

INTERPRETATION OF REVERSE ONUS CLAUSES

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The principle that a person should be presumed innocent until proven guilty is a fundamental principle of procedural fairness in criminal law. Its justifications lie in the socio-legal consequences of convicting an individual for the commission of a crime. This principle acts as a protection against erroneous convictions and ensures that an accused is not oppressed by the immense power and resources of the State. The opposite rule – a presumption of guilt – imposes an unfair burden on the accused that requires him to prove his innocence, failing which he is convicted. Such a burden is envisaged by reverse onus clauses or reverse burdens, which supplant the hallowed presumption of innocence with the grossly unjust presumption of guilt. This paper argues that reverse onus clauses are both unconstitutional and a glaring contravention of a sacred principle of criminal law.

I. INTRODUCTION

The presumption of innocence, the principle that an accused should be presumed innocent unless and until proved guilty, is perhaps *the* fundamental principle of procedural fairness in criminal law.¹ It is considered fundamental because it is believed that allowing the guilty to go free is better than convicting the innocent.² Lying at the heart of criminal law, this principle is invaluable for protecting an accused in a criminal trial, which is seen to be a contest between two unequal actors, namely the State and the accused. It protects his fundamental liberty and human dignity, preventing him from being subjected to the grave socio-legal consequences of a conviction unless his guilt is unequivocally established. This is essential in any society that believes in equity and social justice and thus, the principle is worthy of paramount respect by both the legislature and the judiciary.³

The presumption of innocence is inextricably linked to the burden of proof. Burden of proof, in simple terms, dictates which party bears the onus to prove a certain fact during the course of a civil or criminal trial. It has been defined in the following words:

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¹ ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 72 (2009).

² Victor Tadros & Stephen Tierney, *The Presumption of Innocence and the Human Rights Act*, 67(3) *MOD. L. REV.* 402 (2004).

³ Byron M. Sheldrick, *Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses*, 44(2) *U. TORONTO FAC. L. REV.* 179, 180 (1986).

“On every issue, there is an obligation on one party to convince the tribunal of the truth of some proposition of fact which is in issue and which is vital to his case.”⁴

Since presumption of innocence is the fundamental element of a trial, the legal or ultimate burden of proof is always on the prosecution to prove the guilt of the accused.⁵ The prosecution must, therefore, prove a concurrence between *mens rea* and *actus reus* beyond reasonable doubt in order to discharge its burden.⁶ The burden is on the accused to rebut the court’s presumption that a particular exculpatory circumstance was absent by raising either a defence or an exception.⁷ Commonly referred to as the reverse evidential burden, it merely requires proof from the accused, which satisfies the ‘prudent man’ standard or at least creates reasonable doubt regarding one or more necessary ingredients of the offence. The prosecution will continue to bear the legal burden to negate the exculpation of the accused. If the accused succeeds in creating reasonable doubt, he will be acquitted because the prosecution has been unable to prove his guilt.⁸ Thus, the legal burden of proving all necessary ingredients of an offence is on the prosecution from the commencement to the termination of a trial.

One would imagine that given the near sacred status of the presumption of innocence, it cannot be compromised in any circumstance whatsoever. Reverse onus clauses or reverse burdens, however, constitute a singular exception to this fundamental rule, supplanting the ‘golden thread’⁹ of criminal law with a presumption of guilt. They strip the principle of its very essence and replace ‘innocent until proven guilty’ with ‘guilty until proven innocent’, making the accused a presumptive criminal who needs to prove his innocence. Reverse onuses dilute the prosecution’s legal burden to the extent that the prosecutor is required to prove only a minimum threshold (also referred to as the basic or predicate fact), which is the *actus reus*.¹⁰ Based on the minimal amount of proof adduced, the culpability of the accused is presumed and the burden

⁴ S.L. PHIPSON & MICHAEL HOWARD, PHIPSON ON EVIDENCE 51 (2000).

⁵ The Indian Evidence Act, 1872, §101: Burden of Proof - Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on the person.

⁶ Tadros & Tierney, *supra* note 2, 406.

⁷ The Indian Evidence Act, 1872, §105: Burden of proving that case of accused comes within exceptions- When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (45 of 1860) or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

⁸ David Hamer, *The Presumption of Innocence and Reverse Burdens: A Balancing Act*, 66(1) CAMBRIDGE LAW JOURNAL 142, 143 (2007); *See also* Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563.

⁹ *Woolmington v. D.P.P.*, [1935] A.C. 462 (‘Woolmington’).

¹⁰ Sheldrick, *supra* note 3, 181-182.

to establish absence of *mens rea* is then shifted to the accused.¹¹ The burden upon the accused in such cases, also known as the persuasive burden, is ultimate or legal because failure to discharge it will result in the conviction of the accused.¹²

Therefore, unlike in a reverse evidential burden, where the accused only has to raise reasonable doubt as to his guilt while the legal burden continues to persist on the prosecution, in a reverse persuasive burden, the role of the prosecution ends once the burden shifts to the accused.¹³ In most reverse onus clauses, the standard of proof to be met by the accused is a preponderance of probabilities standard.¹⁴ The failure to meet this standard results in his conviction even if reasonable doubt as to his guilt exists whereas in an ordinary offence carrying a reverse evidential burden, reasonable doubt as to the guilt of the accused results in his acquittal.¹⁵

This paper argues that reverse onus clauses are unconstitutional as they infringe the presumption of innocence. The paper assesses the justifications and objections to reverse burdens and seeks to demonstrate their incompatibility with the principles and values of a democratic society.

II. JUSTIFICATIONS

There are various policy motivations that have been advanced to justify reverse burdens. The argument of public interest combined with the magnitude of the evil sought to be suppressed is the most common policy rationale advanced. As a result, the presumption of innocence has been watered down on the pretext of public interest and speedy justice, therefore justifying the inclusion of reverse onus clauses in socio-economic legislation.¹⁶ The recommendations of the 47th Report of the Law Commission, 1972 suggest that since offences relating to narcotics, corruption and food adulteration threaten the 'health or material welfare of the community as a whole', special efforts are

¹¹ Tadros & Tierney, *supra* note 2, 418.

¹² See generally *State of Tamil Nadu v. A. Vaidyanatha Iyer*, AIR 1958 SC 61 (discussing the concept of mandatory presumptions creating reverse burdens).

¹³ Sheldrick, *supra* note 3, 182.

¹⁴ While the standard of proof employed in most reverse onus clauses is one of preponderance/balance of probabilities, certain statutes prescribe the standard of proof beyond reasonable doubt such as the Narcotic Drugs and Psychotropic Substances Act, 1985, the Essential Commodities Act, 1955 and the Wealth Tax Act, 1957.

¹⁵ Sheldrick, *supra* note 3, 182-183.

¹⁶ Some statutory provisions employing reverse onus clauses in India are- the Food Adulteration Act, 1954, §10(7-B), the Essential Commodities Act, 1955, §10C, the Customs Act, 1962, §§123, 138A and 139, the Foreign Exchange Management Act, 1999, §39, the Narcotic Drugs and Psychotropic Substances Act, 1985, §§ 35, 54 and 66, the Wealth Tax Act, 1957, §35-O and the Prevention of Corruption Act, 1988, §20.

necessary for their enforcement.¹⁷ The Commission further emphasised that the injury to society was greater in certain offences against public welfare in comparison to crimes having an identifiable victim, such as murder.¹⁸ It was felt, therefore, that conformity with the traditional standard of proof impeded the State's efforts to prove the mental element that "undoubtedly exists" in such offences, preventing the State from effectively addressing and regulating escalating instances of such crimes.¹⁹

Reverse onus burdens are not confined to socio-economic offences and have subsequently been incorporated into the Indian Penal Code, 1860, for the offences of rape and dowry death.²⁰ An analysis of the specific statutory provisions utilising reverse onus clauses is outside the scope of the paper and it would suffice to say that these clauses mandate the accused to prove absence of *mens rea* in the form of intention, motive, knowledge, or belief in relation to the *actus reus* of a crime.

The rationale adopted by the legislature, as reflected in the 47th Report, is that exigency demands that various socio-economic offences be put down with a heavy hand, therefore justifying a departure from the traditional requirements of criminal procedure.²¹ Such an approach attempts to achieve the goal of deterrence, which could contribute towards reducing the occurrence of these offences.²²

Another justification is the practical difficulty encountered by the prosecution in the process of obtaining proof. In this respect, it is argued that it is difficult for the prosecution to adduce evidence about matters that are within the exclusive or peculiar knowledge of the accused.²³ This justification also encompasses the rationalisations of judicial economy and administrative convenience since reverse burdens appear to facilitate shorter, easier and less expensive trials, thereby conserving valuable resources that would have ordinarily been expended in investigating facts that are exclusively within the knowledge of the accused.²⁴ These clauses are also perceived as securing a higher conviction

¹⁷ LAW COMMISSION OF INDIA, 47th REPORT- THE TRIAL AND PUNISHMENT OF SOCIAL AND ECONOMIC OFFENCES 2, 4 (1972) (highlighting, *inter alia*, that avaricious or rapacious motive of the criminal, non-emotional background of the crime, fraud as the mode of operation, etc.).

¹⁸ *Id.*, 3.

¹⁹ *Id.*, 44-47.

²⁰ Indian Penal Code, 1860, §114A (Presumption as to rape) and §113B (Presumption as to dowry death) (introduced on the recommendations of the 84th and 91st Law Commission Reports respectively).

²¹ Sheldrick, *supra* note 3, 12; *see also* Tadros & Tierney, *supra* note 2, 428.

²² Solomon E. Salako, *Strict Criminal Liability: A Violation of the Convention?*, 70 JOURNAL OF CRIMINAL LAW 531, 533 (2006) (Although the paper discusses this idea in the context of strict criminal liability in regulatory offences, it can be extrapolated to the socio-economic offences in India for which reverse onuses have been introduced).

²³ Paul Roberts, *Taking the Burden of Proof Seriously*, CRIMINAL LAW REVIEW 783, 785 (1995).

²⁴ Sheldrick, *supra* note 3, 204; Salako, *supra* note 22, 535; Hamer, *supra* note 8, 158.

rate than under the rigid standard of proof beyond reasonable doubt, thereby furthering the goal of deterrence.²⁵

III. COUNTERS

In my opinion, these justifications are sleights of the hand that conceal the real dangers that reverse onus clauses engender. The discussion that follows will identify these dangers and examine the constitutionality of reverse burdens as upheld by the Supreme Court.

The first of two objections that should be raised at the very outset is that the prosecution dictates the structure of the case. Prosecutors determine not only the charge against the accused but also the sufficiency of evidence required to prove the *actus reus*. In addition, the process of adducing evidence weighs heavily in the prosecution's favour. Thus, requiring the accused to prove that he did not possess the requisite *mens rea* in response to the prosecution's case is a formidable task. In most cases, the prosecution has easier and greater access to investigative resources than the accused and is, therefore, better equipped to establish guilt than an accused trying to establish innocence.²⁶

Second, peculiar knowledge of the accused is not correlated to his ability to prove a relevant fact. The judicial economy justification, which claims that only the accused can prove what is exclusively known by him, thereby conserving time and resources, is misconceived. Even if he knows that he is innocent, he may not be able to prove it on a balance of probabilities and the assumed correlation between knowledge of an element and the ease of proving the same is false.²⁷ The prosecution's difficulty in proving what is known only to the accused does not warrant an inroad into the presumption of innocence. Given that most *mens rea* terms are within the peculiar knowledge of the accused, the prosecution is likely to encounter this difficulty in most cases, which would then tantamount to justifying the placing of the onus of proving every element of the offence on the accused.²⁸ David Hamer asserts that the "proof imbalance" claimed by the prosecution must be extraordinary, particularly because the presumption of innocence tackles the asymmetry in adducing proof by providing the accused with the benefit of the doubt. Given that the prosecution will have access to objective evidence from which *mens rea* can be inferred, the rights of the accused should not be sacrificed merely on account of constraints the prosecution may encounter in obtaining proof.²⁹ Peculiar knowledge can at best justify a reverse evidential burden on the accused to raise

²⁵ Sheldrick, *supra* note 3, 204.

²⁶ Roberts, *supra* note 23, 786.

²⁷ Tadros & Tierney, *supra* note 2, 426-427.

²⁸ Glanville Williams, *The Logic of "Exceptions"*, 47(2) CAMBRIDGE L. J. 261, 268 (1988).

²⁹ Hamer, *supra* note 8, 158-161.

certain facts or defences in circumstances where the prosecution would not otherwise know of their existence.³⁰

IV. CONSTITUTIONAL CHALLENGE

The presumption of innocence and reverse burdens seek to balance the personal rights of the accused with the community's broader interest in law enforcement.³¹ The question that arises in relation to this balancing act is which one should be privileged. While presumption of innocence places greater weight on the rights of the accused, reverse burdens favour law enforcement, thereby justifying the latter's inclusion and constitutionality in India.

In *Noor Aga v. State of Punjab*,³² the Supreme Court held that reverse burdens are constitutional, both policy considerations and social control concerns justifying this extraordinary measure. Although the presumption of innocence was recognised to be an element of personal liberty, Sinha J. held that individual liberty must be subject to social interest to ensure security of the State. In addition, he stated that a penal provision's constitutionality needs to be tested on the anvil of the State's responsibility to protect innocent citizens and hence, the rights of the accused and societal interest need to be balanced. The Court seemed to justify the shift in legal burden on the ground that the shift is not automatic and occurs only once the prosecution has met the threshold of establishing the *actus reus* and foundational facts according to the procedure stipulated.³³

Although the Court cautioned that the prosecution needs to strictly comply with a statute's procedural requirements and establish the *actus reus* beyond reasonable doubt, it is alarming that despite acknowledging the importance of presumption of innocence in maintaining public confidence in the legal system, the Court still upheld the constitutionality of reverse burdens. While it recognised the need to protect innocent citizens and the higher degree of certainty needed to secure convictions in serious offences, it failed to realise the higher likelihood of reverse burdens convicting innocent individuals even when a reasonable doubt subsists.

³⁰ Ian Dennis, *Reverse Onuses and the Presumption of Innocence: In Search of Principle*, 12 CRIMINAL LAW REVIEW 901, 915 (2005); See also Williams, *supra* note 28, 268.

³¹ Hamer, *supra* note 8, 147.

³² (2008) 16 SCC 417.

³³ See also *M/s. Seema Silk and Sarees v. Directorate of Enforcement*, (2008) 5 SCC 580.

A. ARTICLE 14 CHALLENGE

At this stage it would be relevant to highlight the two-pronged test adopted by the Canadian Supreme Court in *R. v. Oakes*³⁴ to evaluate the constitutionality of reverse burdens in a democratic society:³⁵

1. Measures responsible for limiting a constitutionally protected right or freedom must be for an objective of sufficient importance.

The objective of sufficient importance in the context of reverse burdens is public interest and welfare. It is submitted that attempting to create an intelligible differentia on the basis of this objective renders reverse burdens unconstitutional, as the classification arrived at is highly dubious. There is no clarity as to which offences satisfy this criterion, generating a problem of the over-inclusion and under-inclusion of offences, which creates a realm of uncertainty that cannot exist in the constitutional domain.

Victor Tadros and Stephen Tierney make an argument germane to the Indian context when they argue that although a crime such as murder directly harms particular individuals, such crimes can also be construed as a threat to public interest, given the frequency of its occurrence in society.³⁶ Acts are made crimes which society views as both inherently wrong and dangerous to public well-being. Thus, the justification of using public interest as a basis of classification is questionable at best.³⁷ In addition, when legislation covers an important area of social policy, it is often overlooked whether ‘public interest’ is being used to disguise internal problems encountered by the prosecution or whether there exists any empirical evidence that supports the claim that reverse burdens subserve Parliament’s intended purpose.³⁸ In India, however, no such empirical study has been conducted.

Even assuming that public interest is a valid objective, it is necessary to assess the rational connection between reverse burdens and the State’s purported objective.

This is where the second prong of *Oakes* features.³⁹

³⁴ *R. v. Oakes*, [1986] 1 SCR 103 (‘*Oakes*’).

³⁵ *Id.*, ¶ 69.

³⁶ Tadros & Tierney, *supra* note 2, 433.

³⁷ *Id.*

³⁸ Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 10(4) INT’L J. EVIDENCE & PROOF 241, 243 (2006); See also Tadros & Tierney, *supra* note 2, 428.

³⁹ *Oakes*, *supra* note 34, ¶70.

2. There must be proportionality between the means and recognised objective.
 - a. The means must be rationally connected to the objective;
 - b. Even if rationally connected, the means should impair as little as possible of the rights or freedom in question; and
 - c. There must be proportionality between the effects of the means and the recognised objective.

Reasonable nexus refers to the existence of a rational connection between the law's intended object and the means used to achieve that end. Firstly, there needs to be an internal rational connection, which refers to a nexus between the proof of the basic fact (i.e., the *actus reus*) and the presumed fact (i.e., the *mens rea*). This is absent in a reverse burden as there is no legitimate link between the two.⁴⁰ The grave injustice that such a connection engenders can be gauged by an inquiry of the use of §§ 35 and 54 of the Narcotic Drug and Psychotropic Substances Act, 1985 ('NDPS Act'). §35 presumes that the "culpable mental state" of the accused at the time of his prosecution for any offence under the NDPS Act and §54 presumes that the accused has committed an offence if he fails to account for the possession of any narcotic drug or psychotropic substance satisfactorily. The outcome of these two sections has been to presume that the accused is guilty merely on the basis of physical possession and not *conscious* possession. Once the prosecution has proved the former, the possession is presumed to be conscious and the accused bears the burden of proving the absence of a "culpable mental state." For instance, in *Megh Singh v. State of Punjab*,⁴¹ the accused was convicted because he was unable to rebut the presumption of conscious possession, which was based solely on the accused being found sitting on a gunny bag containing poppy husk.

Having noted this, it needs to be emphasised that merely proving an internal rational connection cannot justify the constitutionality of a reverse onus clause. It is an insufficient protection for the accused because a basic fact may tend to prove a presumed fact but not prove it beyond reasonable doubt. Therefore, an accused could be convicted despite the presence of a reasonable doubt if he is unable to satisfy the persuasive burden, which contravenes the presumption of innocence.⁴²

Reverse burdens are believed to prevent an accused from escaping the strict standard of proof beyond reasonable doubt, thereby augmenting the conviction rate and securing public interest. A high conviction rate, however,

⁴⁰ *Id.*, ¶77.

⁴¹ *Megh Singh v. State of Punjab*, (2003) 8 SCC 666: AIR 2003 SC 3184.

⁴² *Oakes*, *supra* note 34, ¶ 59.

does not necessarily imply a crime-free society. This is all the more pertinent in reverse onus clauses where a conviction is not a necessary indicator of the proof of the guilt of the accused and may just be the unfortunate result of the accused being unable to meet the high standard of proof imposed upon him. With the probability of erroneous convictions being significantly higher in reverse burdens, public interest stands defeated. This is because trapping innocent individuals in the rigours of criminal law is never in the interest of a democratic society,⁴³ and does not contribute towards reducing the incidence of the very offences for which reverse burdens were introduced. Further, the possibility of achieving the legislative purpose of public interest by less draconian means is often not considered, either by Parliament or courts.⁴⁴

Although the risk of miscarriage of justice engendered by reverse burdens is seen to be proportionate to the benefit that will accrue from effective law enforcement leading to a concomitant reduction in the threat posed to society by the evil in question,⁴⁵ public interest is actually potentially defeated as reasoned above.⁴⁶ Further, as Hamer writes, no matter how valid the exigency of the threat to society is, it does not license the legislature to trample upon a defendant's right to a fair trial by indiscriminately employing any means regardless of the existence of a rational connection.⁴⁷ Reverse burdens can possibly only be used for offences imposing minor penalties.⁴⁸ The extremity of using reverse burdens can be expressed in the following words by Paul Robert:⁴⁹

“From the fact that special measures are sometimes justified in response to acute threats of harm, it simply does not follow that anything goes in the fight against it. Exclusively result-oriented practices and procedures are fundamentally incompatible with just censure and punishment under the rule of law. At the bottom of the slippery slope, where policing has assimilated the techniques of terror, law enforcement is in danger of forfeiting its essential claim to legitimacy... ”

Having demonstrated the incompatibility of reverse onuses with the requirements of intelligible differentia and a reasonable nexus, I conclude that they violate Art. 14 of the Constitution.

⁴³ Hamer, *supra* note 8, 147.

⁴⁴ Tadros & Tierney, *supra* note 2, 411, 429.

⁴⁵ *Id.*, 428.

⁴⁶ See *supra* text accompanying notes 42-43.

⁴⁷ Oakes, *supra* note 34 (the Supreme Court conceded the seriousness of the object (suppression of drug trafficking) but found reverse burdens to be an irrational means).

⁴⁸ Hamer, *supra* note 8, 156.

⁴⁹ Paul Roberts, *The Presumption of Innocence Brought Home? Kebilene Deconstructed*, 118 L. Q. REV. 41, 65 (2002).

B. ARTICLE 21 CHALLENGE

Rules relating to burden and standard of proof in criminal trials are indispensable because they promote individual freedom and are bulwarks against oppression. Reversing the burden, however, renders the accused a presumptive criminal, disregarding his individual liberty and dignity, thereby violating Art. 21.⁵⁰

Many commentators argue that reverse burdens are an unjust means because the risk the accused is subjected to is much graver than the law's intended object, regardless of the latter's importance to society.⁵¹ Ian Dennis rejects judicial deference to legislative intent as a justification used by courts to override such concerns since the proportionality of reverse burdens to the policy goal is a question of the procedural fairness, which courts must decide upon as guardians of principles of procedural injustice and constitutionality.⁵² Paul Roberts goes to the extent of saying that laws incorporating reverse burdens "commend themselves to a totalitarian regime which wished to retain the bare window-dressing of legality, but it is not the badge of an administration which values and respects its citizens' freedom."⁵³

Art. 21 contemplates that the 'procedure established by law' to be reasonable, right, just and fair,⁵⁴ and embraces the right to a fair trial.⁵⁵ Reverse onus clauses, on the other hand, are antithetical to this. It is a settled principle of criminal jurisprudence that crimes of a more serious nature entail a higher degree of certainty before convicting the accused. Reverse burdens, however, enable the State to "intervene in the lives of individuals and their families in far-reaching and sometimes catastrophic ways."⁵⁶ They operate on the very essence of criminal culpability, displacing the presumption of innocence with one of guilt, making the accused a presumptive criminal.⁵⁷ Once the prosecution has proved the *actus reus* beyond reasonable doubt and the legal burden

⁵⁰ Oakes, *supra* note 34, ¶ 29 (Dickson C.J. said: "The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.").

⁵¹ Dennis, *supra* note 30, 908.

⁵² IAN DENNIS, *THE LAW OF EVIDENCE* 463 (2007).

⁵³ Roberts, *supra* note 23, 787-788, 796.

⁵⁴ Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

⁵⁵ Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374.

⁵⁶ Roberts, *supra* note 23, 785.

⁵⁷ *Id.*, 785-786.

shifts to the accused, the accused will be convicted if he is unable to satisfy the balance of probabilities standard, even if a reasonable doubt exists as to whether he possessed the *mens rea* to commit the offence. The law thus moves to convict individuals on the basis of a presumption, which they cannot rebut satisfactorily.

Further, reverse burdens compel the accused to testify as opposed to the reverse evidential burden, which gives the accused the opportunity to either respond to the prosecution's evidence or raise any exculpatory defence.⁵⁸ Reverse burdens, however, leave the accused with no choice but to testify to his innocence, attracting concerns of self-incrimination as well as infringement of his right to remain silent.⁵⁹ Such clauses also ignore legitimate apprehensions an accused may have about his failure to testify being viewed as conclusive of his guilt.⁶⁰

The denigration of individual liberty is connected to the most far-reaching argument against reverse onus clauses – the infraction of the presumption of innocence. The *locus classicus* on presumption of innocence is undoubtedly *Woolmington v. D.P.P.*,⁶¹ in which Lord Chancellor Viscount Sankey's elucidation of the principle continues to be remembered even today.⁶² Reverse onus clauses replace the presumption of innocence with a presumption of guilt. The presumed fact's rebuttable nature is an unreasonable justification for imposing a reverse burden because what the accused is being made to do is rebut a presumption of guilt and prove his innocence.⁶³ A balance of probabilities standard does not in any way justify a reverse onus clause because the burden on the accused is ultimate, implying that his failure to discharge this burden would result in his conviction.⁶⁴ In addition, while such a standard is lower than proof beyond reasonable doubt, it is still extremely difficult to meet for the accused for the objections raised before.⁶⁵

⁵⁸ Sheldrick, *supra* note 3, 200.

⁵⁹ Salako, *supra* note 22, 540; *see also* Sheldrick, *supra* note 3, 199-200 (discussing several legitimate reasons for the unwillingness of an accused to testify).

⁶⁰ Roberts, *supra* note 49, 48; *see also* Sheldrick, *supra* note 3, 199-200 (discussing several legitimate reasons for the unwillingness of an accused to testify).

⁶¹ *Woolmington*, *supra* note 9, 481.

⁶² *Id.* (Lord Chancellor Viscount Sankey entrenched the principle in the following words: "One golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt... If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal." Viscount Sankey, however, also stated that the presumption is subject to any statutory exception and thus, the decision sent out mixed signals and allowed Parliament to incorporate reverse burdens); Ashworth, *supra* note 37, 246.

⁶³ Peter Lewis, *The Human Rights Act 1998: Shifting the Burden*, 8 CRIMINAL LAW REVIEW 667, 671 (2000).

⁶⁴ Williams, *supra* note 28, 265.

⁶⁵ *See supra* text accompanying notes 26-30.

The asymmetry in the burden of proof embodied by the presumption of innocence has been deliberately envisaged in order to level the playing field between the accused and the powerful State.⁶⁶ It defends the individual's right to autonomy and dignity against erroneous convictions.⁶⁷ Irit Weiser highlights the important symbolic function of the standard of proof beyond reasonable doubt in singling out criminal offences as particularly serious and affirming public commitment to values of individual liberty.⁶⁸ It is also indispensable towards shielding the accused from the social stigma, loss of reputation, and psychological and economic harms of a criminal conviction.⁶⁹ It is crucial to factor this in because the gravity of the offence has a definite impact on the injustice of an incorrect conviction.⁷⁰ While the stigma associated with regulatory or quasi-criminal offences employing reverse burdens is lesser,⁷¹ offences for which reverse burdens are employed in the Indian context carry grave punishments.⁷² For instance, the NDPS Act has many provisions imposing a minimum punishment of ten years rigorous imprisonment and a maximum of twenty years rigorous imprisonment, with the maximum fine being Rs. 2 lakh, subject to an increase at the court's discretion. Other statutes such as the Essential Commodities Act, 1955, Prevention of Corruption Act, 1988 and Customs Act, 1962 envisage maximum imprisonment terms of seven years and fines to be fixed by the court. This furthers the argument against compromising the presumption of innocence to pursue a policy interest, since the purpose of the principle is to prevent wrongful convictions even though the State may have worthy objectives in seeking a higher rate of conviction.⁷³

In jurisdictions such as Canada and South Africa, the presumption of innocence has been accorded constitutional status, as it is a fundamental right in the Canadian Charter of Rights and Freedoms,⁷⁴ and the South African

⁶⁶ Ndiva Kofele-Kale, *Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes*, 40(4) INT'L. LAW. 909, 922 (2006).

⁶⁷ Ashworth, *supra* note 38, 248-249; *see also* Kofele-Kale, *id.*, 924.

⁶⁸ Irit Weiser, *The Presumption of Innocence in Section 11(d) of the Charter and Persuasive and Evidential Burdens*, 31 CRIMINAL LAW QUARTERLY 318, 323 (1988-1989); *see also* Sheldrick, *supra* note 3, 186.

⁶⁹ Tadros & Tierney, *supra* note 2, 431.

⁷⁰ Hamer, *supra* note 8, 149.

⁷¹ *Id.*

⁷² Subsequent to the Human Rights Act, 1998, the House of Lords has factored offence seriousness in many decisions to invalidate reverse burdens, such as in *R. v. Lambert*, [2001] UKHL 37 ('Lambert') where the offence was punishable by life imprisonment and in Attorney General's Ref. 4/02, [2004] UKHL 43 ('Attorney General') where the punishment was ten years imprisonment. On the other hand, in *Sheldrake v. D.P.P.*, [2004] UKHL 43, the House of Lords upheld a reverse onus clause where the maximum penalty for the offence was six months imprisonment. *See* Tadros & Tierney, *supra* note 2, 433 (arguing that even offences carrying seemingly low penalties can bear serious ancillary repercussions such as social stigma and ostracism).

⁷³ Tadros & Tierney, *supra* note 2, 428.

⁷⁴ Canadian Charter of Rights and Freedoms, 1982, Art. 11(d).

Constitution,⁷⁵ respectively. Consequently, reverse onus clauses have categorically been declared to be unconstitutional for abusing the presumption of innocence.⁷⁶ Although the principle is not an explicit constitutional guarantee in the US, it has been read into the due process provisions of the American Bill of Rights contained in the Fifth and Fourteenth Amendments to the American Constitution.⁷⁷ A high degree of constitutional protection has been accorded to the principle in the US by a strict application of the rational connection test in determining the validity of a reverse onus clause.⁷⁸ In the UK, reverse onus clauses were freely employed by the Parliament in a variety of statutes.⁷⁹ The enactment of the Human Rights Act, 1998, which enforces the European Convention on Human Rights, 1950,⁸⁰ enshrines the principle of presumption of innocence and has resulted in many reverse persuasive burdens being read down to reverse evidential burdens.⁸¹

⁷⁵ The Constitution of South Africa, 1996, §35(3)(h).

⁷⁶ For the Canadian position, see Oakes, *supra* note 34; for the South African position, see *S. v. Zuma*, 1995 (2) SACR 748.

⁷⁷ *Re: Winship*, 397 US 358, 363-364 (1970) (in which the U.S. Supreme Court held: “The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.” Accordingly, the decision read the standard of proof beyond reasonable doubt into the due process clause, thereby impliedly reading the presumption of innocence into the clause as well); See also *Coffin v. United States*, 156 US 432 (1895) (established the presumption of innocence in criminal trials); *Taylor v. Kentucky*, 436 US 478 (1978) (which discusses the relationship between the burden of proof and the presumption of innocence); see generally Shima Baradaran, *Restoring the Presumption of Innocence*, 72(4) OHIO ST. L. J. 723 (2011).

⁷⁸ *Leary v. United States*, 395 US 6, 36 (1969) (Harlan, J. held: “A criminal statutory presumption must be regarded as “irrational” or “arbitrary”, and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.”); *County Court of Ulster County, New York v. Allen*, 442 US 140, 167 (1979) (Stephens J. held that for a mandatory presumption, i.e., a presumption that shifts the persuasive burden to the accused, the basic fact must be sufficiently established to prove the presumed fact beyond reasonable doubt. Such a presumption would be valid and can be considered by the jury. In his words: “Since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt.”); see generally Leo H. Whinery, *Presumptions and their Effect*, 54 OKLA. L. REV. 553 (2001).

⁷⁹ Examples of English statutes employing reverse burdens are the Misuse of Drugs Act, 1971, §28(3), Health and Safety at Work Act, 1974, §40, Insolvency Act, 1986, §353, Road Traffic Act, 1988, §5(2), Criminal Justice Act, 1988, §4, Prevention of Terrorism (Temporary Provisions) Act, 1989, §16A, Trade Marks Act, 1994, §§92(1) (b) and 92(5), Protection from Eviction Act, 1997, §1(2), Terrorism Act, 2000, §§11(1) and 11(2).

⁸⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222, Art. 6(2)- “Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.”

⁸¹ Lewis, *supra* note 63, 668; see also Tadros & Tierney, *supra* note 2, 403. The principle has been upheld in several decisions subsequent to the enactment of the Human Rights Act, 1998 such as *Lambert and Attorney General* where reverse onus provisions were interpreted as merely imposing an evidential burden on the accused.

The Indian Supreme Court has emphasised both the importance of the presumption of innocence, as enunciated in *Woolmington*, as well as its status as a human right.⁸² The fact that the principle has not been expressly included as a fundamental right has, however, been used in combination with the public welfare justification to declare reverse onus clauses constitutional.⁸³ It is submitted that neither justification provides support for the constitutionality of these clauses, for the reasons analysed above.⁸⁴ In addition, there exists sufficient reason for making the presumption of innocence a fundamental right. Since 1978, the Supreme Court has consistently engaged in an expansive interpretation of Art. 21 with numerous rights having been read into it such as the right to fair trial and the right against solitary confinement, among others.⁸⁵ Specifically, since the presumption of innocence is an integral part of ‘due process’, there exists valid ground for incorporating the principle by virtue of *Maneka Gandhi v. Union of India*,⁸⁶ which read ‘due process’ into Art. 21. The importance of this principle is also illustrated by its inclusion in various Human Rights conventions, such as the Universal Declaration of Human Rights, 1948 (‘UDHR’),⁸⁷ and the International Covenant on Civil and Political Rights, 1966 (‘ICCPR’).⁸⁸ Although international conventions are not binding, both the UDHR and the ICCPR hold immense persuasive value as the Supreme

⁸² The Supreme Court has endorsed the principle as propounded in *Woolmington* in several cases such as *K.M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605; *Vijayee Singh v. State of Uttar Pradesh*, (1990) 3 SCC 190; AIR 1990 SC 1459 and *V.D. Jhingan v. State of Uttar Pradesh*, AIR 1966 SC 1762. In cases such as *P.N. Krishna Lal v. Govt. of Kerala*, 1995 Supp (2) SCC 187; 1995 AIR SCW 1325; *Noor Aga v. State of Punjab*, (2008) 16 SCC 417 and *K. Veeraswami v. Union of India*, (1991) 3 SCC 655, although *Woolmington* has been appreciated, reverse burdens have been upheld as being necessary exceptions to the presumption of innocence.

⁸³ See *Noor Aga v. State of Punjab*, (2008) 16 SCC 417.

⁸⁴ See *supra* discussion in Chapter IV(i).

⁸⁵ This trend commenced with *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 and has continued in numerous cases. Examples of such cases are *Hussainara Khatoon (4) v. Home Secretary, State of Bihar*, (1980) 1 SCC 98; AIR 1979 SC 1369 (right to speedy trial); *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158; AIR 2004 SC 3114 (right to fair trial); *Sunil Batra (2) v. Delhi Administration*, (1980) 3 SCC 488; AIR 1980 SC 1579 (right against solitary confinement for indefinite periods).

⁸⁶ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

⁸⁷ The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 10, 1948), (‘UDHR’) Art. 11(1)- “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”; UDHR, Art. 10- “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

⁸⁸ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (December 19, 1966), (‘ICCPR’) Art. 14(2)- “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”; ICCPR, Art. 14(1)- “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law... ”

Court has held that constitutional principles must be interpreted in the light of international declarations/conventions to which India is a signatory.⁸⁹

V. CONCLUSION

Were the Supreme Court to employ Ronald Dworkin's adjudicative principle of integrity,⁹⁰ in ascertaining the validity of reverse onus clauses, it would have acknowledged that law consists of a coherent set of principles of fairness and justice that ought to be consistently applied to equitably determine the rights of citizens according to like standards.⁹¹ Dworkin treats legislation as flowing from the community's present commitment to a background scheme of political morality and therefore, all litigants are entitled to be governed by a consistent scheme of legal principles.⁹² Reverse burdens unequivocally contravene this as they discriminate between individuals accused of reverse onus offences and those accused of non-reverse onus offences solely on the purported objective of public welfare, denying the former the constitutional guarantee of equality before law and equal protection of law.

A democratic society like India is structured upon values such as individual autonomy and dignity. Further, although not explicitly mentioned in the text of the Constitution, the presumption of innocence is nevertheless a potent background to the conception of justice in preserving "public confidence in the enduring integrity and security of the legal system."⁹³ It is these principles of fairness and justice that reverse burdens have sacrificed in the name of pursuing pragmatic policy concerns. The notion of integrity would probably persuade a judge to demonstrate fidelity to such fundamental principles of a democratic polity that must extend to every individual. Although Dworkin argues that judicial decisions should be rooted in principle rather than policy,⁹⁴ he

⁸⁹ The Supreme Court has adverted to international conventions and declarations in many cases to interpret the Fundamental Rights, particularly Arts. 14, 19 and 21. Some of these cases include *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (where Art. 13 of the UDHR was used to interpret Article 19(1)); *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301: AIR 1997 SC 568 (where the Supreme Court emphasised the importance of considering international obligations and refers to Arts. 17 and 12 of the ICCPR and UDHR respectively to interpret Art. 21); *Sunil Batra (2) v. Delhi Administration*, 1980) 3 SCC 488: AIR 1980 SC 1579 (where the Court referred to Art. 10 of the ICCPR and the Declaration of the Protection of All Persons from Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and 1975); *Prem Shankar Shukla v. Delhi Administration*, (1980) 3 SCC 526: AIR 1980 SC 1535 (where the Court referred to Arts. 5 and 10 of the UDHR to interpret Arts. 14, 19 and 21).

⁹⁰ RONALD DWORKIN, *LAW'S EMPIRE* 218-219, 225-254 (1986).

⁹¹ T.R.S. Allan, *Dworkin and Dicey: The Rule of Law as Integrity*, 8(2) OXFORD J. LEGAL STUD. 266 (1988) ('Allan').

⁹² *Id.*, 268.

⁹³ *Noor Aga v. State of Punjab*, (2008) 16 SCC 417.

⁹⁴ Allan, *supra* note 91, 270.

does not dismiss the fact that a judge will have to consider justifications of both policy and principle in interpreting a statute.⁹⁵

Developing on this idea, this paper maintains that a compromise ought to be negotiated between the competing principles of the presumption of innocence and the policy rationale of public interest. Given that an accused is entering a criminal trial where the odds are already against him, the presumption of innocence is absolutely vital to ensure that he is given a fair trial and is not prejudiced against from the outset. The significance of this presumption increases all the more when considered in light of the extremely rigorous sentences inflicted under the statutes in India, which currently employ reverse onus clauses.

Following the judicial practice in the UK, this paper submits that reverse persuasive burdens must be read down to mandatory reverse evidential burdens which require the accused to raise a reasonable doubt as to his guilt while the legal burden continues to remain on the prosecution. The legal burden should always lie on the prosecution to prove criminal liability beyond reasonable doubt. Moreover, considering the gravity of the consequences of a criminal trial, it is only fair to expect the State to respect the presumption of innocence. The State cannot be absolved of this liability by virtue of a presumption that makes the accused a presumptive criminal, wherein he will be convicted even if a reasonable doubt as to his guilt exists.

In light of the above analysis, it may be concluded that contrary to the prevailing judicial position, reverse onus clauses are unconstitutional as they violate the presumption of innocence and contravene fundamental principles prevailing in a democratic society enshrined in Arts. 14 and 21 of the Constitution. Perhaps Indian courts should consider reading down reverse persuasive burdens to reverse evidential burdens as a possible compromise between the individual rights of the accused and pragmatic policy concerns. A criminal justice system that believes in using reverse burdens in order to promote public welfare fails to recognise that such a measure is in fact self-defeating and does not reflect a society that believes in equity and justice. As Paul Roberts writes, “legal rules relating to the burden and standard of proof in criminal trials promote individual freedom and are bulwarks against oppression. They are not to be dispensed with, either directly or by more circuitous means.”⁹⁶

⁹⁵ *Id.*, 272.

⁹⁶ Roberts, *supra* note 23, 796.