being proved or disproved in the process. N.B. ‘proof’ is the noun form while ‘prove’ is the verb.

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*introduce* enough evidence that help *putting a matter in issue*. As Tapper observed, evidential burden refers to: “The obligation to show, if called upon to do so, that there is sufficient evidence to *raise an issue as to the existence or non-existence of a fact in issue*, due regard being had to the standard of proof demanded of the party under such obligation.” [Emphasis added].<sup>9</sup>

A party upon whom such an obligation is imposed is not required to *prove* something thereby *convincing* decision-makers as to the truthfulness of his side of the story in respect of that issue for which he bears evidential burden. In other words, evidential burdens do not envisage an obligation of *proving*. As Emson notes, “[t]he evidential burden is not a burden of *proof* as such but rather an obligation to demonstrate that sufficient evidence has been adduced or elicited in support of an assertion of fact so that it can become a live issue” [Emphasis in the original].<sup>10</sup> Zuckerman also states that such burden “imposes an obligation to adduce some evidence in support of the existence of some facts in issue, without imposing any duty to generate any particular degree of confidence in the adjudicator’s mind.”<sup>11</sup>

In criminal proceedings, in respect of the substantive matters in a criminal charge, it is the prosecutor that always has to *open the case and lead evidence*.<sup>12</sup> The prosecutor has to adduce evidence in support of the *facts in issue*, which pertain to the *material and moral elements* of the offence in its charge. The principle of presumption of innocence to which any criminally accused person is entitled compels prosecuting authorities to bear this initial evidential burden.<sup>13</sup>

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<sup>9</sup> Tapper, *supra* note 6, at 109

<sup>10</sup> Emson, *supra* note 3, at 420.

<sup>11</sup> Zuckerman, *Supra* note 7, at 107.

<sup>12</sup> The presumption of innocence protects the accused from being compelled to lead evidence. But, if collateral issues such as criminal irresponsibility due to minor age, or insanity are raised by an accused person, the accused bears the burden of leading evidence on such collateral issues. See Rinat Kitai (2002), ‘Presuming Innocence’, 55 *Okla. L. Rev.* at 258 (footnote omitted); Andrew Ashworth (2006), ‘Four Threats to the Presumption of innocence’, 10 *Int’l J. Evidence & Proof*, at 249.

<sup>13</sup> As Ashworth (Ibid) noted the “presumption of innocence is a moral and political principle, based on a widely shared conception of how a free society (as distinct from an authoritarian society) should exercise the power to punish.” It is not factual presumption. Ashworth (Ibid) wrote “there is no rational connection between being prosecuted and being innocent, and indeed the statistics on guilty pleas and convictions suggest that most of those prosecuted are guilty.” It is important to note that the principle of presumption of innocence places evidential and persuasive burdens of proof upon the state (prosecutor) and that determines the extent of proof that is required of the prosecutor to discharge its ultimate burden of proof. In its broader sense, it could go to the pre-trial criminal process to imply, guide and

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In some *exceptional* circumstances provided by law, the prosecutor may be *partly* relieved of this burden for *some of the material or moral elements* of the offence or in respect of some incidental or circumstantial matters in the charge.<sup>14</sup> This occurs in cases where the accused, unlike the prosecutor, is in a better position to produce some form of evidence that is within his personal knowledge or within his reach. In such circumstances the legislature may determine to *ease* (but *not to exonerate totally*) the evidential burden of the prosecutor by employing some form of *presumption* to particular facts or related circumstances that are deemed to be within the knowledge or reach of the accused.<sup>15</sup> This scenario involves the *reversal* (“*shift*”) of *evidential burden of proof* in respect of such material or moral or other circumstantial facts. This is more appropriately referred to as *easing of the evidential burden of the prosecutor*.<sup>16</sup> What is eased or reduced in such instances is the partial (and not the whole) evidential burden of the prosecutor.

The prosecutor loses on the case if it fails to *preliminarily* discharge its normal or reduced evidential burden with the required degree of persuasion. Failure to produce *prima facie proof*<sup>17</sup> in criminal proceedings leads into the

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regulate the behavior of the state, state organs and the general public on how they should treat suspected persons.

- <sup>14</sup> See Lindy Muzila, Michelle Morales, Marianne Mathias, and Tammar Berger (2012), *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*; Washington, DC: World Bank. DOI: 10.1596/978-0-8213-9454-0. License: Creative Commons Attribution CC BY 3.0, at 30-31, available at: <<http://creativecommons.org/licenses/by/3.0>>(last visited 15/8/2013); International Council on Human Rights Policy (2010), ‘Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities’, at 65-66; available at: <[www.ichratorg/files/reports/58/131b\\_report.pdf](http://www.ichratorg/files/reports/58/131b_report.pdf)>, (last visited on 12/08/ 2013); Ndiva Kofele-Kale (2006), ‘Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes’, *40 Int’l Law*, at 931-942.
- <sup>15</sup> Kofele-Kale, *Supra* note 14, at 931-942; Bertrand de Speville (1997), ‘Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights’, paper presented to the 8<sup>th</sup> International Anti-Corruption Conference, available at: <<http://8iacc.org/papers/despeville.html>> (last visited on 21 November 2013).
- <sup>16</sup> See Byron M. Sheldrick (1986), ‘Shifting Burdens and Required Inferences: Constitutionality of Reverse Onus Clauses’, *44 U. Toronto Fac. L. Rev.*, at 182; Maud Perdriel-Vaissiere (January 2012), ‘The Accumulation of Unexplained Wealth by Public Officials: Making the offence of illicit enrichment enforceable’, *U4 Brief*, No 1, at 2-3, available at: <[www.U4.no](http://www.U4.no)>, at 33 (last visited on 17/08/2013). Many scholars and court judges have expressed their opinion that such a reversal (easing of) an evidential burden would not contradict with the basic essence of presumption of innocence (Ibid); See also Kofele-Kale, *Supra* note14, at 924-944.
- <sup>17</sup> The expression *prima facie proof* (also loosely, but awkwardly, employed as *prima facie evidence* or as *prima facie case*) signifies that state of condition in which in the
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acquittal of the accused in the middle of the trial process. This is what is often expressed as the order of ‘no case motion’ or ‘no case to answer’.<sup>18</sup>

On the other hand, if the prosecutor successfully discharges the normal or reduced evidential burden, the court orders the accused to enter into his defence. It is at this point that the accused will be required to shoulder and to discharge his burden by leading rebuttal or counter-evidence. This is the point whereupon the other type of burden of “proof”, in the broad sense of the term, will come into the picture- that is *tactical burden of proof*. Often, this is expressed by the term “shift of burden of proof”. More appropriately, this is referred to as the ‘placing of an evidential burden on an opponent’ or, as ‘a shift of the evidential burden of proof from the prosecutor to the accused’.

In the sense of *tactical burden*, the term ‘burden of proof’ refers to what a party to a dispute may do if the other party that bears evidential burden successfully discharges its evidential burden. This is what is also termed as the *provisional burden*.<sup>19</sup> In brief, this refers to the obligation of the other party (against whom *prima facie proof* is submitted) to lead some counter or rebuttal evidence. This burden does not come into the picture if the court, after making a preliminary (provisional) assessment of the evidence of the party that bears persuasive burden (and thus leads evidence) concludes that there is ‘no case to answer’. In criminal proceedings, a judge of a given court orders an accused to enter into his defence *only if* it is *sufficiently convinced* that a reasonable fact finder will convict such an accused if he fails to produce some counter or rebuttal evidence. Once the judge gives an order that the accused has to enter

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absence of evidence to the contrary some fact is (or may or must be) considered as proved or established. In criminal proceedings, it often refers to the provisional (temporary) proof beyond a reasonable doubt degree of conviction. It is said to be *provisional* or *temporary* for there is a possibility for the accused to rebut or counter such degree of proof. It is this *state of conviction created in the mind of judges* that is provisional not the *evidence* introduced. See Zuckerman, *Supra* note 7, at 53-54.

<sup>18</sup> *Ibid.*

<sup>19</sup> Tapper, *supra* note 6, at 107; Emson, *supra* note 3, at 422. Emson wrote:

“If the party bearing an evidential burden on an issue manages to discharge it this is said to place on his opponent a ‘tactical’ or ‘provisional’ burden to adduce evidence in rebuttal. The tribunal of law’s ruling means that sufficient evidence has been adduced on the issue for the tribunal of fact to find, at the end of the trial, that it has been proved. If the opponent fails to adduce evidence to show the contrary it is quite possible that the issue will be proved against him. It would therefore be to the opponent’s advantage to adduce evidence in rebuttal rather than simply hope the tribunal of fact does not find in the proponent’s favour: he is obliged, in a tactical sense, to adduce evidence of his own. If the prosecution [has] established a *prima facie* case against the accused it is not incumbent on him to adduce evidence of his own, for the jury may decide in his favour anyway.”

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into his defence, it would be the responsibility of that accused to lead some counter or rebuttal evidence. Failure on the part of the accused to discharge his tactical burden by adducing some rebuttal (counter) evidence in such circumstances entails a potential *risk* of conviction. As Dennis's observes:

When a party has discharged an evidential burden and raised an issue for the court to consider, there arises a tactical onus on the other party to respond with some rebutting evidence. There is no legal obligation to adduce (further) evidence on the issue, but the party against whom the evidence has been adduced increases the risk of losing on the issue if nothing is done to challenge the evidence.<sup>20</sup>

In the strict legal parlance, the term 'burden of proof' refers to *the obligation of a party to persuade* the existence or non-existence of a disputed matter of fact to *the satisfaction of judges* with the necessary amount and quality of evidence and/or other probative devices. As Tapper notes, it denotes "the obligation of a party to meet the requirement that a fact in issue be proved (or disproved) either by a preponderance of the evidence [in civil cases] or beyond reasonable doubt [in criminal cases]."<sup>21</sup> This is the true burden of proof that determines which party in a proceeding is responsible to prove or disprove a particular fact(s) in issue under risk of losing on an issue or on the whole of the case, as the case may be. It is this burden that determines which party is under an obligation to lead evidence of a particular fact and *convince* the court thereof; it is this burden that mainly determines the *party who will lose* if the court is not satisfied that the fact has been proved. This burden of proof is also referred to as legal (persuasive) burden, or probative burden, or risk of non-persuasion, and it fixes the party that loses on an issue of fact or on the whole of the case.<sup>22</sup> Emson writes:

The legal burden of proof [...] is the obligation the law imposes on a party to prove a fact in issue. In effect it is no more than a risk-allocation mechanism: the party who bears the legal burden on an issue carries the risk of losing on that issue if the evidence relevant to it is evenly balanced or non-existent. It is for that party to adduce sufficient evidence to persuade the tribunal of fact that his version of events is correct.<sup>23</sup>

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<sup>20</sup> Dennis, *supra* note 4, at 373-374.

<sup>21</sup> Tapper, *supra* note 6, at 108.

<sup>22</sup> Other interchangeable terms include 'fixed burden of proof', or simply as 'ultimate burden', See *Ibid.*, 108; Emson, *supra* note 3, at 419; Zuckerman, *supra* note 7, at 106; Dennis, *supra* note 4, at 371. Zuckerman notes (at 106) that each of the alternative terms may, depending on the context, carry much more specific connotations.

<sup>23</sup> Emson, *supra* note 3, at 419.

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As Professor Allen noted “the substantive law determines who has the burden of persuasion through its articulation of elements and defenses.”<sup>24</sup> And, under normal circumstances, the party bearing the legal burden of proof on a fact in issue also bears the evidential burden to make it a live issue.<sup>25</sup> Many legal scholars have observed that the evidential burden is a function of the burden of persuasion.<sup>26</sup> In respect of the substantive contents (ingredients of an offence) of a criminal charge, it is the prosecutor that normally bears legal burden of proof. The prosecutor is duty bound to *convince* that the accused has committed the *actus reus*. It is also duty bound to *persuade* judges that the accused did it with blameworthy state of mind (*mens rea*) unless the specific offence is one of strict criminal liability.

Unless the law makes partial easing (reducing) of the prosecutor’s burden,<sup>27</sup> the prosecutor is required to establish or prove *each and every essential material and moral ingredients of an offence* stated in a charge. The operation of the principle of presumption of innocence commands that the prosecutor bears the duty of proving *guilt* beyond a reasonable doubt. Proving of guilt in turn presupposes establishment of each and every essential material and moral ingredients of an offence. No accused person is required to prove his *innocence* in modern criminal justice systems. It is the accuser- the prosecutor- that must prove *guilt*. And the prosecutor’s legal burden is *fixed*; it does not shift to an accused any time during the course of a trial.<sup>28</sup> The expression ‘fixed burden of proof’ is thus interchangeably used with ‘persuasive burden’ or ‘legal burden’ of proof. As Dennis observes, “[l]egal burdens are allocated by rules of law and are *fixed* at the beginning of the case. They *do not shift* during the course of a trial” [Emphasis added].<sup>29</sup>

Only in very few exceptional circumstances may a *reversal of legal burden of proof* be allowed in respect of *some* (but not all) ingredients in certain offences.<sup>30</sup> This occurs in cases where the legislative body finds it that doing so

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<sup>24</sup> Ronald J. Allen (2011), ‘Standards of Proof and the Limits of Legal Analysis’, at 3; available at: <<http://ssrn.com/abstract=1830344>> (Last visited on 23 December, 2013).

<sup>25</sup> Emson, *supra* note 3, at 421; Zuckerman, *supra* note 7, at 108.

<sup>26</sup> See Allen, *supra* note 2, at 11 citing John T. McNaughton (1955), ‘Burden of Production of Evidence: A Function of Burden of Persuasion’, 68 *Harv. L. Rev.*, at 1382.

<sup>27</sup> If the law made partial easing (reducing) of the prosecutor’s burden, the obligation of the latter to establish/prove would be limited to those that remain under its shoulder.

<sup>28</sup> See Dennis, *supra* note 4, at 371.

<sup>29</sup> *Ibid.*

<sup>30</sup> Kofele-Kale, *supra* note 14, at 943; de Speville, *Supra* note 15, at 2. See also David Hamer (2007), ‘The presumption of Innocence and Reverse Burdens: A Balancing

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is *necessary, appropriate, reasonable and proportional* vis-à-vis the threat an exceptionally serious crime poses to society, and in view of the difficulty the prosecuting authorities face to produce evidence.<sup>31</sup> In some cases, the accused, not the prosecutor, may be in a better position to produce evidence that is within his personal knowledge or within his reach. Such may be the case in grand public corruption criminal cases wherein higher or senior public officials are prosecuted. Even in such cases the ultimate burden of proof remains with the prosecution. The other name for persuasive burden is thus known as the '*ultimate burden*'.

From this brief exposition, it is understandable that the form of burden of proof that is placed upon litigating parties differs greatly and the duty that each form of burden of proof imposes upon a party varies substantially. Failure to successfully discharge one's form of burden of proof at the right time with the required intensity of proof entails irreversible consequences. As most of the confusions and dilemmas in Ethiopian criminal trials seem to surface in these areas, it is appropriate to quote at length what Dennis states in respect of the distinction between evidential burden and persuasive burden:

When a judge is deciding whether an evidential burden has been discharged, he looks only at the evidence favouring the party who bears the evidential burden. The question for decision is whether the favourable evidence is sufficient by itself to raise an issue for the court to consider; the fact that there may be substantial other evidence contradicting the favourable

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Act', 66 *Cambridge L. J.*, at 148-149 (discussing the compatibility or otherwise of reversal of persuasive burdens of proof with the principle of presumption of innocence and further analyzing the various factors that could be considered in determining such compatibility or incompatibility. The factors listed are 'seriousness of offence', 'gravamen of offence', 'exigency of threat posed', and 'pragmatics of proof'.)

<sup>31</sup> Ibid; Jayawickrama *et al* have written: ... with the emergence or escalation of organized crime, drug trafficking, terrorism and corruption, in many legal systems the operation of other statutory presumptions of law or fact have been considered necessary for the effective administration of criminal justice. The pre-eminent position accorded to the presumption of innocence means that these presumptions of law or fact require to be confined within reasonable and appropriate limits. In no circumstances should an accused be required to do more than raise a reasonable doubt as to his or her guilt. Accordingly, a presumption that relieved the prosecution of part of its burden of proving all the elements of a criminal charge, so that a conviction could result despite the existence of a reasonable doubt as to the guilt of an accused person, would be inconsistent with the presumption of innocence.

See Nihal Jayawickrama, Jeremy Pope & Oliver Stolpe (2002), 'Legal Provisions to Facilitate the gathering of evidence in Corruption Cases: Easing the Burden of Proof', 2 *Forum on Crime and Society*, No.1, at 27 (footnotes omitted).

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evidence is immaterial at this stage. When a fact-finder (judge, jury or bench of magistrates) is deciding whether a legal burden has been discharged, the fact-finder looks at all the evidence adduced in the case. Thus the fact-finder will take into account the evidence which first served to discharge the evidential burden plus any other evidence which tends to confirm or rebut it. [...] The discharge of an evidential burden does not involve a decision that any fact has been proved. All it signifies is that a question has been validly raised about the possible existence of a material fact; the decision is only that enough evidence has been adduced to justify a possible finding in favour of the party bearing the burden. [...] The discharge of the legal burden occurs at a later stage in the trial, when the fact-finder is required to decide on the existence or non-existence of facts whose possible existence is in issue [Emphasis added].<sup>32</sup>

The next section briefly deals with some distinct scenarios that arise in the course of the interplay between burdens of proof and presumptions.

## **2. Interplay between Burdens of Proof and Presumptions in Criminal Trials**

Burdens of proof and presumptions are intimately related concepts.<sup>33</sup> The latter are legal devices that enable courts to draw conclusions regarding the existence or otherwise of facts from the establishment of other preliminary facts. As briefly discussed below, the operations of various forms of presumptions entail different consequences as they affect the normal operation of the various forms of burdens of proof thereby determining the respective roles and responsibilities of parties.<sup>34</sup>

Of the two types of presumptions, presumptions without basic facts and presumptions with basic facts,<sup>35</sup> only the latter type is relevant for us now. This is because many of the presumptions that we find in criminal law provisions

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<sup>32</sup> Dennis, *supra* note 4, at 371 (Emphasis in the original) (Also, footnote omitted). David Hamer also writes: “Whereas the reverse persuasive burden requires the defendant to prove his innocence on the balance of probabilities, the reverse evidential burden only requires the defendant to raise a matter of exculpation as a genuine issue. The Prosecution will then carry the persuasive burden of negating the matter.” See Hamer, *supra* note 30, at 143.

<sup>33</sup> Allen, *supra* note 2, at 24 & 30; Dennis, *supra* note 4, at 419-421; Dwyer, *supra* note 5, at 377.

<sup>34</sup> Dwyer writes: “In most cases, a presumption imposes the burden of proof upon the party against whom the presumption is operable. In certain cases, however, a presumption creates a burden which legally cannot be overcome” (Ibid).

<sup>35</sup> Tapper, *supra* note 6, at 120; Dennis, *supra* note 4, at 419.

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including those dealing with corruption offences such as the offence of illicit enrichment and procuring of an undue advantage relate to the type of presumption that comes into the picture only after a prosecuting body succeeds in establishing (proving) at least some facts that constitute the offence in the charge.<sup>36</sup> To draw some conclusion (conclusively or provisionally) about the existence or non-existence, the truthfulness or falsity of a fact in issue, such presumptions with basic facts presuppose a *prior establishment* or *proof of some basic fact(s)*. No such presumption could come into the picture without a prior establishment of some basic fact(s). Again, such presumptions could be either presumptions of fact or presumptions of law,<sup>37</sup> and, presumptions of law could be either rebuttable or irrebuttable.

In the case of irrebuttable presumptions of law, the party against whom such presumption operates does not have any opportunity to adduce any countering or rebuttal evidence. In the case of rebuttable presumption of law, however, the party against whom a fact is presumed to exist can adduce evidence to counter or rebut those provisionally assumed facts or state of affairs. Rebuttal of presumed facts, whether deriving from presumptions of fact or rebuttable presumptions of law, may take either of three forms: *provisional presumptions*, *evidential presumptions*, and *persuasive presumptions*.<sup>38</sup>

#### a) **Provisional presumptions**

These derive from presumptions of fact. Whether one has to draw a conclusion from a proved basic fact is to be determined case by case. Judges *may* exercise their discretionary power either to draw or not to draw a conclusion about the existence or non-existence of some presumed fact. Once such an inference is drawn, however, the party against whom such a presumption of fact is taken bears a *provisional or tactical burden*. If such party wants to challenge the drawing of such a tentative conclusion or wants to avoid a *likely* risk it has to introduce some rebuttal evidence to create some *reasonable doubt as to the existence of a presumed fact*.<sup>39</sup>

#### b) **Evidential Presumptions**

Here the law requires judges to draw a conclusion from a proved basic fact. Once a basic fact is established, judges *must* draw a conclusion about the

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<sup>36</sup> See for example what Arts 403 and 419 of the Criminal Code of Ethiopia enact.

<sup>37</sup> See Dennis, *supra* note 4, at 420. In the case of *presumptions of fact* (provisional presumption) conclusions *may* be drawn from proof of basic facts at the discretion of judges while in the case of *presumptions of law*, the law *requires* judges to draw conclusions from proved basic facts.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

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existence of a presumed fact *in the absence of any evidence to the contrary*.<sup>40</sup> The conclusion stands intact in the absence of contrary evidence. This form of rebuttable presumption of law therefore requires the party against whom such a conclusion is drawn to bear *evidential burden*. This signifies a “shift” or transfer of evidential burden from the party that is beneficiary of the presumption to the other party. It entails that the party against whom such a conclusion is drawn has to adduce *sufficient evidence to bring into question the truthfulness of the presumed fact*, because otherwise judges are *required* to uphold the drawn conclusion.<sup>41</sup> The presumption vanishes only if such a party introduces some rebuttal evidence which puts the presumed fact in doubt. Obviously, such forms of presumption do not affect the *legal burden* of proof that is applicable in the proceeding. Emson writes:

An evidential presumption *does not affect the incidence of the legal burden of proof* but places an evidential burden upon the opposing party once certain basic facts have been proved or admitted. *The party relying on the presumption still bears the legal burden of proving the presumed fact but this burden will be deemed to have been discharged*, and the tribunal of fact will be obliged to accept its truth, *if the opposing party has failed to adduce sufficient evidence to suggest the contrary*. If the evidential burden has been discharged, the tribunal of fact will have to *weigh in the balance the probative value of the evidence adduced by the opposing party against that of the basic facts and any other evidence adduced by the party bearing the legal burden*, in order to determine whether the legal burden has been discharged [Emphasis added].<sup>42</sup>

### c) Persuasive Presumptions

Here the law requires judges to draw a conclusion from a proved basic fact *unless and until such conclusion is disproved by the party disputing it*.<sup>43</sup> In such cases, the party against whom such a conclusion is drawn is required to bear *persuasive burden* on and only on the *presumed fact*. This signifies a “shift” or transfer of legal burden of proof *in respect of the presumed fact only*. It must be noted that there is only “shift” of legal burden of proof in respect of a specified (identified) presumed fact. If such a party wants to avoid losing on that

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid; See also Ashworth (*supra* note 12, at 269) stating: “Discharging the evidential burden does place an obligation on the defendant, and for that reason it requires justification and should not be casually imposed. But the burden is much lighter than the onus of proving an issue on the balance of probabilities, and hence it is less objectionable.”

<sup>42</sup> Emson, *supra* note 3, at 461-462.

<sup>43</sup> Dennis, *supra* note 4, at 421.

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presumed fact or on the whole of the case, as the case may be, he has to *prove* the non-existence of the presumed fact. It is not sufficient for such a party to merely create doubts as to the truthfulness of the presumed fact. He should rather *convince* on a balance of probabilities that his side of the story is true in relation to the presumed fact. Emson notes:

*A persuasive presumption is effectively a rule which places the legal burden of proof on a particular party once certain basic facts have been proved or admitted. The basic facts give rise to the presumed fact, and it is for the opposing party to prove the contrary [Emphasis added].*<sup>44</sup>

It is thus essential to identify the types of rebuttable presumptions that are embodied in statutory laws and to appreciate their specific impacts on specific forms of burdens of proof envisaged thereupon by paying particular attention to how specific offences have been defined or formulated. Apart from paying good attention to terms such as “may”, “must”, “shall”, or any other equivalent term in statutory formulations, one has to critically examine whether there are expressions such as “... *in the absence of any evidence to the contrary*...”, or “...*unless and until disproved*...”. The manner in which rebuttable presumptions are formulated in the provisions that articulate particular offences indicate intended consequences.

### **3. The Notion, Kinds and Application of Standards of Proof in Criminal Trials**

A related concept to the notions of burdens of proof and presumptions is standards of proof. Basically the idea of ‘standard of proof’ is concerned with the question of the *degree* or *level* to which the facts in issue or relevant facts must be proved or, to be shown or supported to exist, as the case may be. It refers to “the degree of probability to which facts must be proved to be true.”<sup>45</sup> In criminal proceedings, the principle of presumption of innocence determines the essence and roles of such standards. This fundamental principle of criminal law and criminal procedure law directs litigating parties to carry out their respective burdens of proof; it also determines the standards of proof that has to be met by parties.<sup>46</sup>

The notion of ‘standards of proof’ may signify different things in various contexts. In the loose sense, it connotes different levels or degrees of “proof”. It may, for example, signify the *extent or level of intensity* of the evidence that is

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<sup>44</sup> Ibid, at 461.

<sup>45</sup> Dennis, *supra* note 4, at 370.

<sup>46</sup> Ashworth, *supra* note 12, at 249; Kitai, *supra* note 12, at 258; Dlamini, *supra* note 6, at 396.

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required for a party that bears *evidential burden* to successfully discharge this burden and thereby to trigger “shift” of burden of adduction of evidence to the other party. In criminal cases, this may arise in two different circumstances.

Firstly (and primarily), it arises in the context of the initial evidential burden of the prosecutor. The prosecutor is required to carry out its evidential burden on the substantive elements of the offence in its charge on the basis of the principle of presumption of innocence and the evidential maxim that ‘he who asserts shall prove his assertion’. After the adduction of the evidence of the prosecutor in respect of the substantive matters in the charge is over, the evidence is *provisionally* (temporarily) assessed or evaluated bearing in mind the *ultimate burden of proof* which would be used to evaluate the overall evidence at the end of the trial. Although proof beyond a reasonable doubt is not the *scale* a judge is employing to measure the intensity of the prosecution’s evidence at this phase of the litigation, in actuality the intensity of the evidence is assessed in view of that scale. Accordingly, the prosecutor is said to have discharged its evidential burden only if it has introduced an amount of evidence that enables the court to order the accused to enter into his defence. This standard of proof, often referred to as *prima facie proof*, is a degree of proof that leads into the conviction of the accused if the latter fails to introduce any rebuttal or counter evidence for any reason, or where the accused who has submitted evidence, fails to introduce an amount of evidence that creates such an intensity to spark some doubt(s).

*Secondly*, in some exceptional circumstances stipulated by law, an evidential burden of proof may be imposed upon the accused for some material and/or moral elements in certain criminal offences. As already stated, such a measure is adopted only in certain justifiable circumstances and only with a view to minimize, to some extent, the evidential burden of proof borne by the public prosecutor. This pertains to evidential presumptions, which is different from those of provisional presumptions as well as persuasive presumptions. The degree of “proof” required of the accused in such instances is one which has the intensity to *raise or create some reasonable doubt(s)* as to the existence or truthfulness of the presumed fact. In the real sense, it could be argued that the accused is not required to create or raise ‘a reasonable doubt’ against the prosecutor’s evidence or the presumed fact. It is rather the prosecutor that should prove its case *beyond* a reasonable doubt degree of proof.

There is also another sense of standard of proof. This is what one may find in criminal proceedings when judges draw a presumption of fact as to the truthfulness (or as to the existence) of some presumed fact thereby imposing some tactical burden of proof on an accused in respect of such presumed fact. In such instances, accused persons would be required to introduce some rebuttal or counter evidence. With regard to the degree of “proof” that is required to discharge such tactical (provisional) burden of proof, (in the strict sense) the accused is *not under any legal burden of proof* in such instances; the accused is

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not expected to *convince* judges to his side of the story in respect of a presumed fact drawn at the discretionary power of judges. No legal obligation is imposed on the accused requiring him to *prove* his innocence or to *disprove* what is presumed to exist. By virtue of the principle of presumption of innocence, it is the prosecutor that should *convince* judges about the *actus reus* and the *mens rea* elements appearing in the charge. This goes in line with the maxim ‘he who asserts [not he who denies] shall prove his assertion’.

This raises the issue as to what is required of the accused in the event of tactical burden of proof. As stated earlier, such burden only demands the accused to adduce some counter or rebuttal evidence that has a potential cogency to *spark some doubt(s)* against the evidence of the prosecutor or against the presumed fact. This is very different from *convincing* judges about the truthfulness of one’s side of the story.<sup>47</sup> To a greater extent, we observe that this standard of “proof” is similar to the one that eventuates in cases of evidential presumptions.<sup>48</sup> Conviction, in both cases, does not depend on the extent of an accused person’s defence. Judges pass judgment of conviction only if the prosecutor proves the case *beyond a reasonable doubt*.

Further still, there is another very rare, theoretically available, form of standard of proof which arises under circumstances wherein persuasive presumptions may be applicable. Theoretically, the legislative body in a national jurisdiction may, arguably, resolve to employ some form of persuasive presumptions (reverse persuasive burden) for a few categories of offences that pose exceptional severe threats to the public such as in respect of organized crime, drug trafficking, crimes of terrorism and public corruption.<sup>49</sup> If such a measure is to be adopted validly, the law could obligate judges to presume the existence of a presumed fact (following the establishment of basic fact(s))

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<sup>47</sup> See Dennis, *supra* note 4, at 373 (it only requires to “respond with some rebutting evidence”).

<sup>48</sup> Evidential burden requires the accused to raise or create reasonable doubt, a standard of proof which is much lighter than preponderance of proof (balance of probabilities). (See Ashworth, *supra* note 12, at 269.)

<sup>49</sup> Kofele-Kale, *supra* note 14, at 942-943; Hamer, *supra* note 30, at 148-149. No jurisdiction has so far recognized persuasive presumptions in criminal offences. Courts of law have interpreted entrenched presumptions as only amounting to evidential presumptions. See Professor Kofele-Kale writing “extant jurisprudence reads reverse onus clauses as casting an *evidential burden* on the accused” despite advocating for recognition of persuasive presumptions in some very exceptional criminal offences (*supra* note 14, at 942-943). Ashworth (*supra* note 12, at 269) also wrote “Where courts have found the reverse onus of proof incompatible with the presumption of innocence, the relevant provision has generally been reinterpreted as imposing only an evidential burden.”

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*unless and until an accused person disproves* the presumed fact. Such a presumption transfers *persuasive burden of proof* on some fact(s) from the prosecutor to the accused.<sup>50</sup> If such a measure is to be validly adopted by the legislature (which must be made in explicit terms), *what standard of proof* is to be required of an accused to *disprove* or *refute* the truthfulness (or the existence) of the presumed fact? Would it be acceptable or justifiable if the legislature determines it to be one of ‘proof beyond a reasonable doubt’ degree? What would be the implication if such a standard of proof is to be recognized?

These questions are beyond the scope of this note, and it suffices here to briefly state that ‘proof beyond a reasonable doubt’ standard of proof is required of the prosecutor to minimize risk of mistaken conviction. Demanding such high degree of proof from an accused for the facts presumed otherwise would open dangerous loopholes toward the conviction of an accused despite the existence of some reasonable doubt. This goes against many fundamental values and interests including the principle of presumption of innocence and equality of arms. Under such thresholds, innocent persons can be easily convicted for merely failing to persuade judges about the contrary version of facts presumed.

Various jurisdictions such as Canada have maintained that requiring an accused to bear even a preponderant degree of proof is antithetical to the principle of presumption of innocence. In this regard, it has been noted that “where the accused bears the burden of proving an essential element of an offence on a balance of probabilities, it would be possible for conviction to occur despite the existence of a reasonable doubt, if the accused adduces sufficient evidence to raise a reasonable doubt of his guilt but fails to convince the jury on the balance of probabilities.”<sup>51</sup> As could be gathered from various writings of scholars and the case law of other jurisdictions that recognize a reasonable limitation of the presumption of innocence under certain justifiable circumstances, a preponderance degree of proof suffices to maintain public interests without obliterating the fair trial rights of accused persons.<sup>52</sup>

In the strict and proper sense, the concept of standard of proof in criminal trials denotes the *ultimate* degree or *quantum* of proof that is required to satisfy

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<sup>50</sup> Note the distinction between reversal (easing) of evidential burdens of proof and reversal (easing) of persuasive burdens of proof. The former only requires the accused to *raise reasonable doubt* while the latter requires him to *prove* to the *required standard* that the fact presumed does not hold to be true or to exist.

<sup>51</sup> See Lilian Y. Y. Ma (1991), ‘Corruption Offences in Hong Kong: Reverse Onus Clauses and the Bills of Rights’, 21 *Hong Kong L. J.*, at 307-308. To require the accused to shoulder more than the balance of probabilities (preponderance degree of proof) would be beyond an acceptable degree of tolerance and compromise in any modern criminal justice system.

<sup>52</sup> Kofele-Kale, *supra* note 14, at 942-943; Hamer, *supra* note 30, at 148-149.

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the minds of judges to decide upon the existence or non-existence of an issue of fact under inquiry. In this strict sense, the degree of proof which a prosecutor, in an adversarial criminal proceeding, bears to obtain conviction is *proof beyond a reasonable doubt*.<sup>53</sup> There is the need to properly understand what this standard means in practical terms. It means that in order to convict, judges must be *almost certain* that *the crime is committed* and that *the accused did it*. In other terms, judges must be *overwhelmingly* convinced; the probability that the crime might not have been committed or the probability that it might not have been committed by the accused must be found *unlikely*.<sup>54</sup>

### Concluding Remarks

The principle of the presumption of innocence requires the prosecution to bear both initial *evidential burden of proof* and *persuasive or ultimate burden of proof* in criminal trials. It has to lead evidence and prove each ingredient of the

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<sup>53</sup> Like the notion of burdens of proof, there are some distinctions in the conceptions and applications of the notion of *standards of proof* between common law and continental law jurisdictions. Continental lawyers often employ the expression *in dubio pro reo* (in case of doubt favour the defendant). Unlike ‘a reasonable man’s standard’ requirement of the common law and some continental law jurisdictions, judges in civil law countries are allowed to use *subjective* evaluation (*intime conviction*) when they assess and evaluate evidence presented to them. Yet, both common law and civil law jurisdictions require highest degree of persuasion to convict an accused. Of the three commonly applied degrees of proof recognized in judicial proceedings (i.e., ‘preponderance of the evidence’, ‘clear and convincing evidence’ and ‘proof beyond a reasonable doubt’ or ‘*in dubio pro reo*’), criminal proceedings require the prosecutor to prove the guilt of each accused *beyond a reasonable doubt* or *in dubio pro reo*. For further conceptual clarity and analysis see, for example, Damaška, *supra* note 2, at 540-544; Dwyer, *supra* note 5, at 377-404; J. P. McBaine, ‘Burden of Proof: Degrees of Belief’, 32 *Cal. L. Rev.* (1944), at 242-268. See also Christoph Engel (2008-2009), ‘Preponderance of the Evidence versus *Intime Conviction*: A Behavioral Perspective on a Conflict between American and Continental European Law’, 33 *Vt. L. Rev.*, at 435ff; Kitai, *supra* note 12, at 258 (footnote omitted); Ashworth, *supra* note 12, at 249.

<sup>54</sup> It goes without saying that the judicial search of truth is a matter of probability. So far, no society has invented a mechanism that helps ascertaining truth in criminal cases an absolute mathematical certainty. See Zuckerman, *supra* note 7, at 19-28; Dennis, *supra* note 4, at 3, 90-122. Dennis writes (at 3): “Because of the limitations of human knowledge ‘truth’ [...] has to be regarded as a question of probability. We can never be confident to the point of absolute certainty that our evidence is always accurate and complete, and that we have always drawn the correct inferences from it. Perfect knowledge is unattainable in an imperfect world. The law, like other fields of human inquiry, has to be satisfied with degrees of probability of accurate truth-finding” (footnote omitted).

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offence. It should also establish that the crime is committed and that it is committed by the accused with a culpable state of mind.

An accused person, on the other hand, is not required to open the case and to lead evidence to show or to prove his innocence. It would be antithetical to the principle of presumption of innocence and other fundamental societal values to require an accused to make a defense or to disprove guilt (or to prove innocence) before the prosecutor has successfully established guilt. Even in cases where the prosecutor might have successfully discharged its initial evidential burden, the accused is not required to *convince* judges about the truthfulness of his side of story in respect of facts in his defense or to *persuade* the falsity of the prosecution's evidence, partly or as a whole. Instead, the accused is required to raise or spark some doubt against the evidence of the prosecutor bearing a *tactical burden of proof*. Only in exceptional cases is the accused required to bear *evidential burden of proof* in respect of certain material and/or moral elements of an offence in a charge. That occurs in cases where the law embodies a rebuttable form of presumption (evidential presumption) in respect of certain material and/or moral elements of an offence that poses serious threats to the public. Under such circumstances where evidential burden of proof is imposed on an accused in respect of some elements of an offence, the evidential burden of proof of the prosecutor is said to be eased or reduced. In such cases the accused is only required to *create or raise reasonable doubt*, which is much lighter than establishing at a balance of probabilities.

As the judicial jurisprudence and the experience of various jurisdictions indicate, endorsing persuasive presumptions against accused persons cannot stand valid in the face of the fundamental human right to, and principle of, the presumption of innocence. The risk of convicting and punishing innocent individuals requires society to prefer erring on acquitting criminal persons rather than erring on the conviction of innocent persons.

By virtue of the operation of the presumption of innocence, the prosecutor is required to *convince* judges by creating such an intensity of belief in their minds that the crime stated in the charge is committed by the accused with a blameworthy state of mind. This persuasion of the guilt of the accused should indeed reach at the standard of proof envisaged by and compatible with the principle of presumption of innocence. The degree of proof envisaged by this principle as a prerequisite for conviction and punishment is *proof beyond a reasonable doubt*. ■

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