

<https://doi.org/10.22364/jull.15.18>

Permissibility of the Reverse Burden of Proof and its Limits in Criminal Proceedings in the Context of the Presumption of Innocence

Dr. iur. Jānis Rozenbergs

Faculty of Law, University of Latvia
Lecturer at the Department of Criminal Law
E-mail: janis.rozenbergs@lu.lv

This publication explores the limits of admissibility of the reverse burden of proof in criminal proceedings. To determine these limits, the reverse burden of proof is tested *vis-à-vis* the fundamental principle of the presumption of innocence in criminal proceedings. In searching for answers to the advanced question, the Latvian criminal procedural regulation is analysed in the context of the findings made in the Latvian and foreign theory of criminal procedure law, fundamental rights enshrined in the *Satversme* [Constitution] of the Republic of Latvia and the case law of the Constitutional Court of the Republic of Latvia, as well as international legal regulation and case law of the European Court of Human Rights.

Keywords: criminal procedure, reverse burden of proof, presumption of innocence, right to a fair trial.

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Introduction

Since ancient times, the burden of proving a person's guilt in criminal proceedings has been laid upon the State, and no person with the right to defence must be engaged in proving their innocence. Quite often, the provision, included in the Code of Justinian, is mentioned as a striking historical proof of the presumption of innocence, it provides that all accusers must understand that accusations should be based on evidence, the totality of which is incontestable and clear as daylight¹.

At the same time, currently, both in Latvia and in the European legal space, as well as elsewhere in the world, all rights of persons that are derived from the presumption of innocence are not granted absolute nature. Various legal instruments are used to create, through the legislative process, such legal institutions that *prima facie* are in conflict with the presumption of innocence or, at least, in some cases provide for exemptions to the application of this presumption. The establishment of the reverse burden of proof (hereafter also – the reverse onus clause) with respect to a certain range of issues in the procedural legal norms should be mentioned as one of the most obvious examples.

The aim of this publication is to determine the criteria for permissibility of reverse burden of proof in a criminal proceeding. To assess, whether such reverse burden of proof is a permissible exception to the presumption of innocence, first of all, the purpose of presumption must be clarified to determine whether the permission of exemptions does not cause risks of error in criminal legal proceedings. Following that, criteria may be sought that could be used to assess whether the establishment of the reverse burden of proof does not violate persons' rights that follow from the presumption of innocence to the extent that jeopardises criminal legal proceedings. And, finally, it would be possible to explore how the provisions of the Criminal Procedure Law, currently valid in Latvia and comprising elements of the reverse burden of proof, comply with these criteria.

1. Purpose of the presumption of innocence

This classical fundamental principle of criminal procedural law has been enshrined not only in the first and the second part of Section 19 of the Criminal Procedure Law² but also in the second sentence of Article 92 of the *Satversme* [Constitution] of the Republic of Latvia³, Article 11 of the UN Universal Declaration of Human Rights⁴, the second part of Article 14 of the International Covenant on Civil and Political Rights⁵, the second part of Article 6 of the European Convention for the Protection

¹ *Stumer, A.* The Presumption of Innocence. Evidential and Human Right Perspectives. Oxford: Hart Publishing Ltd, 2000, p. 1.

² Latvijas Republikas Saeimas 21.04.2005. likums "Kriminālprocesa likums" ar grozījumiem ["Criminal Procedure Law" of the *Saeima* of the Republic of Latvia of 21.04.2005., as amended] Available: <https://likumi.lv/ta/id/107820-kriminalprocesa-likums> [last viewed 10.04.2022].

³ Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: <https://likumi.lv/ta/id/57980-latvijas-republikas-satversme> [last viewed 10.04.2022].

⁴ UN Universal Declaration of Human Rights (10.12.1948). Available: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> [last viewed 10.04.2022].

⁵ UN International Covenant on Civil and Political Rights (16.12.1966). Available: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> [last viewed 10.04.2022].

of Human Rights and Fundamental Freedoms⁶, and Article 48 of the Charter of Fundamental Rights of the European Union⁷.

Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings⁸ can also be mentioned here as one of the legal acts of the European Union. Sometimes the findings consolidated in the Directive are narrower compared to the ones accepted by the European Court of Human Rights and the Court of Justice of the European Union, therefore, the Member States, including Latvia, in respecting the requirements of this Directive, must keep in mind that already now broader perspective is required and the provisions, included in the Directive, do not give grounds for derogating from those standards that already have been recognised in the case law of the European Court of Human Rights and the Court of Justice of the European Union.⁹

It is beyond doubt that all criminal proceedings must be concluded by a fair outcome. The guilt of those persons, who have committed a criminal offence, of the charges brought against them must be established in a legally correct way, and they must receive just punishment, whereas innocent persons should not be brought before the court but, if they have ended up in court due to an error, they should be acquitted.

Therefore, public safety requires criminal proceedings to be effective and law enforcement institutions to be able to detect crimes and prove the guilt of perpetrators thereof. Naturally, this includes the need to establish such criminal procedure that would not unfoundedly complicate the tasks of law enforcement institutions and would not render detection of crimes and proving of guilt impossible.

However, at this point another aspect intervenes – wrongful conviction of innocent persons cannot be in public interests either. This problem affects not only the person at risk of unfounded conviction but the entire society, because, in the case of wrongful conviction of a person, the perpetrator remains unpunished, which, in turn, increases the public safety risks. A saying has been heard in society that it is better to acquit ten guilty persons than to convict one that is innocent. Although, to a large extent, one can subscribe to it, nevertheless, it should be kept in mind that, in such a case, the ten ungroundedly acquitted persons still continue posing a threat to society. This presents a complicated task for lawyers to solve, namely, finding the balance between the presumption of innocence and the need to combat crime effectively.

Therefore, one of the overarching tasks of a criminal procedural legal act is to establish such procedure that limits to minimum these two risks of criminal proceedings – mistaken acquittal and wrongful conviction.

As noted in foreign legal literature, the primary aim governing burdens and standards of proof is to minimize the expected cost of error. This goal, which can be

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (04.11.1950). Available: https://echr.coe.int/Documents/Convention_ENG.pdf [last viewed 10.04.2022].

⁷ Charter of Fundamental Rights of the European Union (26.10.2012.). Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=LV> [last viewed 10.04.2022].

⁸ Directive (EU) 2016/343 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (09.03.2016). Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0343&from=LV> [last viewed 10.04.2022].

⁹ *Strada-Rozenberga, K.* Juridisko personu nevainīguma prezumpcija kriminālprocesā [Presumption of innocence of legal persons in criminal proceedings]. Autoru kolektīvs, Juridisko personu publiski tiesiskā atbildība: aktualitātes, problēmas un iespējamie risinājumi [Public Legal Liability of Legal Entities: Current Issues, Problems and Possible Solutions]. Rīga, University of Latvia Press, 2018, p. 44.

understood probabilistically, provides an explanation for the levels at which general standards of proof are set, and the general allocation of burdens of proof to prosecution. Variations from the general presumptions position, achieved through presumptions, and affirmative defences, can also be understood as directed towards this goal.¹⁰

Stringent requirements regarding the presumption of innocence, which place the entire burden of proof upon the prosecution, basically, are aimed at preventing conviction of innocent persons. Because it can be validly assumed that, often, it might be quite difficult for persons to prove their innocence. At the same time, if the legislator establishes that such absolute burden of proof for public prosecutions, in some aspects, is detrimental for reaching the purposes of criminal proceedings, demands incommensurate effort or even renders obtaining of evidence impossible, the legislator may consider and establish narrowly defined derogations from the presumption of innocence, where one of the instruments would be shifting the burden of proof with respect to some particular matters upon the suspect or the accused, if such reversal helps to balance the attainment of the two aims referred to above and does not cause serious risks of wrongful conviction of a person or other adverse consequences.

The presumption is not solely concerned with wrongful convictions. It is in the business of error management more broadly. It weighs up the probability and harm of both wrongful convictions and mistaken acquittals, and adopts a rule on proof that minimizes the expected cost of errors. Ordinarily, the expected cost is minimized by giving the prosecution a heavy burden of proof. At times, however, a recalibration of the error harms or probabilities will suggest the need for lesser stringency. Reversing the persuasive burden in respect of one of the matters pertaining to guilt may provide an effective means of adjustment.¹¹

2. Understanding of reverse burden of proof

Occasionally, rather critical opinions regarding the place of the reverse burden of proof within the system of criminal law are encountered in legal literature. Thus, Professor of the University of Otago (New Zealand) K. E. Dawkins once wrote that we have allowed statutory exceptions to grow on the back of the presumption of innocence for too long. Many of them are unsubtle devices that promote prosecutorial convenience and procedural economy at the expense of the fundamental principle that the prosecutor must prove a person's guilt beyond reasonable doubt. Mandatory presumptions and reverse onus clauses are especially unpalatable. They give prosecutor an unwarranted short-cut to proof and rob a person of the benefit of reasonable doubt.¹²

However, the prevailing current opinion is that the reverse burden of proof within the system of criminal law is acceptable in some cases, and research of this issue rather focuses on the limits to such reverse burden of proof and the admissible criteria for application thereof.

What exactly is designated as the reverse burden of proof in criminal procedure, and what is the relationship between this reverse burden of proof and the presumption of innocence?

¹⁰ *Hamer, D.* Presumptions, standards and burdens: managing the cost of error. *Law, Probability and Risk*, Vol. 13, Issue 3-4, September–December, 2014, p. 239.

¹¹ *Hamer, D.* A Dynamic Reconstruction of the Presumption of Innocence. *Oxford Journal of Legal Studies*, Vol. 31, No. 2, 2011, p. 434.

¹² *Dawkins, K. E.* Statutory Presumptions and Reverse Onus Clauses in the Criminal Law: In Search of Rationality. *Canterbury Law Review*, Vol. 3, No. 2, 1987, p. 238.

The nature of the relationship between the presumption of innocence and reverse burdens is a contentious subject among criminal lawyers. Some see the presumption of innocence as prohibiting reverse burdens only with respect to the formal elements of an offence, with anything labelled as a defence being beyond the scope of the presumption's protection. Conversely, others interpret the presumption of innocence as prohibiting reverse burdens outright, on the grounds that they allow for an accused to be convicted in spite of reasonable doubt as to guilt. Between these two positions, a series of intermediate views also exists, each with different interpretations of how reverse burdens can be compatible with the presumption of innocence.¹³ In no system of human or constitutional rights is the presumption of innocence regarded as absolute. There is some variation in the ways by which different constitutional or human rights documents allow for dilution of the presumption, but one might say that the South African, Canadian and European human rights laws are broadly concordant in the result.¹⁴

A preliminary question is one of statutory interpretation. Does the legislation impose any burden on the defendant and, if so, is the burden evidential or persuasive? Reverse evidential burdens merely require the defendant to raise the exculpatory matter as a genuine issue. It is still up to the prosecution to negate the defendant's claim and prove guilt beyond reasonable doubt, and compatibility with the presumption is not viewed as problematic. Reverse persuasive burdens, however, require the defendant to prove innocence on the balance of probabilities.¹⁵ Thus, reverse onus clauses have come to be classified by the type of burden placed on the accused. If the presumption can be rebutted simply by evidence raising reasonable doubt as to the presumed fact's existence, the reverse onus clause is characterized as evidential. If, on the other hand, the accused must actually prove, on a balance of probabilities, the non-existence of the presumed fact, the reverse onus clause is classified as persuasive.¹⁶

It has even been noted in literature that it is wrong to use, in designating this burden of proof, such concepts that link it to proving because, actually, as the result of performing this duty nothing is proven, only an issue is raised for review. Thus, such cases are possible where the persuasive burden remains with the prosecution, whereas to initiate examination of some matters, the burden of submitting evidence lies upon the defence. This means that if the defence has submitted sufficient evidence for reviewing a matter, then the prosecution is obliged to rebut it.¹⁷

While the persuasive burden could be defined as the obligation to convince the court of the truth of a fact, important for the disputed matter, within the limits of the required standard of proof,¹⁸ sometimes this obligation is also called the ultimate burden, and also the designation "the risk of non-persuasion" is used in relation to it.¹⁹

¹³ *Allen, J.* Rethinking the relationship between reverse burdens and the presumption of innocence. *The International Journal of Evidence & Proof*, Vol. 25(2), 2021, pp. 116–117.

¹⁴ *Ashworth, A.* Four threats to the presumption of innocence. *The International Journal of Evidence and Proof*, No. 10, 2006, p. 257.

¹⁵ *Hamer, D.* *A Dynamic Reconstruction*, p. 418.

¹⁶ *Sheldrick, B. M.* Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses. *University of Toronto Faculty of Law Review*, Vol. 44, No. 2, Fall 1986, p. 182.

¹⁷ *Strada-Rozenberga, K.* Pierādīšanas teorija kriminālprocesā, vispārīgā daļa [Theory of proof in criminal proceedings, general part]. Rīga, Biznesa augstskola Turība, 2002, pp. 129–130.

¹⁸ *Murphy, P.* *Murphy to Evidence*. 5th edition. London, Blackstone Press, 1995, p. 86.

¹⁹ *Strada-Rozenberga, K.* Pierādīšanas teorija kriminālprocesā, pp. 123–124.

3. Limits of permissibility of the reverse burden of proof

Exceptions to the presumption of innocence have been discussed as one of the main threats to the presumption of innocence. The possibility that a legislature may neutralise or even emasculate the practical impact of the presumption of innocence by manipulating the definitions of criminal offences remains. If the burden of disproving a particular defence to a crime is required (by the presumption) to fall on the prosecution, might the legislature eliminate that defence entirely, or deem a matter to be proved in law in the absence of proof in fact? This does not affect the defendant's procedural right to require the prosecution to prove guilt, but by redefining what constitutes guilt, it empties the presumption of much significance.²⁰

The presumption of innocence balances the defendant's right to avoid mistaken conviction against the community's interest in law enforcement, taking account of the practicalities of proof. The balance ordinarily favours the defendant, and the burden of proof carried by the prosecution is heavy, but not absolute. The reverse persuasive burden requires the defendant to prove his innocence. It strongly shifts the balance in favour of law enforcement. It can be expected to bring more convictions, but also increase the number of the erroneous convictions. To be compatible with the presumption of innocence, this readjustment must be justified. In determining whether a reverse burden is compatible with the presumption of innocence, the pragmatics of proof should also be considered. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden?²¹ In some cases, the prosecution may face extraordinary difficulties in proving the guilt of a guilty defendant, while an innocent defendant could easily prove his innocence. In such cases, a reverse burden would reduce the risk of mistaken acquittal without unduly increasing the risk of a wrongful conviction.²² The extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access would also be relevant to proportionality analysis. From ancient times, when the presumption of innocence was crafted, it was known that it could be applied in situations where it would be relatively easy for the defendant to present evidence disproving their guilt. However, we have never insisted that they do so,²³ because it is kept in mind that rebuttal of presumptions, rather than being a mandatory duty, is the right of the accused person.

Most probably, such pragmatic considerations are the ones that the legislator must weigh every time, when an issue related to introducing current derogation from the presumption of innocence into the Criminal Procedure Law is placed on the agenda. Society's interest in effective combatting of crime and fair punishment of perpetrators within the framework of criminal law must be weighed in the balance with the interest of society and each individual addressee of law to prevent imposing unjustified and difficult to discharge obligations upon persons, which might lead to unjustified convictions or other unjustified criminal law or adverse financial consequences.

²⁰ *Ashworth, A.* Four threats, pp. 276–277.

²¹ *Hamer, D.* The presumption of innocence and reverse burdens: a balance act. *Cambridge Law Journal*, 66(1), 2007, pp. 170–171.

²² *Hamer, D.* A Dynamic Reconstruction, p. 427.

²³ *Grey, A. D.* The presumption of innocence under attack. *New Criminal Law Review: An International and Interdisciplinary Journal*, Vol. 20, No. 4, Fall 2017, p. 611.

According to Professor Victor Tadros, it has often been claimed that, in assessing interference with the presumption of innocence, it has been important to strike a fair balance between “the rights of the individual and the wider interests of the community”. What constitutes interference with the rights of the individual, on one side of this balance, is very poorly understood. What constitutes the wider interests of the community is almost entirely unexamined. The wider interests of the community, it is supposed, will be served by conviction on an insecure epistemic basis. Why would the wider community have an interest in convicting people of criminal offences where it has not been proven beyond reasonable doubt that they have been the intended targets of such criminal offences? Statements about the interests of victims, or the interests of the wider community, when unexamined, can be very dangerous in the context of criminal justice.²⁴

Associate Professor of law Dr. Federico Pinicali differentiates between “*substantivist*” and “*proceduralist*” approach to defining the limits of reverse burden of proof in the context of the presumption of innocence. According to the *substantivist* approach, the presumption of innocence does not merely govern the proof of facts at trial; it also has implications for criminalisation. *The presumption is violated, when a person is convicted of conduct that should not be subject to punishment, whether or not a reverse burden is involved.* As a result, a reverse burden on a particular fact is compatible with the presumption only if the prohibited behaviour, considered without (the negative of) that fact, would be deserving of punishment. In contrast, according to the *proceduralist* approach, the presumption of innocence only concerns the proof of facts at trial. *The proceduralist maintains that the presumption of innocence is violated when a person is convicted notwithstanding that an element of the crime is not proven.* Whether the conduct, with or without this element, is deserving of punishment is irrelevant to determining whether the presumption has been breached. Proceduralism contends that only reverse burdens regarding the negative of an element of the crime conflict with the presumption of innocence.²⁵

Concerning the approach of the European human rights law, we should consider that the Convention does not *prima facie* allow for any exception from the presumption. The Strasbourg Court has decided that the presumption of innocence is not so invariable as to prohibit all presumptions of fact or law in criminal cases. However, States are required, according to the leading decision in *Salabiaku v. France*²⁶, to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.²⁷

Para. 22 of the Preamble to Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings notes, *inter alia*, that the use of such presumptions should be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, and the means employed should be reasonably

²⁴ Tadros, V. Rethinking the presumption of innocence. *Criminal Law and Philosophy*, Vol. 1 (2), 2007, p. 193.

²⁵ Picinali, F. Innocence and burdens of proof in English criminal law. *Law, Probability and Risk*, Vol. 13 (3–4), 2014, pp. 8–9.

²⁶ Decision in case *Salabiaku v. France*, 07.10.1988, application No. 10519/83. Available: <https://hudoc.echr.coe.int/eng#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22appno%22:%5B%2210519/83%22%5D,%22documentcollectionid%22:%5B%22CHAMBER%22%5D,%22itemid%22:%5B%22001-57570%22%5D%7D> [last viewed 10.04.2022], para. 28.

²⁷ Ashworth, A. Four threats, p. 257.

proportionate to the legitimate aim pursued. Such presumptions should be rebuttable and, in any event, should be used only where the rights of the defence are respected.

It has been recognised in the case law of the European Court of Human Rights that the presumptions of fact and law exist in all systems of criminal law and, as a matter of principle, the existence thereof is not contrary to the second part of Article 6 of the European Human Rights Convention (*Falk v. the Netherlands (dec.)*); however, in the application of such presumptions, reasonable balance should be maintained between the interests of society (for the ensuring of which such presumptions are applied) and an individual's interests (who is directly affected by this presumption). In other words, the measures used should be commensurate with the legitimate aim pursued. Implementation of fair proceedings also falls within society's interests, therefore, in those cases where it is easier for the person with the right to defence to prove certain circumstances, it is fairer to shift the burden of proof upon this person.²⁸

The Constitutional Court of the Republic of Latvia has noted that one of the circumstances to be examined in order to establish whether application of the legal presumption of a fact is permissible is the issue whether a person's interests are balanced, i.e., whether a person, with respect to who the legal presumption of a fact is applied, has been at the same time ensured also the possibility to rebut this presumption by the evidence already at their disposal or by such that can be readily obtained²⁹.

To summarise, it can be concluded that the inclusion of the reverse burden of proof in the criminal procedural legal provisions will be justifiable and will not violate the presumption of innocence, if two conditions are met.

Firstly, an objective need to facilitate the work of investigative authorities should be present. It should be established that proving of certain facts usually causes disproportionate complications for the investigative authorities, or that it is even impossible, and these complications seriously jeopardise crime prevention in a certain area.

Secondly, it is easy for the person, upon whom this burden of proof has been placed, to discharge it. Namely, the person is informed of precisely what they should indicate and the facts, regarding which the information should be provided. Moreover, this information should be readily accessible to the person, and they should have the possibility to submit it.

4. Manifestations of the reverse burden of proof in the Latvian Criminal Procedure Law

The Latvian Criminal Procedure Law also provides for several instances, when the obligation to prove something or to indicate something has been imposed upon a person. Here, several exceptions regarding the burden of proof can be noted.

²⁸ *Gribonika, Ē.* Pierādīšanas standarts un pienākums noziedzīgi iegūtu līdzekļu legalizācijas lietās [Standard of proof and burden of proof in money laundering cases]. *Jurista Vārds*, No. 5 (1167), 2021, 15.–23. lpp., *Roberts, P., Hunter, J.* Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions. Oxford: Hart Publishing, 2013, p. 262.

²⁹ See *Satversmes tiesas 15.11.2016. spriedums lietā Nr. 2015-25-01* [15.11.2016. Judgement of the Constitutional Court of the Republic of Latvia in case No. 2015-25-01]. Available: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/12/2015-25-01_Spriedums.pdf#search=\[last viewed 10.04.2022\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/12/2015-25-01_Spriedums.pdf#search=[last%20viewed%2010.04.2022]), para.19, see also *Satversmes tiesas 28.03.2013. spriedums lietā Nr. 2012-15-01* [28.03.2013. Judgement of the Constitutional Court of the Republic of Latvia in case No. 2012-15-01]. Available: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2012-15-01_Spriedums.pdf#search=\[last viewed 10.04.2022\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2012-15-01_Spriedums.pdf#search=[last%20viewed%2010.04.2022]), para. 15.1., 15.2.

4.1. Duty to indicate the alibi

Para. 6 of Section 67 (1) of the Criminal Procedure Law, regarding the suspect's obligations, provides that the suspect also has the obligation to indicate the fact that, at the time when the criminal offence was committed, the respective person had been in another place (hereafter – the alibi), or the conditions provided for in the Criminal Law that exclude criminal liability.

Likewise, Section 126 (4) of the Criminal Procedure Law (Subjects of Evidence and the Duty of Proving) provides that a person who has the right to defence must indicate circumstances that exclude criminal liability, as well as indicate the alibi. I.e., the official in charge of the proceedings does not have the right to ignore information about a person's alibi or circumstances that exclude criminal liability, but, at the same time, if the person does not indicate such circumstances or the alibi, the prosecution is not obliged to prove that such do not exist. The term of Latin origin "alibi" in criminal law is understood as information that, at the time when the criminal offence was committed, the person had been in another place. Circumstances that exclude criminal liability, in turn, are listed exhaustively in Chapter III of the Criminal Law – necessary self-defence, detention causing personal harm, extreme necessity, justifiable professional risk, and execution of a criminal command or criminal order.

The third and the fourth part of Section 126 of the Criminal Procedure Law provide that a person must indicate the alibi and circumstances that exclude criminal liability, as well as the proof that rebuts the legal presumption of a fact, envisaged in Section 125. It is important to pay attention to the fact that, in this case, the legislator has chosen to use the word "indicate" rather than the word "prove", which clearly shows that, in this case, a person has not been imposed the burden of final or persuasive proof but only an obligation to inform about a fact, encouraging verification of it. However, it would be reasonable to recognise that an unconfirmed or vague statement would not be sufficient and would be systemically pointless; hence, the finding, enshrined in judicature, that the indication should be specific should be upheld³⁰. It can be established that a person who has the right to defence is not obliged to provide final proof of their alibi or the existence of circumstances that exclude criminal liability; however, they are obliged to indicate it, as well as provide indications regarding verifiable information confirming this.

As regards the obligation to indicate the alibi or the circumstances that exclude criminal liability, or circumstances presumed in Section 125 (1) of the Criminal Procedure Law, the person who has the right to defence should be able to infer from the procedural decision that defines a person's procedural status (decision by which a person is recognised as being a suspect, decision on making a person criminally liable) the essence of criminal allegations directed at them. If these decisions comply with the requirements set out in Section 398¹ or Section 405 of the Criminal Procedure Law then these decisions should comprise the facts of the alleged criminal offence, which determine the legal qualification, and the amount of this information, usually, should be sufficient to make it clear to the person what event is being investigated and what the circumstances could be, about which the person should inform the person directing the proceedings. For example, if a person is suspected of having inflicted

³⁰ See Decision of 17.12.2013. of the Senate of the Supreme Court in case No. 16870000208 (SKK-0216-1). Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/138975.pdf> [last viewed 10.04.2022], see also Decision of 07.01.2015. of the Senate of the Supreme Court in case No. 11521045809 (SKK-J-0022-15). Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/198393.pdf>. [last viewed 10.04.2022].

bodily harm at a particular time and in a particular place, then it is rather easy for a person to indicate their being in another place at this time.

It has been recognised also in the case law of ECtHR that the right to not self-incriminate is not absolute because not providing any kind of explanation regarding the evidence collected by the prosecution may be taken into account in assessing the prosecution's evidence and it cannot be argued that the silence of a person with the right to defence throughout the course of criminal proceedings will not have an impact upon the assessment in court of the evidence collected by the person directing the proceedings³¹.

Assessment of this regulation, included in the Latvian Criminal Procedure Law, allows concluding that there are no grounds to believe that the obligation, imposed upon the suspect, to indicate these circumstances would in any way violate the presumption of innocence, the right to remain silent and to not self-incriminate because the obligation to indicate circumstances that exclude guilt or exculpatory circumstances cannot be equalled to self-accusation or deteriorating one's standing in criminal proceedings. Assessment of this regulation also in the light of the criteria referred to above allows concluding that it might be rather burdensome for investigative authorities to establish that a person had been in another place at the time when the crime was committed or to obtain information about circumstances that exclude criminal liability unless persons themselves inform the investigative authority about such circumstances. Moreover, providing indications about one's alibi or the existence of circumstances excluding criminal liability might not require special effort from the person himself or herself. Also, as regards this obligation, it is more persuasive to argue not that proving of a particular fact is very difficult for a prosecutor, but that such proof is conspicuously easy for the defendant.³² Hence, it appears that, in such cases, reasonable balance between the society's interests and a person's rights is respect because, usually, it should be neither complicated nor burdensome to provide such indications.

4.2. Legal presumptions of a fact

A reverse onus clause consists of two important elements. First, it contains a required inference or presumptive element. Second, the clause shifts the normal burden of proof and requires the accused to disprove the presumed element of the offence. If the accused successfully meets this onus, the required inference need no longer be drawn, and the issue is decided by the trier of fact based on the natural weight of the evidence and the normal allocation of burdens.³³

Section 125 of the Criminal Procedure Law (Legal Presumption of a Fact) includes nine assumptions that are considered to be proven without performing additional procedural actions, unless the opposite is proven during the course of criminal proceedings. In all of these nine cases, the person whose legal interests are affected by these assumptions must prove the opposite, i.e., must rebut the assumption that follows from this presumption, which they consider to not be true, as it is stated *expressis verbis* also in Parts 3, 3¹ and 4 of Section 126 of the Criminal Procedure Law.

³¹ Decision in case *John Murray v. The United Kingdom*, 08.2.1996., application No. 18731/91. Available: <https://hudoc.echr.coe.int/eng#{%22fulltext%22:%22John%20Murray%22},{%22documentcollectionid%22:%22GRANDCHAMBER%22,%22CHAMBER%22},{%22itemid%22:%22001-57980%22}}> [last viewed 10.04.2022], para. 47.

³² *Ashworth, A. Four threats*, p. 266.

³³ *Sheldrick, B. M. Shifting Burdens*, p. 182.

Some aspects of these legal presumptions of a fact may be viewed critically. Most probably, all these assumptions, included in Section 125 of the Criminal Procedure Law, are applicable to circumstances where proving might make the work of investigative authorities disproportionately difficult. At the same time, the other aspect may lead to reflections on whether the person who has the right to defence will always understand exactly what facts they are obliged to prove. Due to the limited scope of this research, we shall proceed by examining in detail only one of these presumptions, applicable to the origin of property.

4.3. Presumption of the criminal origin of property

One of the legal presumptions of a fact, defined in Section 125 of the Criminal Procedure Law, deserves special attention, having gained relevance also in the practice of applying law of the recent years, i.e., the presumption of the criminal origin of property and the owner's duty to prove the legal origin of property. Such presumption is included in Section 125 (3) of the Criminal Procedure Law (it is considered proven that the property with which laundering activities have been performed is criminally acquired if a person involved in criminal proceedings is not able to believably explain the legality of origin of the relevant property and the totality of evidence provides grounds for the person directing the proceedings to assume that a property is, most likely, of criminal origin). Furthermore, Section 126 (3¹) of the Criminal Procedure Law (Subjects of Evidence and Duty of Proving) additionally provides that, if a person affirms that the property is not to be considered as criminally acquired, such person has the duty to prove the legality of the origin of the relevant property.

It is indicated in the annotation³⁴ to the amendments to the Criminal Procedure Law, adopted on 22.06.2017³⁵, regarding this case of reverse burden of proof, introduced to the Criminal Procedure Law, that this norm provides for a person's duty to prove the legal origin of property in those cases where the person directing the proceedings holds that there are grounds for recognising the property as being criminally acquired. Here, the authors of the draft law have expressed an assumption that in case, where the origin of property is legal, the owner should encounter no difficulties in proving it (for example, requesting information from the State Revenue Service regarding income, submitting other documents that prove the origin of the property). At the same time, the fifth part of Section 356 has been added to the Criminal Procedure Law, determining the moment as of which the person (including the owner of property affected in criminal proceedings) has the right to start proving the legal origin of property, i.e., the moment of arrest or seizure of property. This provision, however, was altered by the amendments adopted on 21.11.2019 to Section 356 (5)³⁶ of the Criminal Procedure Law, which now stipulates that the burden of proof sets it by a special notification to the owner of property – if an assumption is expressed that the property is criminally acquired or related to a criminal offence, the person directing the proceedings notifies the person that such person may, within 45 days

³⁴ Preliminary Impact Assessment Report (annotation) of the 12th *Saeima* Draft Law No. 630 / Lp12 "Amendments to the Criminal Procedure Law". Available: <http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/AB2871419A747C7FC2258011002DD2FA?OpenDocument> [last viewed 10.04.2022].

³⁵ Latvijas Republikas Saeimas 22.06.2017. likums "Grozījumi Kriminālprocesa likumā" [Amendments to Criminal Procedure Law of the *Saeima* of the Republic of Latvia of 22.06.2017]. Available: <https://likumi.lv/ta/id/292018-grozijumi-kriminalprocesa-likuma> [last viewed 10.04.2022].

³⁶ Latvijas Republikas Saeimas 21.11.2019. likums "Grozījumi Kriminālprocesa likumā" [Amendments to Criminal Procedure Law of the *Saeima* of the Republic of Latvia of 21.11.2019]. Available: <https://likumi.lv/ta/id/311271-grozijumi-kriminalprocesa-likuma> [last viewed 10.04.2022].

from the moment of notification, submit information on the legality of the origin of the relevant property.

To proceed, it should be explored whether such burden of proof related to the criminal origin of property is proportional and justified. Let us examine whether the regulation, included in Part 3, 3¹ and 4 of Section 126 of the Criminal Procedure Law, complies with these criteria.

The designation “a duty to prove the legality of the origin of the relevant property” is used in Section 126 (3¹) of the Criminal Procedure Law with respect to the criminal origin of property, which leads to the conclusion that, in this case, the owner of property is expected, in order to rebut the assumption regarding unlawful origin of property, to submit full proof rather than only indications regarding the existence of such proof.

In order to rebut this presumption, a person first of all should be precisely informed, what exactly they have to prove or rebut, i.e., the owner of arrested property should receive from the person directing the proceedings sufficiently precise information about presumed fact. If such sufficiently clear information is lacking, the person, most often, objectively will be unable to discharge their burden of proof.

In this respect, the wording of Section 125 (3) of the Criminal Procedure Law must be taken into account, as it follows from it that the origin of property is regarded as criminal, if the totality of evidence provides grounds for the person directing the proceedings to assume, on the balance of probability, that the property is of criminal origin. Hence, actually, here we are not dealing with classical presumption, when the truthfulness of a fact is assumed without evidence justifying this fact, but with evidence with a lower standard of proof, provided by the person directing the proceedings. Thus, for this presumption to become operational, the person directing the proceedings should have at their disposal some evidence, which, on the balance probability, could be used to substantiate the criminal origin of property. Accordingly, if the person directing the proceedings has such evidence at their disposal, then the person directing the proceedings is able to provide sufficiently precise information to the owner of arrested assets about the facts, on the basis of which this presumption can be applied. The duty of the person directing the proceedings, set out in Section 356 (5) of the Criminal Procedure Law (Recognition of Property as Criminally Acquired), to inform the person that this person, within 45 days of the date of notification, may submit information regarding the legal origin of the respective property, actually, does not regulate directly the amount of information that the person directing the proceedings should include in such a notification. Also, in the practice of applying law, usually these notifications by the person directing the proceedings do not include any indication about the scope of information that had allowed the person directing the proceedings to arrive at the conclusion regarding the possible criminal origin of property.

Hence, neither the legal provision, nor the practice of application currently ensures that the persons, who have the burden of proof, are informed in sufficient detail about the exact actual circumstances that they are expected to prove. Usually, owners of property are informed only about the scope, in which the property has been arrested, and that persons must prove legal origins of the arrested property.

In this respect, it can be argued that this amount of information regarding the duty to prove the legal origin of property may be sufficient to allow a person to discharge their burden of proof effectively and without complications. Therefore, the assumption, included in the annotation to the amendments to the Criminal Procedure Law, adopted on 22.06.2017, that in the case of legal origin of property the owner should

be able to prove it without difficulty, seems to be too simplistic. Namely, it could function in the most ordinary cases, i.e., with respect to natural persons, whose only income for a long period of time has been a salary for work. Whatever the balance of the arrested account is, a person can submit a statement from the employer regarding the existence of employment relations and salary for work, a statement from the State Revenue Service regarding the taxes paid, account statements showing how this person received and spent their salary.

However, in practice, when the presumption of the criminal origin of property is applied, cases as simple as that are rather rare. Usually, this burden of proof applies to legal entities, merchants who have operated for a long time and had been purchasing goods for many decades from tens or hundreds of suppliers, who have sold goods to tens or hundreds of clients all over the world. What does proving the legal origin of arrested assets mean in such a case? In the case of such a merchant who had been trading for a long time, how to determine, at all, which transactions have resulted in the balance arrested in the account, if the current account constantly has larger or smaller balance and each day there are incoming payments for goods that are sold, as well as outgoing payments for purchased goods or raw materials and other expenditure relates to economic activity. If the movement of financial assets in the merchant's account could be compared to a barrel of water, from which every day several jugs are taken and several jugs of water are poured in, it would be rather impossible, at a certain point of time, to answer the question, which jugs of water, poured into barrel, constitute the water remaining in the barrel, because this amount of water is being constantly increased and decreased, moreover, every day the amount of water in the barrel gets mixed with the water that is poured in.

Therefore, to ensure, with respect to the duty to prove the legal origin of property, the balance between the interests of society and a person, and to ensure to the person, to whom this legal presumption of a fact is applied, the possibility to rebut this presumption by the evidence already at their disposal or the evidence that can be readily obtained, it would be necessary that the persons directing legal proceedings would indicate in the notifications, sent according to the procedure set out in Section 356 (5) of the Criminal Procedure Law, not only an abstract phrase that the person is obliged to submit information within 45 days regarding legality of the origin of the respective property but would also provide sufficiently detailed indications regarding the grounds why suspicions regarding unlawful origin of property had been expressed. Moreover, this substantiation should be sufficiently accurate to allow the addressee to understand which particular transactions with which business partner and in which particular period are the ones that have caused suspicions, as well as to establish the legal content of this suspicions, i.e., what kind of criminal activities are suspected. Only in the case of receiving such sufficiently detailed information the owner of the property will have the possibility to defend his/her financial interests effectively and to discharge his/her procedural duty to prove the origin of property and absence of particular criminal activities in the process of acquiring property in a precise and targeted way.

To summarise, it can be concluded that both the existing criminal procedural law regulation and the current practice of applying law with respect to the presumption of criminal origin of property and the reverse burden of proof following from it could cause a violation of persons' right to a fair trial. Firstly, persons are not provided with a sufficiently detailed and timely information about what exactly they have to prove. This, in turn, impedes discharging the reverse burden of proof or even renders it impossible.

Summary

1. As a result of the study, the aim of the research has been achieved – the criteria for permissibility of reverse burden of proof in a criminal proceeding have been identified.
2. The presumption of innocence is not absolute in its nature, and the rights derived from the presumption of innocence, in some of their aspects, may be restricted by shifting the burden of proof to the person, if these restrictions comply with the two criteria indicated below.
3. First of all, inclusion of the reverse burden of proof in the criminal procedural legal provisions will be justified and will not violate the presumption of innocence if proving of some facts causes disproportional difficulties for law enforcement institutions or is even impossible. These complications seriously jeopardise crime prevention in a certain area. Secondly, the burden of proof imposed upon a person should be easy to discharge.
4. For the burden of proof to be easy to discharge, a person should be informed as accurately as possible about the facts that he/she is expected to prove. Moreover, information needed for proving these facts should be readily accessible to a person and an objective possibility to submit this information should be present.
5. The obligation, set out in the Latvian Criminal Procedure Law, to indicate the alibi or circumstances that exclude criminal liability meet these two criteria, hence, usually, in this respect an unjustified violation of the presumption of innocence cannot be found.
6. As regards the presumption of criminal origin of property, included in the Latvian Criminal Procedure Law, and the obligation derived from it to prove the lawful origin of property, it can be concluded that this regulation, as well as the practice of applying the law may cause a violation of persons' right to a fair trial, since, usually, a sufficiently detailed information is not ensured to persons regarding the circumstances that must be proven, which, consequently, impedes discharging of this reverse burden of proof, or even renders it impossible.

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