The Presumption of Innocence: Evidential and Human Rights Perspectives BY ANDREW STUMER [Oxford: Hart Publishing, 2010. xl + 218 pp. Hardcover: £50]

The presumption of innocence is widely celebrated. In Singapore, it has been hailed by V. K. Rajah J.A. as "the cornerstone of the criminal justice system and the bedrock of the law of evidence" (see *XP v. PP* [2008] 4 S.L.R.(R.) 686 (H.C.) at para. 90). But what exactly is the presumption of innocence? The author of this book takes it to mean the common law principle famously declared by Lord Sankey in *Woolmington v. Director of Public Prosecutions* [1935] 1 A.C. 462 (H.L.) [*Woolmington*] as the "golden thread" of English criminal law (at 481-482): The prosecution must bear the burden of proving guilt beyond reasonable doubt, which includes the burden of disproving facts in issue material to any defence (except for insanity and statutory exceptions).

Does the presumption deal only with the burden and standard of proof? There is much debate on whether it is wholly procedural or has substantive bite. The competing arguments are carefully considered in Chapter 3. One concern raised is the ease with which the burden on the prosecution may be reduced in scope if the state is free to define an offence however she likes: All that needs to be done is to exclude from the definition of the offence any element which the state wishes to be relieved from the onus of proving. Some writers believe that the presumption should not be so easily circumvented and have argued that it must impose some constraints on how an offence may be defined. The House of Lords has rejected this 'substantive approach' (see *R v. G (Secretary of State for the Home Department intervening)* [2008] 1 W.L.R. 1379). Stumer agrees with this rejection. He also rejects the 'narrow procedural approach' in favour of the 'broad procedural approach': According to the former, the presumption only requires the prosecution to bear the burden of proof on core aspects of an offence whereas the latter requires that the prosecution as a general rule proves all matters that are necessary for conviction.

On the standard view, the presumption is a rule of criminal evidence and procedure. But it is no ordinary rule; in many countries, it has an elevated status and the legislature cannot erode it as easily as, for example, the rule on hearsay. The presumption is entrenched in many national bills of rights as well as in many international and regional human rights documents. In England, it has quasi-constitutional status by reason of Art. 6(2) of the *European Convention on Human Rights* (*Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223) [*ECHR*] and the *Human Rights Act 1998* (U.K.), 1998, c. 42 [*Human Rights Act*]. Article 6(2) of the *ECHR* explicitly gives anyone charged with

a criminal offence the right to be "presumed innocent until proved guilty according to law".

The author has been criticised for treating the presumption merely as a rule about the allocation of the burden of proof during trial. It is said that this is too narrow a view to take, especially in a book purporting to offer "human rights perspectives" of the presumption (see *e.g.*, Richard Glover, "Andrew Stumer: The Presumption of Innocence: Evidential and Human Rights Perspectives" (2011) 15 Int'l J. of Evidence and Proof 89). I have argued elsewhere that the presumption *as a human right* should be understood in broader terms than the *Woolmington* principle (see Ho Hock Lai, "The Presumption of Innocence as a Human Right" in Paul Roberts & Jill Hunter, eds., *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, forthcoming in December 2011): compare Stumer's criticisms of the Strasbourg approach of associating the presumption with the general right to a fair trial (at pp. 95-98)). The author is clearly aware of some of the broader human rights dimensions (at pp. xxxviii-xxxix; 90-92) and states at the outset that he is leaving them out of his study. This is understandable. It is necessary for him to limit the scope of his research in order to render manageable the doctoral thesis on which this book is based. Nonetheless, the English conception of the presumption (which in itself is not universally recognised) may not be the best way to understand Art. 6(2) of the *ECHR*. After all, this provision also applies to non-common law legal systems and there is considerable divergence in the scope and understanding of the presumption within Europe (see *e.g.*, François Quintard-Morénas, "The Presumption of Innocence in the French and Anglo-American Legal Traditions" (2010) 58 Am. J. Comp. L. 107). The discussion in Chapter 4, which is generally devoted to an examination of the relevant Strasbourg cases, seems to presuppose the *Woolmington* definition of the presumption. What is called for is arguably a 'universal' conception that is able to accommodate local variations and differences and one that is more sensitive to the range of political contexts in which human rights can potentially operate.

From the subject matter of the monograph, I now turn to its contents. Chapter 1 gives a brief history of the presumption, discusses the concept of the burden of proof, explains the distinction between persuasive and evidential burdens, and elaborates on the meaning of 'proof beyond reasonable doubt'. It also gives an introduction to the impact of the *Human Rights Act* in England. Chapter 2 sets out Stumer's main thesis on the question which occupies the book: "[W]hether limits on the presumption of innocence can be justified, and if so to what extent" (at p. 27). By "limits", he means the placing of the burden of proof—in particular the persuasive burden—on the accused. Legislative provisions which have this effect are commonly known as 'reverse onus' provisions. Stumer derives his normative answer to the question from what he considers are the two "mutually-reinforcing values" served by the presumption: "[F]irst it is instrumental in preventing the conviction and punishment of the innocent; and second it promotes the rule of law by insisting that criminal sanctions not be imposed unless guilt has been publicly demonstrated to a sufficient standard of certainty" (at p. 27). In developing his argument, the author draws on theories of punishment. However, punishment comes into the picture only after guilt is found. Theories of the criminal trial (*viz.*, the process of proof in which guilt is determined) would have provided a firmer foundation for his argument.

Briefly stated, the author's thesis is that any reversal of the burden of proof is incompatible with Art. 6(2) of the *ECHR* unless (a) there is a low risk of wrongful conviction or (b) the consequences of conviction are minimal. Chapter 6 identifies three situations where either (a) or (b) is the case: First, where the penalty is non-custodial; second, where the defendant can prove his or her innocence with relative ease; and third, where the prosecution has proved sufficient facts to establish that the defendant had acted wrongfully. Other factors, such as the seriousness of the offence, the existence of a regulatory regime, and the possession of 'peculiar knowledge', are irrelevant (at p. 189).

Even where either (a) or (b) is the case, the reversal of the burden is compatible with Art. 6(2) only in limited circumstances. It must pass the proportionality analysis, which is extensively discussed in Chapter 5. In particular, the author states that "[t]he proportionality analysis must focus upon whether it is 'necessary' to employ a persuasive burden, rather than an evidential burden" (at p. 190). It is here, and only here, that "[c]onsiderations of 'balance' between the community interest in obtaining convictions and the residual interest of the defendant in avoiding wrongful conviction may be taken into account as part of the 'necessity' test". In most cases, "an evidential burden is sufficient to overcome any problems of proof faced by the prosecution". As such, few 'reverse onus' provisions survive the proportionality analysis (at p. 191).

This monograph is the product of meticulous research and contains much thoughtful analysis. It is well-structured: The aims of every chapter are carefully stated and readers are told clearly how the chapters are related to one another. I cannot in a short review of this nature do justice to the richness of the thesis or engage fully with all of the arguments. On the whole, Stumer is to be commended on his attempt to develop and defend a robust theory of the presumption and to articulate its importance in a liberal state. However, not everyone will agree with him. Hamer, for instance, finds that the author has gone too far by overstating "the presumption's imperative of protecting the innocent" (see David Hamer, "A Dynamic Reconstruction of the Presumption of Innocence" (2011) 31 Oxford J. Legal Stud. 1 at 18). For Hamer, the primary goal of the presumption is to minimise "the expected cost of erroneous verdicts" (see Hamer, *supra* at 2). Even if the presumption is only about error management (which is contestable), one should still be mindful of the reason and the point of entrenching the presumption as a fundamental right. These considerations should make us pause before treating the protection of citizens from wrongful conviction as merely one of a variety of equal interests that is to be thrown into the balancing process. At any rate, they call for a balancing exercise that gives sufficient weight to the constitutional implications. Where the accused carries the legal burden in relation to a fact material to his or her conviction, proof of that fact must be established on a balance of probabilities; it is insufficient to raise a reasonable doubt on the matter. As Glanville Williams has persistently argued (see *e.g.*, Glanville Williams, "The Logic of 'Exceptions"' (1988) 47 Cambridge L. J. 261), this is problematic: How can it be morally permissible to convict (and thus condemn) someone for committing a crime when there is reasonable doubt about his or her guilt? Analysis from the 'systemic perspective' tends to obscure this fundamental problem raised by 'reverse onus' provisions. (I discuss this perspective, and distinguish it from the standpoint of the fact-finder as a moral agent, in Ho Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008).)

It would be wrong to think that this book is of little value to readers in Singapore. It is true that the Privy Council in *Ong Ah Chuan v. PP* [1979-1980] S.L.R.(R.) 710 declined to declare (or, more accurately, failed to declare forthrightly) that the presumption of innocence is one of the fundamental rules of natural justice that form part of the content of 'law' for the purposes of Art. 9(1) of the *Constitution of the Republic of Singapore* (1999 Rev. Ed.). And it is also true that the *Woolmington* principle has practically no application to defences in Singapore because our courts (following *Jayasena v. R* [1970] A.C. 618) have interpreted s. 107 of the *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.) in a way that 'shifts' to the accused the persuasive burden of proving circumstances that bring his or her case under virtually any exception to an offence. Nonetheless, we learn most from studying the unfamiliar. It is especially rewarding to examine the law and discourse on the presumption in other jurisdictions where the contrast with local views throws into relief telling differences. This better enables us to critically assess our own laws and engage in a more informed debate on the content, strength and role of the presumption.

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