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CONCEPTUAL DEFINITION OF THE BURDEN OF PROOF AND OTHER RELATED TERMS

Abstract

The paper examines the concept of burden of proof in the criminal proceedings and other related terms that are similar but not same as burden of proof. Making the distinction between burden of proof and terms like an evidential burden, standard of proof that might be a civil standard (I. preponderance of evidence and II. Clear and convincing evidence) and a criminal standard (proof beyond a reasonable doubt), the burden of persuasion, burden of going forward as well as the concept of shifting of the burden of proof are main objectives of the paper. Those terms are tightly related to the necessary court conviction about the guiltiness of the defendant.

In this paper, I will mostly concentrate in different standards in civil matters and criminal matters and try to explain why the court procedure operates with a higher standard of proof in criminal matters compared to the standard in civil matters.

The burden of proof is tightly related to the presumption of innocence and in dubio pro reo principle. I will also try to make a co-relation among the burden of proof and these two principles (the presumption of innocence and in dubio pro reo principle).

Keywords: burden of proof, standard of proof, proof beyond a reasonable doubt, in dubio pro reo, presumption of innocence.

I. INTRODUCTION

In the procedural literature, besides the term "burden of proof", we often meet other similar and co-responding terms that have their specifics which make them differ from the main term of the burden of proof. These terms deserve to be analyzed because only by analyzing them we will be able to make the distinction among similar but not the same procedural activities of the trial subjects. Such terms are evidential burden, standard of proof that might be a criminal standard- prove beyond a reasonable doubt and a civil standard- I. on the balance of probabilities and II. clear and convincing evidence, the burden of going forward, shifting the burden of proof, etc. Some authors (*McBaine, Richard Lempert, Finkelstein Michael),* use to connect and express these terms with mathematics. This practice creates the so-called New scholarship of evidence.

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II. CONCEPTUAL DEFINITION OF BURDEN OF PROOF - *ONUS PROBANDI*

The term "Onus Probandi" (Eng.: *Burden of proof, Germ.*: *Beiweslast,* French: charge de la preueve, Spanish: *cargo de la prueba,* Italian: *l1onere della prova)* is a term that is used in every language. If the first part, the word *onus* is clear enough and easily can be translated as Burden (in other languages: "Last",, "cargo", "Charge", "onere"), the second part of the phrase, the term *"probandi"* is much more difficult to be exactly translated[1]. It can be translated as evidence as well as proof. But, almost in all languages, the term *onus probandi* means burden of proof and does not mean evidential burden!

There are many attempts for defining the term burden of proof, for example: "the burden of proof means the fact-finding initiative and proposing evidences from parties, the damaged person and his/her representative and the defender"[2]. This implies the duty of the party to prove a certain fact. Generally, the burden of proof lies on the party that claims that a fact is true (prosecutor or the plaintiff). Another definition is that the burden of proof means proposing evidences that determine the facts that have been proposed by the party[3]. There is a difference between the burden of proof, that lies on the party who, if does not prove that there is a certain fact might lose the case and the evidential burden that expresses the duty of the party to propose sufficient evidence for a claim that it becomes the object of the court examination.[4] The "burden of proof" is the obligation which rests on a party concerning a particular issue of fact in a civil or criminal case, and which must be discharged or satisfied, if that party is to win on the issue in question. This burden is often referred to as "the legal burden". It is to be distinguished from what is called "the evidential burden", which as we shall see, is something completely different[5]. It is very important to remember that, in relation to any particular issue, the burden of proof can rest on only one party. Thus, in relation to a single issue, you cannot have a burden on one party to prove the existence of a state of affairs and a burden on the other party to prove its non-existence[6]

Any person charged with an offence is presumed innocent until proven guilty according to the law. The duty of prosecution is to prove two main elements of the crime: *actus reus- a* commitment of the crime and *mens rea-* the mental element. In the beginning, the prosecution must fulfil the evidential burden and prove that the accusation is based on certain facts. After that appears the fulfilment of the burden of proof by proving beyond a reasonable doubt. The court must advise the jury that the prosecution should prove the case and that proving should contribute for convincement beyond a reasonable doubt for the guiltiness of the accused[7].

The burden of proof is tightly connected with the Latin maxim "*simper necessitas probandi incumbit ei qui agit",* that means: "The one who claims, must prove, anytime". Due to that, the accusations in the criminal procedure must be based in particular evidences and the one who claims must convince the judge that the claims are true.

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[1] Uzelac Alan, Teret dokazivanja, Zagreb, 2003, pp.5, I

[2] Manel Pavel, Leksikon za kazneno pravo, Skopje, 2005. Pp.970

[3]Matovski Nikola, Buzharovska-Lazhetikj Gordana,, Kalajdzhiev Gordan, Kazneno Procesno Pravo, Vtoro Izmeneto i Dopolneto Izdanie, Skopje, 2011, pp. 186

[4] Oxford Dictionary of Law, Fifth Edition, Oxford University Press, 2002, pp. 59

[5] Christopher Allen, Practical Guide to Evidence, Fourth Edition, Rouledge and Cavendish, London and New York, 2008, pp.150

[6] Ibid, pp.151

[7] Ibid, pp.59-60

Once the parties propose and present their evidences, the court decides if the party has discharged the burden of proof. The necessary standard of proof depends if it is a civil case or a criminal case. In criminal cases, the necessary standard of proof that must be reached is known as prove beyond a reasonable doubt and in civil cases, there are two standards: I. proving on the balance of probabilities and II. The standard of clear and convincing evidences.

1. Burden of proof in criminal cases- Prove beyond a reasonable doubt

It is well accepted that in criminal cases, the burden of proof, lies on to the accuser and the accuser must prove the guiltiness of the defendant, as well as the defendant, must not prove his/her innocence. The case *Woolmington v DPP*[8] is of high importance in understanding the burden of proof. In this case, Reginald Woolmington, a 21-year man, killed his 17-years old wife Violet Kethleen Woolmington, who had left him. Woolmington`s defence was that he did not intend to kill Violet. Specifically, he claimed that he had wanted to win her back and planned to scare her by threatening to kill himself if she refused. He had attempted to show her the gun which discharged accidentally, killing her instantly. The case was so strong against Woolmington that the burden of proof was on him to show that the shooting was accidental. At trial, the jury deliberated for 69 minutes and Woolmington was convicted and sentenced to death. On Appeal to the Court of Criminal Appeal, Woolmington argued that the trial judge misdirected the jury. *Lord Justice Avory* refused leave to appeal, relying on a passage of *Foster`s Crown law* (1762):

"In every charge of murder, the fact of killing being first proved, all circumstances of accident necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him".

The Attorney General then allowed the case to be appealed to the House of Lords. The issue brought to the House of Lords was whether the statement of law in *Foster`s Crown Law* was correct when it said that if a death occurred, it is presumed to be murder unless proven otherwise. Delivering the judgement for a unanimous Court, *Viscount Sankey*, made his famous "Golden thread" speech:

"*Throughout the web of the English Criminal Law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner`s guilt subject to…the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner…the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained".*

The conviction was quashed and Woolmington was acquitted.

It was this decision in 1935 which first clearly established the so-called "Golden thread" of English criminal law: the principle that it is for the prosecution to prove the defendant`s guilt. As the House of Lords proceeded to state, this rule was subject only to the common law exception of insanity and any statutory exception created by Parliament[9].

[8] Woolmington v DPP, United Kingdom House of Lords Decisions, 1935, https://www.bailii.org/uk/cases/UKHL/1935/1.html [last seen on: 11.10.2019]

[9] Jonathan Doak and Claire McGourlay Criminal Evidence in Context, Second Edition, Routledge-Cavendish,. London and New York, 2009, pp.55

It would be possible to justify the rule as part of a policy to avoid embarrassing criticism of the administration of justice by minimizing wrongful convictions. These are more likely to be avoided if the burden is fixed in this way then if an accused person has to prove his innocence[10]. Knowing that you are innocent does not mean that you will be always able to prove it in front of the court!

But, where a burden of proof rests on the defendant, in relation to any issue, he must be convicted even though the magistrates and jury are left undecided about facts that are relevant to that issue. The Criminal Law Revision Committee, in their 11th Report, were strong of the opinion that burdens of the defence should be evidential only. They pointed out that in the typical case under the existing law, where the essence of the offence is that the offender has acted with blameworthy intent and the defence that the defendant must prove is that he acted innocently, it was "repugnant to principle" that a court, left in doubt as to the defendant`s intent, should be bound to convict[11]. And contrary: if the state as an opposite party of the defendant would be exempted from the duty to propose and to prove the facts against the defendant, the elements of "fair trial" would be excluded from the criminal procedure. The defendant would never be sure that he will be convicted only if there are no doubts on his guiltiness and that the procedure will be based only by law[12].

In criminal cases, sometimes, happens the shifting of burden of proof toward the defendant, which means the duty of the defendant to prove certain circumstances.

III. OTHER RELATED TERMS - CONCEPTUAL DEFINITION

1. Burden of persuasion

The reason for the division of "burden of proof" into two parts by academic commentators is very simple: two different things are happening that are covered by one term. The most common usage of the term, however, and it is frequently unambiguous, is that the burden of proof means the burden of persuasion. The burden of persuasion means the degree to which the finder of facts must be persuaded by the evidences that the fact is true[13]. The burden of persuasion refers to the party`s duty to convince the court to view the facts in his favour. The obligation of a party to introduce evidence that persuades the factfinder, to a requisite degree of belief, that a particular proposition of fact is true. The burden of persuasion is comprised of two elements: the facts a party must plead and prove to prevail on a particular issue; and how persuasively the party must prove those facts[14]. In the European theory, the burden of persuasion is affirmed at the end of the procedure and in spite of it, the case will be lost by the party (after the presentation of all evidences) that fails to convince the court (whether it is a professional judge or a jury) in the veracity of his/her claims[15].

The burden of persuasion refers only to the burden of convincing the fact-finder of the collective truth of evidence produced by one side or the other. When the burden of persuasion has been met, the attorney will be able to refer to the evidence during closing arguments to assist the jury

[10] Allen, pp.159
[11] Ibid, pp.159
[12] Uzelac, Istina u sudskom postupku Zagreb, 1997, pp.391, II
[13] Daniel A. Bornstein, Demystifying the Law: An Introduction for Professionals, 1990, pp.71
[14] Legal Information Institute [LII], Open access to law since 1992, Cornell Law School, https://www.law.cornell.edu/wex/burden_of_persuasion [last access on 19th of July, 2019]
[15] Uzelac, II, pp.277

in understanding why his or her party should prevail and to demonstrate that his or her client`s version is the truth[16].

The burden of persuasion is that burden of persuading the jury of the truth of the matter relied upon. This is commonly known as the legal burden of proof, or, more helpfully, "the burden of persuasion" or "persuasive burden". In theory, this burden lies, with very few exceptions, upon the prosecution. Where it lies with the defence, as where the defendant pleads insanity, the standard of proof is on the balance of probabilities. Where it lies with the prosecution, the standard of proof is "beyond a reasonable doubt". In effect, this means that the jury should acquit if they are not sure the defendant is guilty even if they think he most probably is. An acquittal means that guilt is not proven, not that the jury believe the defendant to be innocent[17].

2. Burden of going forward

The burden of going forward, in the strict sense of the word has not its counterpart in the Euro-continental law. The attempt of its equating with some terms such as the burden of proof or the burden of persuasion, might only lead to superficial similarities and generate certain misunderstandings. Even the Anglo-American theory itself is aware of the specifics of this institute, which is largely related to the distribution of the functions between the professional judges and the jury[18].

The burden of going forward is also known as the burden of producing evidences, the burden of production or the burden of proceedings. It means that the party is obliged to produce evidences during the trial.

At the start of a criminal trial, the prosecution has the obligation to produce evidences that will move toward meeting the burden of proof. The burden of going forward has been defined as: "[a] party`s duty to introduce enough evidence on an issue to have the issue decided by the factfinder, rather than decided against the party…". This is a way of saying that the government possesses the initial burden of going forward by initiating the presentation of evidence. In a sense, at the beginning of a legal contest, the government begins the case and must start with by introducing evidence that will build toward an eventually reach the level of proof beyond a reasonable doubt. If the prosecution meets the burden of going forward with the evidence and survives a defendant`s request for a directed verdict, the burden of going forward with the evidence shifts to the defence to begin building its case. Demonstrative of the principle that the burden of going forward was met is a case in which the defendant has been accused of the rape of a child. The prosecution, during its case-in-chief, had introduced evidence that the defendant had blood on his clothes, the child had blood in her diaper, the victim had torn flash in the private area and the technicians found the defendant`s DNA profile on a diaper. At the close of the prosecution`s case, the defendant requested a directed verdict of acquittal on the theory that the prosecution had failed to meet its burden of going forward with the evidence. The reviewing court upheld the trial court`s denial of the motion because the evidence, both circumstantial and directs, were sufficient for a conviction of child rape if a jury would choose to believe the evidence. If the defendant, in meeting the burden of going forward with the evidence, succeeds in creating reasonable doubt in the prosecution`s case, the burden of going forward will shift to the prosecution at the close of the defendant's case-in-chief. In a case of a defendant who pleads an affirmative defense such as alibi, self-defence, mistake of fact, insanity or other legal theory, the

[16] Jefferson L. Ingram, Criminal Evidence, Tenth Edition, Lexis-nexis, 2009, pp. 48
[17] William Wilson, Criminal Law: Doctrine and Theory, Third Edition, Dorchester, Dorset, UK 2008, pp.10
[18] Uzelac, I, pp. 282

burden of going forward with the evidence supporting the defense initially rests on the defendant. Similarly, in a case involving a felon in possession of firearm, the defendant had the burden of going forward with evidence that he had been pardoned or had otherwise had has his right to bear firearms restored. If the defendant succeeds in going forward with evidence sufficient to meet any burden of proof for that affirmative defense, the burden of going forward shifts to the prosecution to negate the defendant's proof of the defense[19].

The burden of going forward does shift back and forth between the parties. The burden of going forward is initially on the same person who has the burden of persuasion. It is that party`s responsibility to produce some evidence to support its argument that his version of the event is correct. Once it has presented enough evidence that a jury or judge could find for that party, then the burden of going forward shifts to the other party. The other party now has the burden of coming forward with evidence to convince the judge or the jury that the event did not occur or that the fact is not true.

In most situations, the party that has the burden of going forward has the right to just stop and not go forward to any given issue. By this we mean that the fact that one side does not present evidence controverting the other`s side evidence does not automatically mean that the first side will lose on that issue; it can still argue that the evidence presented by the other side is weak, is presented by prejudiced witnesses, etc. and therefore should not be believed. It is not incumbent upon a party to go forward merely because the burden has shifted to it.

However, if a party does go forward and present evidence to controvert the evidences presented by the other party, the burden of going forward will now shift once again to the first party. That party would now have the obligation of coming forward with whatever evidence it might happen to have, which it has not previously presented, regarding the issue. We rarely reach this stage, because it is not generally a good idea not to pull all your evidence in at the first opportunity you have since if the other party does nothing you will not get a second opportunity. Nevertheless, this shifting back of the burden is possible. Indeed, it could shift back and forth again and again, at the discretion of the judge in deciding to admit new evidence on an issue that has already been discussed[20]. By shifting this burden to the other party, the other party comes to the position of its opponent at the beginning of the proving procedure. Theoretically, it is possible this shifting to occur many times during the procedure. In practice, that proving *ping-pong* does not last long and after one or eventually, two replies, the versions of both sides become clear enough to be left to the trial for making a decision. At that point, the burden of going forward disappears and in its place comes the burden of persuasion[21].

3. Evidential burden

Burden of proof means the obligation of the prosecution to prove the guiltiness of the defendant. This term is often used (in an unappropriated way) for evidential burden.

It is necessary to make a distinction between these terms. These two terms are two sides of a medallion- without presenting evidences on factual issues, the party cannot fulfil the burden of proof[22]. Those two terms do not mean the same situation. The evidential burden determines if one issue must be left on the jury for a decision and the burden of proof indicates how one issue

[19] Ingram, pp. 47- 48
[20] Bronstein, pp. 73
[21] Uzelac I, pp. 286
[22] Doak-McGourlay, pp.56

must be solved.[23] This burden is also referred to as "the burden of adducing evidence" and "the duty of passing the judge". It may be defined as an obligation on a party to adduce sufficient evidence on a fact to justify a finding of that fact in favour of the party do oblige. In other words, if obliges a party to adduce sufficient evidence for the issue to go before the tribunal of fact. It is confusing and misleading, therefore, to call the evidential burden a burden of proof: it can be discharged by the production of evidence that falls short of proof. Whether a party has discharged the burden is decided only once in the course of a trial, and by the judge as opposed to the tribunal of fact. In a criminal trial, in which the prosecution bears the evidential burden on a particular issue, they must adduce sufficient evidence to prevent the judge from withdrawing that issue from the jury. If the prosecution also bears the legal burden on the same issue, and fail to discharge the evidential burden, they necessarily fail on that issue since the judge refuses to let the issue go before the jury. However, it does not follow that a discharge of the evidential burden necessarily results in a discharge of the legal burden: the issue in question goes before the jury, who may or may not find in favour of the prosecution on that issue. If the accused adduces no evidence in rebuttal, he will not necessarily lose on the issue, although if he takes that course that is a clear risk that he runs[24].

Like the legal burden, the evidential burden relates to particular facts in issue. The evidential burden in relation to various issues in a given case may be distributed between the parties to the action. Normally, a party bearing the legal burden in relation to a particular fact at the commencement of the proceedings also bears an evidential burden in relation to the same fact. However, this is not invariably so. Thus although the prosecution bears the legal burden of negating all common law defences (except insanity) and certain statutory defences (including the defences of self-defence, duress and non-insane automatism), such a defense will not be put before the jury unless the accused has discharged the evidential burden in that regard. Equally, and to complicate matters further, the evidential burden borne by the accused in these circumstances may be discharged by *any* evidence in the case, whether given by the accused, a co-accused or the prosecution and in this sense, the so-called evidential burden is not a burden on the accused at all. If the evidential burden is discharged, whether by defense or prosecution evidence, the prosecution will then bear the legal burden of disproving the defense in question, but if there is no evidence to support the defense than the judge is entitled to withdraw it from the jury[25].

As in the case of legal burden, judges sometimes refer to the "shifting" of the evidential burden. The evidential burden may sensibly be said to shift on the operation of a rebuttable presumption of the law of the "evidential" variety. However, the phrase has also been employed in other circumstances. Where a party discharges an evidential burden borne by him in relation to a particular fact, his adversary will be under an obligation, referred to as the provisional or tactical burden, to adduce counter-evidence to convince the tribunal of fact in his favor. If he chooses not to adduce such counter-evidence, he runs the risk of a finding on that issue in favor of the other party[26].

4. Standard of proof

One of the main characteristics that differentiate the *burden of proof vs. the evidential burden,* is the fact that for discharging the burden of proof, the prosecutor must convince the judge that the

[23] Tapper Colin, Cross & Tapper on Evidence, Twelfth Edition, Oxford University Press, 2010, pp.111
[24] Keane Adrian, The Modern Law on Evidence, Seventh Edition, Oxford University Press,, 2008 , pp.87
[25] Ibid, pp. 87
[26] Ibid, pp. 88

defendant is guilty and that convincement must be of a high level of probability, which in literature is known as proof beyond a reasonable doubt. At the other hand, discharging the evidential burden means the obligation of parties to propose and produce sufficient evidence to convince the judge that the fact is true.

A question that comes very often is: "Which quantity must have the convincement of the judge?". This question is answered by the term *the standard of proof.*

The standard of proof means the quantity or the level of proving that must be achieved[27]. That standard means the level of proof demanded or required on a specific case, established by assessing the evidences. The standard of proof indicates the volume, the quantum of the evidences required to achieve a certain persuasion in judicial proceedings[28].

In the USA, which doctrine is most concerned with the standard of proof, are mentioned three standards of proof: the general standard (the lowest) known as preponderance of evidence, the general standard that is necessary in criminal cases, which is known as proof beyond a reasonable doubt and the last one which is applied in certain civil cases where is decided for special relevant facts and it is known as clear and convincing evidences. The practice and literature of UK, often recognize only two standards, respectively the civil standard that is known as the standard on the balance of probabilities and the criminal standard, that is known as proof beyond a reasonable doubt[29].

Why should there be two different standards of proof? Having two standards reflects a fundamental assumption that our society makes about the comparative costs of erroneous factual decisions. In any judicial proceedings in which there is a dispute about the facts of some earlier event, the fact-finder can never acquire unassailably accurate knowledge of what happened. All he can acquire is a belief about what *probably* happened. The strength of this belief can vary. A standard of proof represents an attempt to instruct the fact-finder about the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. The expressions "proof on the balance of probabilities" and "proof beyond a reasonable doubt" are quantitatively imprecise. Nevertheless, they do communicate to the fact-finder different ideas concerning the degree of confidence he is expected to have in the correctness of his conclusions. Any trier of fact will sometimes, despite his best efforts, produce a decision about facts that is wrong. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgement in favor of the claimant when the true facts warrant a judgement for the defendant. The corresponding result in a criminal case would be the conviction of an innocent man. On the other hand, a factual determination that is wrong can result in a judgement for the defendant when the true facts justify a judgement in claimant`s favor. The result corresponding to this in a criminal trial would be the acquittal of a guilty man[30].

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If the standard of proof in a criminal trial was proof on a balance of probabilities rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors resulting on the release of guilty persons, but greater risk of factual errors resulting in a conviction of the innocent. The standard of proof in a particular type of litigation, therefore,

[27] Doak- McGourlay, pp. 57

[28] Bilali Arta., Tovarot na dokazhuvanjeto vo krivicnata postapka, PhD Thesis, 09.11.2011, Faculty of Law "Iustinianus Primus"- University "St. Cyril and Methodius"- Skopje, pp. 51

[29] Uzelac, I, pp. 301, see also Doak- McGoarlay, pp. 57

[30] Allen, pp. 175-176

reflects society`s assessment of the harm attaching to each kind of error. It is this that explains the difference between criminal and civil standards of proof. In a civil suit, we generally regard it as no more serious for there to be an erroneous verdict in the defendant`s favor than for there to be such a verdict in the claimant`s favor. Proof on the balance of probabilities, therefore, seems the appropriate standard, but in a criminal case, we do not view the harm that results from the conviction of an innocent man as equivalent to the harm that results from acquitting someone guilty. The defendant in a criminal trial has generally more at stake than a defendant in a civil trial, and so the margin of errors must be reduced in his favor by placing on the prosecution the burden of proving guilt beyond reasonable doubt[31]. As Lord Woolf CJ has stated:

"At the heart of our criminal justice system is the principle that while it is important that justice is done to the prosecution and justice is done to the victim, in the final analysis, the fact remains that it is even more important that an injustice is not done to a defendant. It is central to the way we administer justice in this country that although it may mean that some guilty people go unpunished, it is more important that the innocent are not wrongly convicted"[32].

The level of convenience is higher in criminal cases compared to civil cases. In the criminal cases, while bringing a decision, the judge must be convinced among 95-99% and in civil cases that convincement is above 50%.

4.1 Standard of proof in criminal cases- Proof beyond a reasonable doubt

Defining the term "proof beyond a reasonable doubt" in the theory has been shown as a very difficult thing. Often, it means that the facts are proved to that level, that does not leave a "reasonable doubt" in the man`s rationale. It is possible to exist a doubt, but it is such a little one that does not allow another conclusion. The studies show that the proof beyond a reasonable doubt means convenience that is higher than 90%.

The rule prescribing the standard of proof is a matter of law for the judge. Whether the evidence adduced meets the standard is a question for the jury as a tribunal of fact. In criminal trials, therefore, the judge must direct the jury on the standard of proof that the prosecution is required to meet[33]. In criminal cases, where freedom or life itself may hang in balance, the federal constitution of the USA has been interpreted to require the highest level of proof, known as "proof beyond a reasonable doubt". This demanding level of certainty requires that the prosecution proves that the accused is guilty by introducing strong and overwhelming evidence of guilt that meets the stated standard of proof beyond e reasonable doubt. The proof presented by the prosecution must have sufficient believability and substance to rebut the strong constitutional presumption of innocence that a defendant possesses throughout the trial. In legal theory, this means that every element of the offence charged in the indictment, as well as any aggravating circumstances that affect a sentence, must be proved beyond a reasonable doubt. Otherwise, the accused must be acquitted[34].

Sources from the common-law system define this standard as "golden thread" of criminal law that obliges the prosecution to prove the guilt of the defendant[35].From many attempts for

[31] Ibid, pp. 176
[32] In Re Winship, Washington D.C. , 31.III.1970, http://law.jrank.org.pages/12939/In-re-Winship.httml
[33] Keane, pp. 111
[34] Ingram, pp.
[35] Uzleac, I, pp. 305

defining this standard, in American books is very often mentioned the Lord SHAW, that in the case Commonwealth v. Webster[36], defines it like:

> "*It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. Al, the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgement, of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.".*

Another interesting and important explanation of the term *proof beyond a reasonable doubt* is given in the case In re Winship[37], which states:

> *"The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, supra, at 453. As the dissenters in the New York Court of Appeals observed, and we agree, "a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." 24 N. Y. 2d, at 205, 247 N. E. 2d, at 259.*
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> *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 364*364 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. As we said in Speiser v. Randall, supra, at 525-526: "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne*

[36] COMMONWEALTH vs. JOHN W. WEBSTER 5 Cush.295, 59 Mass.295- March, 1850, http://masscases.cp./cases/sjc/59/59mass295.html, pp.320

[37] **397 U.S. 358 (1970) IN RE WINSHIP No. 778, Supreme Court of United States, 1970**

the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967).

Moreover, the use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In the literature from United Kingdom, most often is cited the speech of Lord Denning in the case Miller vs. Minister of Pensions (1947)[38], which is as follows:

"Proof beyond a reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility in his favour..... the case is proved beyond reasonable doubt but nothing short of that will suffice."

Today, the *reasonable doubt* standard of proof is widely spread on the Continent as well, in the so-called hybrid systems. As such, many criminal justice systems throughout Europe require from the prosecution to prove the guilt of the defendant beyond reasonable doubt or with high certainty, otherwise, the defendant shall be acquitted[39]. For instance, in Germany, the judge`s conviction of the defendant`s guilt "*must be subjective and must be based on persuasive factors, which leave no room for reasonable doubt"*[40].

In the LCP of Italy[41] is stated that: "The judge shall convict the defendant only if defendant is found guilty beyond reasonable doubt of the crime he is charged with.

According to the article 403 (3) of the Law on Criminal Procedure of the Republic of North Macedonia, the court shall acquit whenever the prosecution fails to prove beyond a reasonable doubt that the defendant is guilty.

The standard of proof beyond a reasonable doubt must be discharged by the prosecution. This standard applies on all criminal cases. It does not seem for proving beyond any shadow of doubt, but only convenience beyond a reasonable doubt, that means that a rational person will

[38] Lord Denning in MILLER vs. Minister of Pensions, https://ulii.org>files>judgement>high-court>high-court-2010-178

[39] Doubt in favor of the defendant, Guilty beyond reasonable doubt, Comparative Study, OSCE Mission to Skopje, Skopje, 2017, pp. 65

[40] Richard S. Frase & Thomas Weigend, German Criminal Justice as a Guide to American Law Reform: Similar problems, Better Solutions?, 18(2) B.C. Int`l & Comp. l. Rev.317, 343-344, 1995, cited from: [40] Doubt in favor of the defendant, Guilty beyond reasonable doubt, Comparative Study, OSCE Mission to Skopje, Skopje, 2017, pp. 656

[41] Art. 533(1) of Law on criminal procedure of Italy

not have a reason to not trust to the party or will not have a reason for a clear doubt about it. For the first time it was used in XVIII century in common-law literature[42].

4. 2. Standard of proof in civil cases

Contemporary literature in USA, in civil cases, operates with two standards: I. the standard of clear and convincing evidence and II. the standard of preponderance of evidences. In the UK literature, it is used only the second one (the standard of preponderance of evidences, the standard on the balance of probabilities).

a). Preponderance of evidence

The plaintiff in a civil case possesses the burden of proof, which requires that the truth of the plaintiff`s claim be established by a fair preponderance of the credible evidence when considered with the defendant`s evidence. The preponderance standard means by the greater weight of evidence and has been stated to be anything more than 50 per cent of the believable evidence, although a mathematical model often does not provide a precise analogy. The concept of the preponderance of the evidence does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase preponderance of the evidence refers to the quality of the evidence; that is its ability to convince and the weight and the effect it has on the juror`s mind. For the civil plaintiff to prevail, the evidence that supports the claim must appear to the jury at least slightly more believable than the evidence proposed by the opposing party. If the evidence proposed by the plaintiff fails to be more believable than the defendant`s evidence or if the evidence of both sides weighs so evenly that the jurors are unable to say that there is a preponderance on the plaintiff`s side, then the jury must resolve the question in favor of the defendant[43].

An attempt to define this standard is that of Denning J. in *Miller v. Minister of Pensions*. There he said that, in a civil case, the evidence "must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not", the burden is discharged, but, if the probabilities are equal, it is not[44].

The preponderance of the evidence does not mean more evidences or more witnesses, but evidences that weigh more! It is lower than the standard of proof beyond a reasonable doubt.

b). Clear and Convincing Evidence

Intermediate standard of *clear and convincing evidence* is a specific standard for American theory; English theory denies it, although sometimes they use it[45]. It is also known as clear, convincing and satisfactory evidence; clear, cognizant and convincing evidence; clear, unequivocal, satisfactory and convincing evidence. This standard means that to prove a fact, a party must convince the judge or jury that it is highly more probable that the fact is true.

This is a medium level of burden of proof which is a more rigorous standard to meet than the preponderance of the evidence standard, but a less rigorous standard to meet than proving evidence beyond a reasonable doubt. To meet the standard and prove something by

[42] Uzelac, I, pp. 306
[43] Jefferson L. Ingram, Criminal Evidence, Tenth Edition, Lexis-nexis, 2009, pp.47- 48
[44] Allen, pp. 177
[45] Uzelac, I, pp. 304

clear and convincing evidence, the party alleging the contention must prove that the contention is substantially more likely than not that it is true[46].
This standard appears because many civil cases look for a higher certainty. It is typical for cases of fraud, heritage, matrimonial issues, etc. It is higher than the standard of the preponderance of the evidence and lower than the standard of proof beyond a reasonable doubt and in percentage, it is higher than 70% certainty[47].

IV. CONCLUSION

The term "burden of proof" is tightly related to the term "burden of evidences", but they are not the same. Burden of proof means the duty of the prosecutor to prove his accusation in front of the court and burden of evidences means the burden of parties to propose evidences in front of the court that will prove that their claim is true.
The burden of proof during the criminal procedure bears on the plaintiff and this burden indicates whether the court is satisfied from the proposed evidences about the guiltiness of the accused, namely, can the accused be found guilty. The burden of evidences, during the procedure can move from one party to the other and indicates if there are proposed sufficient evidences that allow the trial to bring a decision about them.
The main duty of the prosecution in the criminal procedure is to convince the court that the accused is guilty. If the prosecution convinces the court beyond a reasonable doubt that the accused is guilty, he fulfills the burden of proof.
For clarifying the term of burden of proof, the theory uses the expression "standard of proof". The standard of proof means the quantum, the level of convincement that must be achieved about the guiltiness of the accused and only if that standard is achieved, we can say that it is fulfilled the necessary standard for the burden of proof.
The standard of proof is different in different court procedures. In the criminal procedure must be fulfilled the standard of proof beyond a reasonable doubt and in civil procedure must be fulfilled the standard of the preponderance of evidences which is also known as the standard of proof on the balance of probabilities. For the civil procedure, the American theory and practice use one more intermediate standard, that is known as a standard of clear and convincing evidences.
The standard of proof beyond a reasonable doubt is achieved if after the presentation of all evidences, on the ratio of a normal person does not remain any relevant doubt that the criminal act has happened and that it`s actor is the accused. This is the highest standard that must be achieved in a court procedure and mathematically it correlates to the value of above 98% certainty. The two other above-mentioned standards that are used in civil procedure are lower than the standard of proof beyond a reasonable doubt.

[46] Clear and Convincing Evidence, Legal Information Institute, Cornell Law School, Open Access to Law since 1992, https://www.law.cornell.edu/wex/clear_and_convincing_evidence, [last seen on: 01.10.2019]
[47] Bilali, pp. 62

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