

# OPERATION AND EFFECT OF PRESUMPTIONS IN CIVIL PROCEEDINGS:

AN INQUIRY INTO THE INTERPRETATION OF ART 2024 OF THE ETHIOPIAN CIVIL CODE

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*“Although presumption is not evidence and has no weight as such, it does make a prima facie case for the party in whose favor it exists and points out the party who has the burden of going forward [...], but it must be remembered at all times that basic facts must be supplied before a presumption comes into existence, [ . ], and it has a binding effect until successfully rebutted by the other party.”<sup>1</sup>*

## Abstract

‘Presumption’ is an ambiguous term that one often finds in substantive and procedural laws. The controversy regarding the operation and effect of ‘*presumption*’ in civil proceedings has not yet been conclusively resolved despite efforts of scholars. In Ethiopia, it has been subject to different judicial interpretations. The Cassation Division of the Federal Supreme Court has adopted a binding interpretation of Art 2024 of the Civil Code on the presumption of payment of debts. Yet, the propriety of this authoritative interpretation has become contentious. This Article examines the operations and effects of presumptions in civil actions in general and inquires into the propriety of the precedent adopted by the Cassation Division. It argues that the Division’s interpretation needs to be reconsidered when the issue arises in future cases.

## Key words:

Presumptions, kinds of presumption, rebuttable presumptions of law, operation of presumptions, effects of presumption, persuasive & evidential presumptions.

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<sup>1</sup> Freeman, F (1971- 1972) ‘A Trial Lawyer Utilizes the Concepts of Judicial Notice and Presumptions’, 7 *Forum*, at 248.

## Introduction

Since the re-amendment of the Federal Courts Proclamation<sup>2</sup> (which reintroduced the doctrine of *precedent* in Ethiopia<sup>3</sup>), the Cassation Division of the Federal Supreme Court has exercised its (statutory and constitutional) cassation and precedential powers.<sup>4</sup> It has reviewed cases it considered to have had fundamental errors of law<sup>5</sup> and rendered binding precedents. As per Art 2 (1) of the Proclamation, an “interpretation of a law by the Federal Supreme Court rendered by the Cassation Division with not less than five judges *shall be binding on federal as well as regional (courts) at all levels.*” (Emphasis added). It is, however, important to note that it is the *interpretation* of a given law (by

<sup>2</sup> Federal Courts Proclamation No.25/1996, Fed. Neg Gaz. 2nd Year, No.13.

<sup>3</sup> Since 1962 there had been, at least on paper, the principle of *stare decisis* (or doctrine of *precedent*) with regard to interpretation in the Ethiopian legal system. According to Art 15 of the Courts Proclamation of 1962, (Proclamation No. 195/1962, Neg. Gaz. 22<sup>nd</sup> year, No.7) decisions of superior courts on matters of law were binding on subordinate courts. This Proclamation was however repealed thirteen years later by the Administration of Justice Proclamation No. 52/1975, Neg. Gaz. 35<sup>th</sup> Year No. 2. Ethiopia once again re-introduced the doctrine of *precedent* into her legal system in 2005 by the Federal Courts Proclamation Re-amendment Proclamation No. 454/ 2005, hereinafter, the Proclamation. This Proclamation entered into force as of 14 June, 2005/ Sene 7, 1997 E.C.

<sup>4</sup> By virtue of Art 80-(3) (a) of the Constitution of the Federal Democratic Republic of Ethiopia, hereafter the Constitution, and Art 10(1), (2), and (3) of the Federal Courts Proclamation, the Federal Supreme Court is empowered to review final court decisions in *cassation*. It is clear that this court has statutory and constitutional power of cassation today. Such practice of reviewing in cassation is believed to have been introduced into Ethiopia for the first time during the era of Emperor Menilik II in 1908. (See Yohannes Heroui (2009), ‘Brief Notes about Cassation Power and its Procedure’, (in Amharic), *Ethiopian Bar Rev. Vol 3, No. 1*, at 132. Since 1987, Ethiopia adopted clear legal frameworks regarding cassation power of the last resort court in the country. During the Dergue era, Arts 4 & 5 of the Supreme Court Establishment Proclamation No. 9/1987 expressly gave cassation power to the Supreme Court. Following the overthrow of the Dergue by the EPRDF (Ethiopian Peoples’ Revolutionary Democratic Front) in 1991, this was replaced by Art 12 of the Central Government Courts Establishment Proclamation No. 40/1993 (Neg. Gaz. 52<sup>nd</sup> Year.No.25) of the Transitional Government of Ethiopia. This was again followed by the above cited provisions of the FDRE Constitution and the Federal Courts Proclamation. At this juncture, it is essential to bear in mind the inherent differences that exist between *cassation power* and *precedential power* of a court.

<sup>5</sup> See the decisions of the Cassation Division of the Federal Supreme Court of Ethiopia, published in various volumes. According to the above-mentioned articles of the Constitution and the Federal Courts Proclamation only cases that allegedly contain *fundamental or basic errors of law* can be reviewed in cassation.

the Cassation Division in the presence of five or more judges) that is binding, and not the *case decision* as such. Case precedent, *per se*, enables courts to derive case law from the principles enshrined in the case analysis and decision, while binding interpretation is half-way between a purely statutory regime and a case law system because it does not require lower courts to use case law, as such. It rather obliges them to be bound by the cassation interpretation given to a law (i.e. statutory provision) in a certain fact situation so that the interpretation can be binding when similar issues and comparable fact situations are involved.

By exercising its judicial powers, the Supreme Court Cassation Division is playing a decisive role in ensuring the consistent application of national laws across the country and enhancing predictability of outcomes in court litigation. However, some of the interpretations that the court rendered in a few of the cases have, arguably, triggered controversy.<sup>6</sup> A binding precedent of the Cassation Division which has provoked such a controversy is the legal interpretation it adopted in the *Agency for the Administration of Rented Houses v Mr. Bironi Atikpo* case.<sup>7</sup> The case involved various issues that pertain to presumptions, particularly presumptions of law, and burdens of pleading and proof. Issues such as *nature of presumptions, operation and effect of presumptions, relationship of burdens of proof and presumptions of law etc.*, were at the forefront of the judicial analysis and exposition.

There was no unanimity of opinion regarding the *nature of presumptions of law and how they come into operation*. They were divided on whether Art 2024 of the Civil Code (1960) applies to a case where a defendant appears in court but *does not deny* plaintiff's allegation of *non-payment* of a debt that is more than two years overdue or in the case of an *ex-parte proceeding*. They disagreed on whether it is necessary to follow *special rules of procedure and evidence* if litigation involves a presumption of law such as the one embodied under Art 2024 of the Civil Code. The binding precedent in the case was rendered by a close majority of 3 judges to 2 judges.

The majority's exposition of presumptions of law, operation and effect of such presumptions, the alleged roles and responsibilities of litigating parties and courts in such a case, their subsequent interpretation of Art 2024 of the Civil Code as well as the contrary exposition by the minority, etc., evoke a couple of

<sup>6</sup> See for example Mekbib Tsegaw (2007), 'Contracts relating to an immovable and Questions of Form', (in Amharic), *Ethiopian Bar Rev. Vol.2. No. 1*; Yohannes Heroui (2008), 'Registration of Immovables under the Ethiopian Civil Code: An overview in Comparative perspective', *Ethiopian Bar Rev. Vol. 2 No. 2*; Mehari Redae (2008), 'Case Comment; Dissolution of Marriage by Disuse: A Legal Myth', *J. Eth. L. Vol. 22, No. 2*.

<sup>7</sup> File No 17068, Supreme Court Cassation Division decided on 19/11/1997 E.C.

questions. A careful reading of the majority and the minority opinions of the court evokes the following questions: ‘What are presumptions?’ ‘Are they items of evidence?’ How does a given presumption of law come into operation in a given proceeding? How is such operation related to burdens of pleading and proof? What legal consequence(s) follow from an operation of a given presumption of law? Does the operation of any presumption of law in a given case require courts to follow special rules of evidence and procedure to resolve a dispute in litigation? These and related issues, of course, were the core themes in the case mentioned above.

Other subsequent cases bearing similar allegations of non-payment of matured debts falling under Art 2024 of the Civil Code have triggered the same issues. These cases were resolved in accordance with the majority’s interpretation of Art 2024 of the Civil Code in the *Agency for the Administration of Rented Houses v. Bironi Atikpo* case.<sup>8</sup> A minor deviation was shown only last year in *Commercial Bank of Ethiopia v Liyew Chekol & Million Mengistu* wherein seven sitting judges unanimously observed that the type of presumption under Art 2024 of the Civil Code is a restrictively rebuttable presumption.<sup>9</sup>

The judicial interpretation in the cases mentioned above and other cases (both in lower and appellate courts) and the academic debate that ensued demonstrate the difficulties in establishing a proper link between *presumptions of law* and *burdens of proof*, on the one hand, and *burdens of pleading*, *burdens of proof* and *presumptions of law*, on the other. It is also clear that there is ambiguity in grasping the true nature of presumptions, in identifying the mode of operations and legal effects of the various presumptions. The Cassation cases mentioned above substantiate this fact.

in view of such divergence of opinion among judges and lawyers relating to presumptions in general and presumptions of law in particular, and also in view of such uncertainties about their operation and effects, an in-depth research on this area of the law is essential. The frequent appearance of civil cases that involve issues of presumption necessitate an extensive research. This Article is an attempt in that direction. Yet, its scope and depth are limited. It aims at giving a general overview of the concept, and canvassing the various types of presumptions along with their operations and legal effects. The Article assesses

<sup>8</sup> See for instance the following cases: *Dr. Daniel Alemu V W/ro Romanework Yemanebirhan et al* (File No.14047), *Agency for the Administration of Rented Houses V Sossina Asfaw* (File No. 15992), *Paoulos Rumicho V Chaltu Merdassa* (File No.15493), and *Riesom G/Medihin V Almaz G/Michael* (27697). These indicate the recurrence of cases bearing similar issues in our courts.

<sup>9</sup> Refer to Cassation File No 29181; this was rendered on 20 Tahisas 2002 E.C.

Incidentally one learns the recurrence of cases bearing similar issues in our courts.

the propriety of the binding precedent adopted by the majority in the *Bironi Atikpo* case, which represents the current binding interpretation. The Article focuses on civil proceedings although criminal proceedings are marginally touched upon in a few instances with a view to enhancing the clarity of ideas.

The first section of the article briefly highlights concepts and definitions. Sections 2 and 3 deal with types, operations and legal effects of various categories of presumptions. Section 4 briefly raises the issue of interrelationship between burdens of pleading, burdens of proof and rebuttable presumptions of law. Section 5 focuses mainly on the binding precedent adopted in the *Agency for the Administration of Rented Houses v Bironi Atikpo* case. This section and the sixth section probe whether the Court's interpretation of Art 2024 of the Civil Code is valid. Particular attention is given to examining the propriety of the Cassation Court's holdings relating to *operation and effect of presumptions of law*. Sections 5 and 6 also inquire whether the operation of any rebuttable presumption of law in a given civil proceeding really requires following of *special procedural and evidentiary rules* as the majority in the Cassation Division maintained. Finally, the author suggests that the Cassation Division of the Federal Supreme Court needs to revisit its legal interpretation of Art 2024 of the Civil Code in a future case that involves a similar issue as envisioned under Art 2(1) of Proclamation No. 454/2005.<sup>10</sup>

## 1. Concept and Definitions: An Overview

The term *presumption* is one of the most ambiguous and slippery terms in the whole corpus of the law.<sup>11</sup> Yet, it is one of the most commonly employed terms in the legal literature, in law making and court decisions. Writing half a century ago, Laughlin noted that the Corpus Juris Secundum listed about 113 so-called presumptions.<sup>12</sup> Writers on law of evidence, commentators, judges and law

<sup>10</sup> See that Art 2 (1) provides: "...The cassation division may however give a *different legal interpretation* some other time."

<sup>11</sup> Fisk, Otis H. (1921), *Presumptions in the Law*, A suggestion, Reprinted in 1997, William S. Hein & Co. Inc. Buffalo, New York, at 1-2; Andrews, John A. & Hirst, M. (1992), *Criminal Evidence*, 2<sup>nd</sup> ed., at 99; Elliott, D.W(2001), *Phipson & Elliott Manual of the Law of Evidence*, 2<sup>nd</sup> ed.(New Delhi: Sweet & Maxwell Limited), at 75-77; Emson, Raymond (2004), *Evidence*, 2<sup>nd</sup> ed.(New York: Palgrave Macmillan), at 457; Strong, John William (1992), *McCormick on Evidence*, 4<sup>th</sup> ed., at 578; Morgan, Edmund M. (1938-1939), 'Techniques in the use of Presumptions', 24 *Iowa L. Rev.*, at 414, hereinafter to be cited as Morgan, Techniques. See also Fenner, G. M. (1991-1992), 'Presumptions: 350 Years of Confusion and it has come to this', 25 *Creighton L. Rev.* at 383ff;

<sup>12</sup> Laughlin, Charles V. (1953-1954), 'In Support of the Thayer Theory of Presumptions', 52 *Mich. L. Rev.* at 195. The same author observes that the term has

makers both in the continental and common law countries have been using this term in varied senses and contexts.<sup>13</sup> That loose employment of the term to signify different things has brought about uncertainties which transcend jurisdictions and times. inaccurate use of the term has resulted, says Belton, in confusing and incongruous attempts to apply a presumption analysis in inappropriate situations. since early times, especially from the twelfth until the nineteenth century many legal scholars made attempts to bring clarity to the various ideas of presumptions. it was in the course of such academic pursuits that Morgan, albeit figuratively, remarked, “Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness, and has left it with a feeling of despair.”<sup>14</sup>

Notwithstanding the complexities of the issues involved and variety of senses, legal scholars and commentators from the civil law tradition such as Tancredus, Alciati, Cujas, Domat, and Pothier, and from common law traditions such as Best, Gilbert, Greenleaf, Phillips, Starkie, Thayer, Wigmore, Morgan, McCormick, McBaine and others have examined the nature, operations and effects of presumptions.<sup>15</sup> These efforts have brought about appreciable achievements and some degree of clarity of the concept. Thayer and Wigmore in particular are credited for their contribution towards semantic and conceptual clarity by narrowing down the senses in which the term ‘presumption’ has to be employed.

in spite of positive achievements toward the reduction of the degree of ambiguity, the term has still continued to connote different ideas. in an article written at the beginning of 1980s Allen expressed that the longstanding controversy over the nature and proper rule of presumptions in civil actions has continued undiminished in America<sup>16</sup> and, for that matter in other jurisdictions as well, as it is the case in Ethiopia today. Emson has recently opined: “confusingly, the word ‘presumption’ is used in the law of evidence to describe

been so promiscuously used as to be devoid of much of its utility and that it has become a *magic word*. (Id.)

<sup>13</sup> Id; Read also Shain, M. (1944), ‘Presumptions under the Common and the Civil Law’, 18 S. Cal. L. Rev., at 92 ff; and, McBaine, J.P (1937-1938), ‘Presumptions: Are they evidence?’ 26 Cal. L. Rev., at 522 ff.

<sup>14</sup> Morgan, E. M. (1937) ‘Presumptions’, 12 *Wash. L. Rev. & St. B. J.*, at 255, hereinafter, to be cited as Morgan, Presumptions.

<sup>15</sup> For a brief historical reference read the two articles written by Shain and McBaine, note 13.

<sup>16</sup> Allen, Ronald J. (1980-1981), ‘Presumptions in Civil Actions Reconsidered’, 66 Iowa L. Rev. at 843.

a number of different concepts which have little in common.”<sup>17</sup> And as many authors including Hecht and Pinzler observed, there is great disagreement among legal writers, court judges, lawyers, academics and legal commentators as to the scope of the term and its operation in court trials.<sup>18</sup>

The term *presumption* is an English translation of the Latin term “*praesumptio*”. It originated from the Roman law of the Middle Ages.<sup>19</sup> As Fisk noted, in the earlier days of Roman law, there have been *praesumptio juris* and *praesumptio hominis*. Shain adds *praesumptiones juris et de jure*. Fisk observed that “*Praesumptio juris* means a presumption (inference) of fact made by law: *praesumptio hominis* means a presumption (inference) of fact made by man.”<sup>20</sup> This does not tell us what the term presumption is. So, what is a presumption? is it a type of evidence? is it a substitute for evidence? Or is it a rule of law, or an argument, or a fact? Or is it all of these things? As the literature shows, particularly since the publication of Thayer’s book entitled *A Preliminary Treatise on Evidence at the Common Law* in 1898, many authors have raised these questions and tried to provide answers.

The 7<sup>th</sup> edition of Black’s Law Dictionary considers *presumption* as a “*legal inference* or *assumption* that a fact exists based on the known or proven existence of some other fact or group of facts” and it states that “[m]ost presumptions are *rules of evidence* calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.” (Emphasis added). In other words, presumptions signify legal inferences or assumptions that trigger the drawing of conclusions from proved facts.

According to Fisk, presumption can be defined as : “*A process of reasoning* by which something not already deemed proved by pleadings or by admissions in court outside the pleadings or by judicial notice is deemed proved.”<sup>21</sup> Thayer

<sup>17</sup> Emson, note 11, at 457.

<sup>18</sup> Hecht, Neil S. and Pinzler, William M (1978), ‘Rebutting Presumptions: Order out of Chaos’, 58 B. U. L. Rev., at 527-528.

<sup>19</sup> Shain, note 13, at 92.

<sup>20</sup> Fisk, note 11, at 4. This same author further said that the two Latin expressions could have properly been translated into English as “presumption by law” and “presumption by man”, respectively, but incorrectly translated as “presumption of law” and “presumption of fact”.

<sup>21</sup> Id, at 9. The process, whether required and made by law or by judges, Fisk maintained, is an inference by legal reasoning or human reasoning (logic); it is a process of proving something by inference from something else proved or deemed proved.

observes that “[presumptions are *aids to reasoning and argumentation*, which assume the truth of certain matters for the purpose of some given inquiry.”<sup>22</sup> Laughlin enumerated some eight diverse senses<sup>23</sup> and preferred to take the eighth sense as useful to his context. Thus he took presumption as meaning *a rule of law that shifts burden of proof*. These definitions substantiate the view that most presumptions are rules of evidence, and not evidence, *per se*.

Klotter regards presumption as “*a rule of law* that attaches definite probative value to specific facts or draws a particular inference as to the evidence of one fact, not actually known, arising from its usual connection with other particular facts that are known or proved” and he considers it as “*a legal principle* whereby the court accepts the existence of one fact from other facts already proven.”<sup>24</sup> Belton has a related idea.<sup>25</sup> On the other hand Ashford and Risinger define presumption as a “*legal device* which imposes the burden of introducing evidence as to a given issue upon the opponent of the party who has the burden of persuasion as to that issue.”<sup>26</sup>

Morgan states that “[p]resumptions may properly be used to designate the *assumption of the existence of one fact*, which the law requires the trier of fact to make on account of the existence of *another fact or group of facts*, standing

<sup>22</sup> See McBaine, note 13, at 525.

<sup>23</sup> Laughlin, note 12 at 196-209. These are: 1) As indicating a general disposition of courts; 2) As an authoritative reasoning principle; 3) As a rule of substantive law; 4) As a rule fixing the burden of persuasion; 5), As a permissible inference; 6) As a statutory prima facie case; 7) As a proposition of judicial notice, and 8) As a rule shifting the burden of producing evidence.

Laughlin mentions that professors Morgan and Maguire enumerated four senses in which this term is used. These are: (1) As synonymous with *permissible inference*, (2) as *establishing a case sufficient to permit the judge to decide that the presumed fact exists* (3) as requiring the *acceptance of the presumed fact until certain specified conditions are met*, and (4) as a conclusive presumption or *rule of substantive law*. (Id- therein at footnote 1.)

<sup>24</sup> Klotter, John C. (2000), *Criminal Evidence*, 7<sup>th</sup> ed., at 106. Klotter has presented another definition which considers presumption as “*an inference* that common sense, enlightened by human knowledge and experience, draws from the connection, relation, and coincidence of facts and circumstances with each other.”Id.

<sup>25</sup> Belton, Robert (1981), '*Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*,' 34 Vand. L. Rev., at 1222. He holds that presumption is “*a rule of law* that deals with the *assumption-at least temporarily-* of a certain factual situation based upon proof of other usually logically related facts.”

<sup>26</sup> Ashford, Harold A. & Risinger, D. Michael (1969), '*Presumptions, Assumptions and Due process in Criminal cases: A theoretical overview*', 79 Yale L. J. No.2, at 172.



alone.”<sup>27</sup> Elliott regards presumptions “as a *conclusion*, which may or must be drawn in the absence of contrary evidence”<sup>28</sup> while Andrews and Hirst, in a relatively recent edition, note that ‘presumption’ “properly describes *the process whereby, on the proof of one fact (the basic fact) another fact (the presumed fact) may be inferred.*”<sup>29</sup> Having observed that the term is used loosely in the law of evidence, Dennis has reached a similar conclusion.<sup>30</sup> Hecht and Pinzler share the same view with Maguire regarding the standard definition of ‘presumption’ which is said to exist when a designated basic fact or aggregate of facts exists. This envisages the existence of another fact or aggregate of facts, called the presumed fact or fact(s) that must be assumed in the absence of adequate rebuttal.

Presumption may thus mean an inference, or an assumption of fact, or a conclusion drawn from another fact, or a rule of law that fixes burden of persuasion, or a rule of law that shifts burden of production of evidence, etc. As a result, there is no agreement among legal scholars as to the correct and single definition of the term.<sup>31</sup> For most scholars and commentators, true presumptions mean more than mere inferences. It will thus be inappropriate to employ the term to mean a rule of law that fixes persuasive burden or to use it as a substantive rule of law that results from proof of a given fact.<sup>32</sup>

in spite of such variations on the meaning of the term, most legal scholars today generally agree on one aspect of the term. In the words of Ashford and Risinger most agree “that a presumption is a *legal mechanism* which... deems one fact to be true when the truth of another fact has been established.” In the strict and proper sense, therefore, the term presumption is used to refer to the process whereby one fact *must* be inferred from the proof of another basic fact.

The fact which must be deemed proved is identified as the *fact presumed* while the other fact whose truth must be established before the fact presumed will be deemed true is referred to as the *preliminary or basic fact*.<sup>33</sup> Hecht and Pinzler

<sup>27</sup> Morgan, Edmund M. (1930-1931), ‘Some Observations Concerning Presumptions’, 44 Harv. L. Rev, at 906; hereinafter to be cited as Morgan, Observations.

<sup>28</sup> Elliott, note 11, at 75.

<sup>29</sup> Andrews & Hirst, note 11, at 99.

<sup>30</sup> Dennis, I.H. (2002), *The Law of Evidence*, 2<sup>nd</sup> ed., (London: Sweet & Maxwell Limited), at 401& 419. He notes that presumption “.. properly refers to an inference of fact, the ‘presumed’ fact that may or must be drawn from proof of another fact, often called the ‘basic’ fact.”

<sup>31</sup> Ashford. & Risinger, note 26, at 165. They hold that “[t]here is no agreement among legal writers as to exactly what a presumption is..”

<sup>32</sup> Andrews & Hirst, note 11, at 99; Belton, note 26, at 1222; McBaine, note 13, at 526-530.

<sup>33</sup>Ashford and Risinger, note 31, at 165; See also Dennis, note 30, at 419.

state that “[t]he fact that may be deemed proved by the operation of a presumption is called the “presumed fact” and the fact whose truth must be established before the presumed fact will be deemed true is called the “basic fact.”<sup>34</sup>

As can be understood from the discussion above, a presumption is neither a *fact* nor *evidence*. We know that *fact*, unlike presumption, refers to an occurrence or event or state of affair which is perceptible through our sense organs. We also know that in the strict legal parlance *evidence* refers to that thing or circumstance or data that establishes or proves the existence or otherwise, the falsity or truthfulness of a fact under inquiry. It refers to one of the means of proof. It consists of oral, documentary and real evidence. But presumption is a different thing. It is not a kind of oral or documentary or real evidence. It may, however, be treated as one other mechanism of proving of facts under inquiry like evidence, formal admissions, or judicial notice - without being confused with any of the latter. To this end, McBaine stresses that it is wrong to treat presumptions as *evidence* or as *something that is equivalent to evidence*.

Moreover, presumption is neither *argument* nor *an item of evidence*.<sup>35</sup> Argument refers to the persuasive propositions of material facts, issues, laws, analysis, reasoning, conclusion and relief submitted by litigating parties while presumption is not. An item of evidence pertains to probative material which consists of oral testimony of witnesses or contents of documents (including electronic and digital data,) or appearance or state of conditions of physical objects while presumption is entirely a different thing. Belton and many others conclude that presumption is not even a substitute for evidence; it is a *rule of law* or a *legal mechanism* that operates to affect the evidential and persuasive burdens of litigating parties one way or the other. Belton writes: “[t]he weight of authority holds that genuine presumptions are neither evidence nor substitutes<sup>34 35 34 35</sup>

<sup>34</sup> Hetcht & Pinzler, note 18, at 529.

<sup>35</sup> See Morgan, Observations, note 27, at 908; McBaine, note 13, at 526-530. Klotter writes, “Some courts [in the USA] argue that a true legal presumption is in the nature of evidence and is to be weighed as such. Others hold (probably more properly) that a presumption is not evidence, but is a substitute for evidence.” See Klotter, note 24, at 106. McBaine wrote: “Though a presumption accomplishes the purpose of evidence ...it does not follow that it is evidence.” In other pages he concludes that legal rebuttable presumptions (the true presumptions) are not evidence. They are rather rules of law in which, under certain circumstances, facts are deemed to be established until the contrary is proved. Note that McBaine made it clear that so-called presumptions of fact and irrebuttable presumptions of law are not true presumptions. The first are inferences drawn from evidence while the second are misnomers as they are substantive rules of law.

for evidence, but are merely *procedural devices* that shift the burden of producing evidence to the party against whom it operates.”<sup>36</sup> He maintains that they are *burden-shifters*.

As most scholars including Morgan, Laughlin, McBaine, and Belton (cited above) correctly stated, the *true presumptions* are *rebuttable presumptions of law*. And rebuttable presumptions of law are *neither evidence nor substitutes for evidence*. Rather, they are *rules of law* that require judges to draw conclusions about the truthfulness or falsity or the existence or otherwise of facts based upon other proven facts unless the adversely affected parties disprove the conclusions with evidence of any admissible kind.

Nevertheless, problems in drafting coupled with the semantic ambiguity in the usage of the term ‘presumption’ have brought about problems in various legislative formulations in Ethiopia.<sup>37</sup> A cursory look at some of the Ethiopian laws proves that the term presumption is used to refer to a number of things in different contexts.<sup>38</sup> It is thus necessary to identify the particular context in which this term is used in our laws.

in particular, one should not confuse the context in which the term is used in provisions which do not envisage a prior establishment of a given fact such as the constitutional presumption of innocence in criminal proceedings (until proven guilty) or the presumption of capability in civil proceedings (unless found otherwise). Under these contexts, the term is used without a precondition. Most presumptions that we find in our laws, however, presuppose the proving of some basic facts. Even then, there are basic distinctions that Ethiopian legal professionals need to explore, a theme which will be briefly addressed in the following section.

<sup>36</sup> Belton, note 25, at 1222.

<sup>37</sup> For a better understanding one may read McBaine’s article cited at note 13. One may find that *presumption* was listed as one type of evidence in the 1967 Draft Evidence Rule of Ethiopia. But it should be underlined that evidence is a means or device that helps establish a disputed matter of fact. And we have three types of evidence, viz., testimony, documentary evidence and real evidence. Presumption does not fit into any of these kinds of evidence. It is an idea that stands for something(s) or rule(s) different from any of these as shown so far. Discussion that pertains to Art 2002 of the Civil Code of Ethiopia is made under Section 6 below. Suffice here to mention McBaine’s conclusion that it is an “absurd and mischievous fallacy” to say that true presumptions, i.e., rebuttable presumptions are “evidence”.

<sup>38</sup> One may check this fact by making a swift reading into any of the country’s codes or other laws. E.g. Art 20(4) Constitution; Arts 3, 4, 22, 196, 341, 342, 344, 346, 1162, 1193, 1195, 1196, 1200, 1201, 1259 of the Civil Code; Arts 63, 71, 97, 106, 126-129, 148, 157, 169-172 of the Federal Revised Family Code of Ethiopia.

## 2. Types, Operation and Effect: Presumptions Without and With Basic Facts

In the looser or broader sense, presumptions can be classified into two broad categories: *Presumptions without basic facts* and *presumptions with basic facts*. There is also another broad classification: *presumption of fact* and *presumption of law*.

### 2.1. Presumptions without Basic Facts

*Presumptions without basic facts* are said to be presumptions that arise without proof of any particular fact.<sup>39</sup> In such cases we do not have preliminary (basic) facts and presumed facts to be drawn or inferred from basic facts. The law simply says that something shall be presumed until the contrary is proved. No precondition is set for the operation of such so-called presumptions. Truly speaking, such presumptions without basic facts are *rules of substantive law* that allocate or fix the place of burden of proving or legal burden of proof.<sup>40</sup> It is regrettable that such rules are described in terms of presumptions.

Presumptions without basic facts do not need any prior fact to activate a particular presumption to come into operation. In Elliott's words "no basic fact is needed to activate the presumption which applies in every case."<sup>41</sup> They arise, Emson maintains, without the need to prove any basic fact in advance. The presumption of innocence under Art 20 (3) of the constitution, presumption of capability under Art 192 of the civil code, presumption of sanity and

<sup>39</sup> Elliott, note 11, at 75; Emson, note 11, at 457.

<sup>40</sup> if such a presumption of law exists it means that one party bears the legal burden of proof or *the burden of persuasion*. So, the presumption of innocence that exists in modern criminal proceedings obliges the prosecution to prove, with the required degree of proof, the accused's guilt. This presumption of innocence exists to favor and protect any criminally accused person without the need to establish any preliminary fact beforehand. similarly, the presumption of criminal responsibility or the presumption of sanity refers to the accused's legal burden of proving of his irresponsibility or insanity. The prosecution is not required to prove in each case that the accused is responsible for the criminal act alleged to have been committed by him or that the particular accused is sane. The law assumes that any person is responsible and sane thus shouldering the burden of proving the contrary. *Legal burden* of proof (also referred to as the persuasive burden or the risk of non-persuasion or the burden of proof on the pleadings) is one of the various burdens that parties to litigation bear. unlike the burden of pleading and burden of production of evidence, legal burden of proof refers to the obligation that lies on one of the litigating parties to prove an issue of fact or law to the satisfaction of the court.

<sup>41</sup> Elliott, note 11, at 75.

presumption of criminal responsibility under Art 48 of the Criminal Code (2004), etc... are examples in this regard.

## 2.2. Presumptions with Basic Facts

*Presumptions with basic facts*, on the other hand, are presumptions that arise after the initial establishment of some other basic fact. Such presumptions with basic facts only arise *when some basic fact is first established*,<sup>42</sup> No presumed fact will come into the scene for judicial inquiry without such prior establishment of a basic fact. it is impossible for anyone to bring such a presumption into operation without securing that prerequisite. If W/ro A, for example, institutes a paternity case against Ato B alleging that the defendant is the father of Mamush who denies the existence of marital status and his paternity to the child, the court *must* draw the conclusion that Ato B is the father of Mamush by virtue of Art 126 of the Revised Federal Family Code<sup>42 43 44</sup> if W/ro A can prove the existence of the marriage, and secondly if she can prove that the child was born or conceived during the marriage. The court arrives at this conclusion because plaintiff has proved two basic facts that compel drawing of the presumed controversial fact. The two basic facts are: that there was marriage between plaintiff and defendant, and that Mamush was born while the marriage was intact. The presumed fact that the court *must* draw is: that Ato B is the father of Mamush.

The beneficiary of such presumption with basic fact has to first prove the existence, truthfulness or occurrence (or the contrary) of some basic fact(s). That is usually done by introduction of *evidence* - be it oral, documentary, or real evidence or a combination of any of these- in support of that basic fact alleged to exist. it is also possible to establish such basic fact by the *formal admission* of the other party, by agreement of the parties, or by *judicial notice* of such fact, if the fact alleged is part of the common knowledge or can be easily verified from indisputable sources.<sup>44 42 43 44</sup>

<sup>42</sup> Id; Dwyer, Stephen I. (1975), 'Presumptions and Burden of Proof, 21 *Loy. L. Rev.* at 390. Dwyer writes that "the existence of this basic fact is a prerequisite to the existence of the resultant "presumed fact". As Professor Morgan stated, the basic fact of a given presumption may be established by evidence, or by judicial notice, or by pleadings or by stipulation of parties. Read Morgan, Edmund M. (1952-1953), 'How to Approach Burden of Proof and Presumptions', 25 *RockyMtn. L. Rev.* at 44.

<sup>43</sup> See Revised Family Code Proclamation No. 213/2000.

<sup>44</sup> In cases of *formal admissions* and *judicial notice*, a litigating party may, partially or wholly, be exonerated from the burden of proving a particular fact under investigation by the court.

In the case of presumptions with basic facts, once certain basic facts are established or proved, other facts *may* or *must be taken as proved in the absence of contrary evidence*<sup>45 46 47 48 49</sup> or *must be taken as proved conclusively*.<sup>46</sup> According to Emson, presumptions that require initial proof of basic facts are of three types:<sup>47</sup> (i) presumptions of fact, (ii) irrebuttable presumptions of law, and (iii) rebuttable presumptions of law. For Dennis such presumptions can be sub-classified into: (i) provisional presumptions or presumptions of fact, (ii) evidential presumptions, (iii) persuasive presumptions, and (iv) conclusive presumptions.

There is no basic difference in these further classifications. They all are varieties of presumptions with basic facts; they all fall within that broad categorization of presumptions into presumptions of fact and presumptions of law. It is the latter that is further sub-classified into rebuttable and irrebuttable, or into evidential, persuasive and conclusive presumptions. The evidential and persuasive presumptions are subdivisions of rebuttable presumptions of law. And conclusive presumption is another expression for irrebuttable presumption.

### **3. Types, Operation and Effect: Presumptions of Fact and Law**

#### **3.1. Presumptions of Fact**

Presumptions of fact also termed as provisional presumptions denote a conclusion which *may* be drawn from proof of the basic fact of the presumption, but the court is under no obligation to draw the conclusion, even in the absence of any rebutting evidence.<sup>48</sup> For example if a person refuses to submit himself/herself to medical examination (that does not involve any danger) which a court needs to prove or disprove an allegation invoked in a statement of claim, the court can, by virtue of Art 22 of the Ethiopian civil code, consider the fact under inquiry as established.

courts *may* draw inference about certain facts from other proven facts or circumstantial evidence. Emson notes that “to say a presumption of fact has arisen is simply to state that as a matter of common sense it would be permissible to draw an inference from a *proved or admitted basic fact*”<sup>49 45 46 47 48 49</sup>

<sup>45</sup> Elliott, note 11, at 75.

<sup>46</sup> Emson, note 11, at 457.

<sup>47</sup> *Id.* it is common to classify such presumptions into presumptions of fact and presumptions of law. The latter consists of irrebuttable and rebuttable presumptions of law.

<sup>48</sup> Dennis, note 30, at 420.

<sup>49</sup> Emson, note 11, at 458.

Drawing of such common sense inference from other proven facts is within the discretion of courts. They are thus referred to as permissive presumptions or permissive inferences. Most legal writers label this process of drawing of a conclusion as *inference* rather than as presumption.

Though judges of courts are under no obligation to draw conclusions or inferences in the presumptions of fact, it is likely that they will draw relevant conclusions in real cases accepting presumed facts as true if the opposing other parties do not challenge their existence. Such presumptions impose 'provisional' or 'tactical' burden on the party against whom they are operating.<sup>50</sup> Tactical burden is a burden that requires the party against whom the inference is operating to respond by adducing some evidence that could rebut the presumed fact. The operation of such a presumption of fact in a given case simply casts upon the opposing party a *tactical burden* to adduce evidence to the contrary.<sup>51</sup> in the example of the medical examination mentioned above, the person against whom the claim is brought may refute the inference by submitting himself/herself to the medical examination ordered by the court.

Strictly speaking, a tactical burden does not as such entail burden of proof, be it legal or evidential, on the opposing party. Yet, it is to the advantage of such party to adduce evidence in rebuttal rather than simply hope that the court will not find in favor of the party that benefits from the presumption<sup>52</sup> because there is a *possibility* for the court to rely on the inference and decide on the issue if this opposing party fails to adduce evidence that contradicts it. Emson maintains that "[p]resumptions of fact say nothing about the incidence of the legal burden of proof, nor do they give rise to an evidential burden," and further notes that "[o]nce a basic fact has been proved or admitted, the tribunal of fact may (but need not) infer another fact, the presumed fact, in the absence of any or any sufficient evidence to the contrary."<sup>53</sup>

### 3.2. Presumptions of Law: Irrebuttable and Rebuttable

A presumption of law is what the law requires a court to make where certain facts are established. Such presumptions may be irrebuttable or rebuttable.

<sup>51</sup>Dennis, note 30, at 420.

<sup>1</sup> Emson, note 11, at 458. A *tactical* or *provisional burden* to adduce evidence is different from burden of persuasion and burden of production of evidence. it simply requires the party against whom a factual inference is taken by the court to adduce some evidence that contradicts the conclusion drawn by the court.

<sup>53</sup><sub>1</sub>d

### 3.2.1. Irrebuttable presumptions of law

*Irrebuttable presumptions* of law /*praesumptio juris et de jure*/ refer to conclusions that must be drawn by a court on proof of a basic fact.<sup>54</sup> Here, once a basic fact is established, the court *must* draw a conclusion about the existence or non-existence, truthfulness or falsity of the presumed fact. And it is not open for any other party or for the court to rebut the presumed fact; i.e., no rebutting evidence is allowed to the contrary.<sup>55 56 57</sup> Since no rebutting evidence is admissible at any rate, irrebuttable presumptions of law are referred to as *conclusive or absolute presumptions*. in a paternity case for example, if Ato D admits marriage but argues that the child was conceived after divorce without refuting W/ro C's evidence that the child was born on the 210<sup>th</sup> day from the date of divorce, the court is bound to draw a conclusion that Mimi is conceived in wedlock. This is because Art 128(1) of the Federal Revised Family Code provides that a child shall be deemed to have been conceived in wedlock if she is born within 300 days after the dissolution of marriage. in this case it is not possible to adduce any evidence with a view to disprove the date of conception. Sub (2) of the article proclaims: "No proof to the contrary shall be admitted."

As many scholars in this area observed, irrebuttable presumptions fall outside the scope of the law of evidence. such presumptions are, properly speaking, parts of the substantive law. As Dwyer stated, "conclusive presumptions allow no proof which might contradict them. They thus provide an absolute basis for judgments in certain fact situations. such presumptions are therefore more accurately matters of *substantive law* than of procedural or evidentiary law because of their definitely decisional nature."<sup>56 57</sup> (Emphasis added).

### 3.2.2. Rebuttable presumptions of law

The other types of presumptions which are taken as *true presumptions* are the *rebuttable presumptions of law*.<sup>51</sup> In rebuttable presumptions of law, once a basic fact is proved, the court *must* draw a conclusion about the existence, truthfulness or otherwise of the presumed fact. This drawing of a conclusion about the existence of the presumed fact is, however, *susceptible to rebuttal evidence* by the party against whom that presumption operates. in different jurisdictions, the legislature determines whether such party against whom a rebuttable presumption operates can rebut freely with any type of evidence or with some limited type of evidence. if one can rebut what is presumed to exist

<sup>54</sup> Dennis, note 30, at 421.

<sup>55</sup> Emson, note 11, at 457, 460-461; Elliott, note 11, at 75-76.

<sup>56</sup> Dwyer, note 42, at 390; See also Elliot, note 11, at 76. Thus, scholars express that the expression "irrebuttable/ conclusive presumption" is a misnomer.

<sup>57</sup> Andrews and Hirst, note 9, at 104.



with *any type of evidence* that type of (rebuttable) presumption is referred to as *freely rebuttable presumption*; if one is restricted with some *identified type of evidence*, the type of (rebuttable) presumption is referred to as *presumption of law that can be rebutted with limited evidence* or *restrictively rebuttable presumption*.<sup>58</sup> What Arts 97, 106 and 169 of the Revised Family Code provide in respect of disproving of marriage, irregular union and sexual intercourse, respectively, can be cited as examples of the first type of rebuttable presumptions of law. The same is true under Arts 1147, 1200, 1201, and 2132 of the Civil Code. Again, Art 2025 & 2026 of the Civil Code on presumptions of payment are, as we are going to see, good examples of the second type of rebuttable presumptions of law.

#### a) Persuasive rebuttable presumptions of law

Rebuttable presumptions of law are either *persuasive presumptions* or *evidential presumptions*. Persuasive presumptions of law denote a conclusion that *must* be drawn by a court on proof of the basic fact of the presumption *unless and until the party disputing it disproves the conclusion*.<sup>59</sup> Here, if a proponent of a basic fact establishes this basic fact with admissible evidence or if the basic fact is admitted by the opponent or if the court can take judicial notice of the alleged basic fact, the court *must* draw the conclusion on the existence or otherwise, truthfulness or falsity of the presumed fact. And then, it is up to the party against whom that presumption is drawn to satisfactorily disprove that established basic fact with admissible evidence and to prevent the court from considering the presumed fact as established.

it is not sufficient for the party against whom this presumption is operating to introduce rebuttal evidence. To win on that issue, this party has to *convincingly* disprove the alleged basic fact with *sufficient degree or quantum* of proof. It is not sufficient to create *balance of probability*, or to put the fact at an *equilibrium* state of condition in a civil proceeding. This party has to prove with a preponderant *degree* of persuasion showing that his version is true. if it is a criminal proceeding relating to the elements of the crime under inquiry it is, of course, sufficient if the defendant brings or spreads some *reasonable doubt* against the prosecution's established basic fact.

Unlike the civil proceedings, it is always the public prosecutor that bears the legal burden of proof on the elements of crime. in civil cases, however, an operation of a rebuttable presumption of law may bring about change of incidence of legal burden of proof. The party against whom such a presumption

<sup>58</sup> See Brigadier General Tatek Tadesse (1997 E.C), *Basic Principles of the Law of Evidence*, (in Amharic), (Addis Ababa: Addis Ababa University Book Center), at 76.

<sup>59</sup> Dennis, note 30, at 421. Read also Elliot, note 11, at 78; Emson, note 11, at 461- 462.

is invoked bears the legal burden of proof; or else, it cannot persuade the court. Thus Emson says: "If a presumption is persuasive, the opposing party in civil proceedings bears a legal burden of disproof on the balance of probabilities."<sup>60</sup> Persuasive rebuttable presumptions of law thus operate to *place a legal*, as opposed to evidential, burden on the party challenging the existence or otherwise, truthfulness or falsity of the presumed fact.<sup>61</sup> \*

### **b) Evidential rebuttable presumptions of law**

Evidential rebuttable presumptions of law, on the other hand, signify a conclusion that *must* be drawn by a court upon proof of the basic fact of the presumption *in the absence of any evidence to the contrary*<sup>62</sup> As in persuasive rebuttable presumptions of law, evidential rebuttable presumptions of law first come into the picture in any lawsuit *after* the initial establishment of basic facts in the litigation process. It is such establishment of the basic fact(s) that activate or bring into operation this type of presumption.<sup>63</sup>

Once such a presumption has come into the scene following the proof of the basic fact(s), it has its own legal consequence different from that of persuasive presumptions of law. That effect is to put the incidence of the *evidential burden*, i.e., *burden of going forward with evidence*, or simply, *burden of adduction of evidence*, on the party against whom that presumption applies.<sup>64</sup> This simply pertains to the party that has to move to adduce or present admissible evidence under the pain of losing on that particular issue(s) if the case stops at that point. Of course, mere adduction of some evidence by the party against whom this presumption is operable is not sufficient: rather, it is necessary to adduce sufficient evidence that contradicts the existence of that presumed fact. Yet, this party, unlike the party that bears legal burden, is not expected to *convince* judges about the truthfulness of the fact under investigation on his side as compared to his opponent because bringing the minds of judges to the state of equilibrium is sufficient to win on the issue under inquiry. In short, evidential presumptions do not affect the incidence of legal burden of proof.<sup>65</sup>

<sup>60</sup>Emson, note 11, at 462.

<sup>61</sup>Dennis, note 30, at 421.

<sup>62</sup>Id., at 420.

<sup>63</sup>Read Morgan, Observations, note 27, to know more about the point of time in which a given presumption, including those of persuasive and evidential presumptions, comes into operation in the course of civil proceedings. Read also Morgan, Presumptions, note 14, to know more about effects of operations of presumptions and related issues.

<sup>64</sup>Read Elliot, note 11, at 78; Emson, note 11, at 461; Dennis, note 30, at 421.

<sup>65</sup>Id.

Whether a given rebuttable presumption of law is of a *persuasive* or *evidential* nature has to be checked from the express or implicit gist of the law. One has to check by asking the following two questions. (1) which of the two opposing parties in the litigation risk losing on an issue of fact under inquiry, in the face of an operable rebuttable presumption of law, if the case stops at a given point? (2) which of the two opposing parties in the litigation risks losing on an issue of fact under inquiry, in the face of an operable rebuttable presumption of law, if the *cogency of evidence* produced on both sides remain at equilibrium?

#### **4. Relationship between Burdens of Pleading, Burdens of Proof and Rebuttable Presumptions of Law**

There is some ambiguity with respect to the operations of rebuttable presumptions and this traces its roots to conceptions regarding the nexus between burdens of pleading, burdens of proof and types of presumptions. This is indeed manifest in the decision of the Cassation Division in *Agency for the Administration of Rented Houses v Mr. Bironi Atikpo* mentioned earlier in the introduction.

in an adversarial procedural system such as ours, parties to disputes in civil cases start with preparations and presentations of their respective pleadings to courts. That is made at the pleading and pre-trial stage. The plaintiff has to state all material facts and grounds of claim that constitute his/her cause of action, i.e., s/he must allege facts to support his/her claim. An adversary system of justice imposes such an obligation or burden of pleading upon plaintiff.<sup>66</sup> The defendant also bears another burden of pleading, preferably called burden of response, to what is alleged by plaintiff. Sedler notes that defendant *must respond* to each allegation of fact contained in a statement of claim, *admitting* or *denying* it.<sup>67</sup>

when the written pleadings are over, courts normally proceed to examine parties orally and determine if there are issues that should be further taken to the next phase to be resolved in a full scale trial. At the trial stage, litigating parties introduce their respective evidence as provided in the Civil Procedure Code. In the normal course of things, each of the parties to such dispute bear some *burdens of proof* (- evidential or legal or both). As can be gathered from Arts

<sup>66</sup> Read Belton, note 25, at 1212-1217. To the Ethiopian context, refer to Arts 80- 91 *cum* Arts 222- 227 of the Civil Procedure Code of the Empire of Ethiopia (1965).

<sup>67</sup> Sedler, Robert Allen, (1968), *Ethiopian Civil Procedure*, at 2-6, 120, 199-203 ff. and Fisher, Stanley Z. (1969), *Ethiopian Criminal Procedure: A Sourcebook*, at 135. Also read Arts 234 - 240 *cum* Arts 80- 91 of the Civil Procedure Code.

258- 260 of the Civil Procedure Code, the plaintiff *must* adduce evidence to support his allegations and defendant *must* adduce his own countering evidence under pain of loss of one's case on an issue of fact or certain issues of facts. Apart from what Art 258 provides, the determination of the party entitled or obliged to begin to introduce evidence is to be identified from the pleadings of parties, and /or from the substantive law.

in case, however, the legislature has provided presumptions of law in favor of one or the other party in respect of some facts (which is usually based on some public policy grounds), it suffices if that party establishes only the basic fact(s) alleged in the pleading. Once such party establishes the basic fact(s), the court has the duty to draw the presumed fact stated in the pleading. Hence, one clearly observes the nexus that exists in some instances between burdens of pleading, burdens of proof and rebuttable presumptions of law.

Once a rebuttable presumption of law comes to be operative in the course of litigation as described above, it is necessary to know how it affects the respective legal and evidential burdens of proof of parties.

in the case of evidential presumptions of law, once a basic fact is established, the court is duty bound to draw a conclusion about the existence (or absence), the truthfulness (or falsity) of a disputed matter of fact *in the absence of evidence to the contrary*. This "shifts"<sup>68</sup> the burden of adduction of evidence from the party who bears the burden to the opposite party against whom that presumption is operating. As the court is legally required to give a decision on the basis of the presumption in the absence of evidence to the contrary, this party, therefore, bears the burden of adduction of sufficient evidence- evidence that is sufficient to raise doubt against the conclusion that should be drawn in its absence. This party's rebuttal evidence must be strong enough to justify a finding in his favor if the case stops at that point. if his evidence brings equal probability, or puts the matter in equilibrium at the end of the litigation process, or if the court is left in doubt at the conclusion of all the evidence, the party with the evidential burden wins on that issue. That is because the party in favor of whom the presumption is operating, i.e., the beneficiary of the presumption, still bears the burden of persuasion. if the party fails to adduce preponderant

<sup>68</sup> Strictly speaking there is no *shift* of burden, be evidential or persuasive. An evidential or legal burden can rest on only one party in respect of an identified issue. The term shift, a commonly employed term, must be referring to the other party's burden to adduce evidence, and to persuade with that evidence to establish *another fact* that contradicts or disproves what had been made out by the party that carried the evidential or legal burden.

evidence, he/she loses on that specific issue. In this regard Emson writes the following:<sup>69</sup>

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

In the case of persuasive presumptions of law, however, the court is duty bound to draw a conclusion about the existence or otherwise of the fact in dispute unless such conclusion is *disproved by the other party disputing it*. Such presumptions operate to place a *legal burden* on the party challenging the presumed fact. Here, unlike evidential presumptions, the legal burden of proof “shifts” from the beneficiary of the presumption to the party against whom that presumption is operable. Hence it is not sufficient for this latter party to adduce some evidence. It is necessary for this party to adduce evidence that convinces judges of the truth on his side with greater probability. Putting the matter at equilibrium will not be sufficient for this party. Emson states:<sup>70</sup>

A persuasive presumption is effectively a rule, which places the legal burden of proof on a particular party once certain basic facts have been proved or admitted. The basic facts give rise to the presumed fact, and it is for the opposing party to prove the contrary. The presumed fact has no evidential value of its own but merely lays down the rule as to the incidence of the legal burden of proof. [...] If no or no sufficient evidence is adduced by the opposing party to discharge the burden of proof (that is, to rebut the presumption) the tribunal of fact must accept the truth of the presumed fact.

## 5. Presumptions of Payment and the Cassation Court’s Binding Interpretation of Art 2024

Arts 2020 - 2024 of the Civil Code deal with presumptions of payment of contractual debts. The Code provides presumptions that arise from different types of *conduct* of creditors and from *lapse of time*.<sup>71</sup> We have thus

<sup>69</sup>Emson, note 11, at 461-462.

<sup>71k</sup>

Incidentally, one may see the public policy preference that the Ethiopian legislature adopted in creating these presumptions of payment of debts instead of stipulating

presumptions of payment that arise from handing over of document of title by creditor to a debtor (Art 2020) \* <sup>72</sup>, from entries made by creditor (Art 2021)<sup>73</sup>, from a receipt given by a creditor in respect of prior or concomitant debt (Art 2022),<sup>74</sup> and, from the lapse of six months since those specific debts fell due (Art 2023)<sup>75</sup> and from the lapse of two years since those other specified debts fell due (Art 2024).

isolated periods of limitation or prescriptions as was the case in the French code Civil. See Planiol, Marcel (1939), *Treatise on Civil Law*, Vol. 2, Part 1 (11<sup>th</sup> ed.; Translated by the Louisiana State Law Institute), Chapter IX- Prescription, at 342-357, most of the matters provided under Arts 2023 & 2024 of the Ethiopian Civil Code have had different periods of prescription in France. Creation of different prescription periods of thirty years, twenty years, ten years, five years, three years, two years, one year, six months, three months, and one month for various contractual civil actions in the French system was criticized as being unwise and inconvenient. Perhaps, the drafter of the Ethiopian Civil Code, Rene David, decided not to import that inconvenient approach into the Ethiopian system and thus preferred to prepare a draft with one general prescription period of ten years (which we find under Art 1845 of the Civil Code) and left other contractual relationships that require timely enforcement to be sanctioned by such presumptions of payment. This author feels that it would be helpful if scholars do some inquiry on the historical background of these provisions of the Ethiopian Civil Code. it should be clear that presumptions of law and period of limitation (prescription) are entirely different concepts and rules of law. The Cassation Division has rightly maintained that distinction in those cases under discussion. Ato Mekbib Tsegaw has also examined the basic distinctions between the two. (See Mekibib Tsegaw (2009) Presumptions of payment: Are they rules of Limitation or Evidentiary Rules? And Related Issues', *Ethiopian Bar Rev.*, Vol. 3, No. 2, (in Amharic) at 169-178.)

<sup>72</sup> Art 2020 goes: "The handing over of the document of title to the debtor shall raise a presumption that the debt has been discharged."

<sup>73</sup> Art 2021 runs: "Entries made by the creditor at the end, in the margin or at the back of a document of title, which remained at all times in his possession, shall be conclusive evidence although not signed or dated by him, where they tend to establish the debtor's release."

<sup>74</sup> Art 2022 provides that:

- (1) In the case of interests or other periodical dues, the creditor who gives a receipt for a given period, without making any reservation, shall be deemed to have collected the dues for the previous periods.
- (2) Where the creditor gives a receipt for the principal, the debtor shall be deemed to have paid the interest.

<sup>75</sup> According to Art 2023, the following debts shall be deemed to have been paid where six months have elapsed since they fell due:

- (a) debts in respect of wages owed to clerks, office employees, servants, daily workers and workmen;
- (b) debts due to masters or teachers in respect of lessons given monthly;

The focus of this section is presumptions of payments embodied in Art 2024 of the Civil Code.<sup>76</sup> Before an analysis of the presumptions contained in this provision, let us examine how our courts understand and apply those presumptions. Almost all issues raised in court cases that involve Article 2024 of the Civil Code are currently being resolved in accordance with the binding interpretation rendered by the Cassation Division of the Federal Supreme Court in the *Agency for the Administration of Rented Houses v Mr. Bironi Atikpo* case. Only recently did the Division attempt to make some departure in *Commercial Bank of Ethiopia v Ato Liyew Chekol & Ato Million Mengistu*.

*Agency for the Administration of Rented Houses v Bironi Atikpo's* case relating to operation and effect of the presumptions contained in Art 2024<sup>77</sup> indeed deserves careful analysis. The case was first submitted to the Federal First Instance Court in Addis Ababa. The Plaintiff, *Agency for the Administration of Rented Houses*, sued defendant *Mr. Bironi Atikpo* stating that he failed, *inter alia*, to pay rent- debts due in respect of a house he leased from plaintiff. After stating its cause of action, plaintiff requested the court to decide against defendant declaring that he should pay the debts that were due. As the defendant failed to appear to defend the suit, despite summons duly served, the case proceeded *ex-parte*. Eventually the court held that the defendant should pay the debt that fell due for the last two years. But, it dismissed plaintiff's claim of the alleged debt due for more than two years maintaining that defendant is *presumed* to have paid as per Art 2024(d) of the Civil Code.

- (c) debts due to hotel keepers, inn-keepers or managers of boarding-houses in respect of lodging and food;
- (d) debts due to merchants in respect of goods and foodstuffs supplied by them to private persons for consumption or common use.

N.B. The conjunction “and” from sub (a) through (d) is omitted as it appears that it is a result of poor drafting.

<sup>76</sup> According to this provision, “[t]he following debts shall be deemed to have been paid where two years have elapsed since they fell due:

- (a) Debts due to physicians, surgeons, dentists, midwives, pharmacists or veterinary surgeons in respect of professional services or supplies;
- (b) Debts due to advocates, notaries or other members of the legal profession in respect of professional services;
- (c) Debts due to handicraftsmen in respect of work done by them;
- (d) Debts due in respect of rents for houses or agricultural estates;
- (e) Arrears of periodical dues;
- (f) interest on loans and generally any sum payable annually or at shorter periodical intervals.”

<sup>77</sup> Also, refer to Mekbib Tsegaw’s brief Note (about the operation of the presumptions under Art 2023 & 2024), cited at footnote 71 above, at 179-180.

Partly aggrieved, the plaintiff appealed to the Federal High Court. This Court, however, confirmed the decision of the lower court. The court held that appellant's claim of the rent debt that fell due for more than two years is not acceptable as it is presumed in law to have been paid.

Ultimately, the plaintiff took the case to the Cassation Division of the Federal Supreme Court stating, *inter alia*, that the lower courts committed a fundamental error of law in applying the rule of presumption of payment. The appellant contended that the presumption contained in Art 2024 of the Civil Code is not applicable in *ex-parte* cases; and that courts should not raise period of limitation on their own. It argued that the lower courts also committed basic error of law for basing their decisions on *presumption* which has not been invoked by the defendant as the case was being adjudicated *ex parte*.

The Cassation Division, which consisted of a panel of five judges, examined the case in the absence of the respondent.<sup>78 79</sup> The issue framed by the Cassation Division was “*whether it is possible to apply the presumption contained in Art 2024 of the Civil Code in the circumstance where a defendant did not deny the alleged money debt or in the circumstance where the case is proceeded ex-parte.*”

Before directly going to the main issue, the Division primarily went on to give analysis of the nature, operation and legal effect of presumptions of law in general and presumptions of payment of debts in particular. It first tried to show differences that exist between presumptions of law and period of limitation. In this regard all the judges unanimously held the following:

As the *presumption* contained in the Civil Code is different from that of the *period of limitation* found in Art 1845 (and in other articles) of the Civil Code, the contention of the petitioner that the trial court erred in invoking the presumption under Art 2024 without its invocation by defendant is not acceptable. While period of limitation bars courts from entertaining cases on their substantive merits, on the other hand, presumptions of law (including that, which is found under Art 2024 of the Civil Code) entail *only shift of burden of proof*<sup>79</sup> Unlike cases where courts are not allowed to invoke period of limitation on their own, it is possible to see the merits of the case brought by plaintiff. The fact that defendant did not invoke the operation of the presumption under Art 2024 does not bar courts from applying it. Petitioner

<sup>78</sup> since respondent did not appear to defend the case at that level after proper notice (as was the case in the First instance Court), the Cassation Division examined the petitioner's case in the absence of the respondent.

<sup>79</sup> The Amharic version reads: “...P<sup>A</sup>ft<sup>A</sup>-<sup>A</sup> hA7.fr (BTi .Prt®' nAAy...”



confused presumption with period of limitation. That is contrary to the spirit, goal and express content of the law and thus is not acceptable.

However, there was no unanimity among the justices regarding the following points:

- Regarding the interpretation and application of Art 2024 of the Civil Code, i.e., *whether the presumptions apply in a situation where the defendant did not appear and deny the claim brought against him;*
- on the *relevance and applicability of Art 89 of the Civil Procedure Code of Ethiopia (1965) to the case, i.e., whether this article of the law has relevance to the case at hand, and if relevant whether it relieves defendant from burden of pleading;*
- *whether the existence of a presumption of law in a given case requires special rules of procedure and evidence to follow;*
- *whether presumptions are evidence or not;* and
- whether the failure of the defendant to appear before the court to defend the claim brought against him in that case can be taken as an *admission* of plaintiff's claim.

The Division was thus divided into the majority (three judges) and the dissenting minority (two judges). The Cassation Division proceeded to address the main theme of the case.<sup>80</sup> The majority opinion held the following with regard to presumptions of law:

Presumptions of law have substantive and procedural aspects<sup>81</sup>. The presumption contained in Art 2024, found in that part of the Civil Code devoted to *Proof in relation to Contracts*, is one of the numerous presumptions that we have in the Ethiopian substantive laws. It is one of the provisions that deal with presumptions of payment of contractual debts. The article lists the types of contractual debts that should be presumed as paid where two years have elapsed since they fell due. Debts due in respect of rents for houses are among such debts (Art 2024 (d)).

with regard to the rebuttability or irrebuttability of the presumption, the majority opinion held the following:

<sup>80</sup> The theme was once again restated:

“Under what circumstance is the presumption provided under Art 2024 of the Civil Code applicable? Can it be applied in a situation where defendant didn't appear before the court and deny the claim(s) brought against him?”

<sup>81</sup> One wonders what that really means. Is it true that an operation of a given presumption of law has substantive and procedural aspects?

Though the basic effect of presumptions of law is to shift burden of proof from one party to the other, the legal framework in which a party against whom a presumption operates *rebutts the presumption of law*<sup>82</sup> varies....

It is understandable from the reading of Art 2026 (1) that the presumptions contained in Arts 2020- 2024 are irrebuttable. By providing that ‘No proof shall be admitted to rebut the presumptions laid down in Arts 2020- 2024’ this sub-article made it clear that the party against whom the presumption operates cannot in principle adduce any rebuttal evidence. It is only by requiring the opposite party to take an oath that one can rebut the presumption. A party who intends to carry out its burden of proof should expressly indicate this in accordance with Art 83 of the Civil Procedure Code.

The substantive -versus- procedural nature of Article 2024 and the issue whether Art 2024 could have been invoked by the lower courts in an *ex parte* adjudication were also addressed in the majority opinion:

Courts should enforce these articles contained in the Law of Contracts, as they are parts of the substantive law. ... They are provisions, which the courts should enforce as any provisions in the Law of Contracts whether any of the parties to the litigation invoke them or not. ... Therefore, any court, which finds facts covered under Art 2024 in a case before it, is duty bound to presume that the facts are proved.

What is found in the Civil Procedure Code relating to presumptions of law is the same as that which is embodied in the Civil Code. According to the Civil Procedure Code, any factual claim of the plaintiff that is not expressly denied by defendant is presumed to have been admitted. ... However, where the defendant is a beneficiary of legal presumptions, one is relieved of such an obligation as Art 89 of the Civil Procedure Code expressly provides. ...<sup>83</sup> This provision shows that any party who is a beneficiary of presumptions of law has no obligation to expressly deny those facts that are within the presumptions. Any defendant is not required to deny specifically the facts falling within presumptions. Therefore, no court can give judgment against defendant taking that his failure to deny such fact specifically amounts to admission.

As this is the legal framework regarding presumptions of law, courts should give decisions based on such understanding. Further, it is inevitable that courts should have to follow special rules of procedure and evidence different from

<sup>82</sup> The Amharic goes: “...fih<sup>A</sup> Ph<sup>An</sup>T &T} Pu<sup>A</sup> 7<sup>AA</sup>”

P<sup>A</sup>TAnTPu<sup>A</sup>

<sup>83</sup> The English version of Art 89 of the Civil Procedure Code (which is not different from the Amharic version) provides the following:

“Art 89. -Legal Presumptions

Neither party needs in any pleading allege any matter of fact which the law presumes in his favor or as to which the burden of proof lies upon the other party, unless the same has first been specifically denied.”

the normal proceedings when they find a defendant who is the beneficiary of presumptions of law: That also holds true to the decision-making process.<sup>84</sup>

Therefore, as long as there are facts falling within presumptions of law, courts should enforce such presumptions irrespective of the content of defendant's defense- whether defendant denies or not, it does not produce different outcome in respect of such a fact.<sup>85</sup> That the case proceeded *ex-parte* does not bring any difference in this regard; defendant is not required to deny specifically and expressly such facts falling within presumptions of law; failure on this should not be taken as an admission.

The majority opinion thus concluded that “[i]t is clear from petitioner's memorandum that it is requesting payment of house rent bills that fell due over two years. As this is the case, it is proper and it is in accordance with Art 2024 of the Civil Code to presume that the alleged debt is paid even where the defendant did not invoke the provision or in situations where the case is proceeded *ex-parte*.”<sup>86</sup> The Cassation Division thus confirmed the decisions of the lower courts.

The minority opinion held a different position regarding the five issues mentioned above. First, they maintained that “the presumptions of law that are found in Chapter 7 of the Civil Code, [...] including the presumption embodied in Art 2024 should be taken as a type of evidence like documents, witnesses, a party's admission or oath; Art 2002 supports that.” They further held that, with regard to disproving of presumptions, Art 2025 reinforces the assertion that these presumptions of law constitute evidence. Thus, they concluded that the presumptions contained in Chapter 7, Section 3 of the Civil Code, including the one embodied under Art 2024, are presumptions of evidence and not of presumptions that the law takes on facts.

Secondly, they said that a defendant who failed to deny expressly a claim brought against him would be taken as admitting that claim as per Arts 83, 334 (1) (d) and 335 of the Civil Procedure Code.<sup>87</sup> They concluded that Art 2024 of the Civil Code is not applicable under such circumstances.

<sup>84</sup> In Amharic it goes: “+hqfr PUT TAT nn^nT @\$T [^/ft+T] Pnh+frT ^ATA pno^T AqA nAT nAAn? P^T WT hnh+AATA p^v ^CTT^ pAhAn A?OT P+rtP PA£+C VA:”

<sup>85</sup> “...P+AnqTA V7C nuT TAT Ehh+fiAV \*Eh ¥C\* ft+T +hqfr hAA AAHA PUT TA\*7 A\*AT £mn\*qT^PA”

<sup>86</sup> “...hh h-AnnT PA£ hAA nh£A OTmP\* hVn^T hArtT AAT nq£ PAVA hrtAA hhqfi hh OTAT £u hAv ATA +hqfi n,pvqAA nAqnT nATAnAc UT \*TC 2024 PUT TAT E7A+hArt wAmC +7a VA:;”

<sup>87</sup> Next, they contended that the court should give a decision against the defendant on the basis of his admission as per Art 242 of the Civil Procedure Code if,

Thirdly, the minority opinion states that the presumption contained in Art 2024 of the Civil Code applies where a defendant claims to have paid the alleged debt. If a defendant raises such a defense, he would (by the operation of the presumption under Art 2024) be relieved of adducing any other evidence in support thereof. It would be the burden of the plaintiff to disprove this presumption by requesting the defendant to take an oath and explain the fact.

Fourthly, the dissenting judges observed that the defendant did not appear to deny the petitioner's claim; so, they maintained, there was no issue to be framed - in such a case Art 2024 could not be applicable. They stated that the court should give decision in favor of the plaintiff by taking the defendant's failure to appear as amounting to admission.

Fifthly, noting that Art 89 of the Civil Procedure Code has no relevance to the case at hand, they said that it is wrong to maintain that the defendant is relieved from the burden of pleading by virtue of the said article. Lastly, they held that the existence of presumptions of law, including that which is found under Art 2024 of the Civil Code, in a given civil proceeding does not require special rules of procedure and evidence different from other normal proceedings. As the defendant did not appear and deny the debt claimed by the plaintiff, they concluded that he should be liable to pay the house rent arrears that fell due for the period before two years as well.

## 6. Other Court Cases involving the presumptions of payment under Art 2024: General Observations and Comments

The Cassation Division of the Federal Supreme Court itself has cited the interpretation in *Bironi Atikpo's* case as *precedent* in subsequent civil cases.<sup>88</sup> For example, in *Paoulos Rumicho v Chaltu Merdasa*, the Cassation Division held that the debt that the defendant owed to her lawyer fell due for more than two years, and is thus presumed to have been paid under Art 2024 of the Civil Code.<sup>89</sup> Furthermore, the Cassation Division pursued a similar line of interpretation and conclusion in *Daniel Alemu v. Romanework Yemanebirhan et al.*<sup>90</sup> Some part of the dispute in *Agency for the Administration of Rented Houses* •

- he appears and admits the debt that fell due for over more than two years, or
- He fails to deny expressly the claim brought against him.

<sup>88</sup> See for example *Ato Paoulos Rumicho V W/ro Chaltu Merdasa case*, Supreme Court File No. 15493, decided on 29 Hamle, 1997 E.C.

<sup>89</sup> Defendant didn't allege that she paid the debt, but argued that the case is barred as it is more than two years since it fell due.

<sup>90</sup> Here also defendants didn't allege an affirmative defense of payment.

*v Sossina Asfaw* was also related to presumption of payment of debt due in respect of rents of a house and was thus partly entertained in similar fashion.

The *Agency for the Administration of Rented Houses v. Bironi Atikpo* case was different from the other cases mentioned above because it was adjudicated *ex-parte*. In the other cases, the defendants had at least appeared before the first instance courts and submitted their respective defenses. Except in *Agency for the Administration of Rented Houses v. Sossina Asfaw* case, all first instance courts recognized the existence of valid contracts between the disputing parties.<sup>91 92 93</sup> But, none of the defendants mentioned raised an *affirmative defense of payment* of alleged contractual debts.

It has been widely acknowledged that the Ethiopian litigation system, both in the civil and criminal proceedings, is basically adversarial in nature.<sup>92 93</sup> An adversary system has its own unique features and major premises. One of these is that courts start with no prior knowledge of the existence of a controversy between litigating parties in a case; judges do not know about any disputable fact before parties properly present and prove it to them.

Thus, a plaintiff to a lawsuit in Ethiopia who seeks justice in a civil case should take the initiative of following the prescribed steps to bring his/her opponent before a court. As s/he is the one who seeks to change the *status quo*, the plaintiff bears the *burden of pleading*<sup>93</sup> of facts that constitute the *cause of*

<sup>91</sup> In the *Agency for the Administration of Rented Houses V W/t Sossina Asfaw* case, it is the Cassation Division that pronounced the existence of valid contractual relationship between the parties by reversing the decisions of the lower courts.

<sup>92</sup> See for example the views of Sedler, note 67, at 2-6, 120, 199-203 ff. and Fisher, Stanley Z. (1969), *Ethiopian Criminal Procedure: A Sourcebook*, at xii.

<sup>93</sup> Burden of pleading is one of the various burdens that parties to a lawsuit bear to successfully present, prove and eventually win or defend their respective facts in issue, relevant facts or collateral facts or generally their respective cases, as maybe the case. There are a series of legal burdens, other than the usual evidential and persuasive burdens, that parties have to undergo in the way of achieving certain legal results. The burden of initiating is one such burden and includes burdens of suing, filing, applying, etc. Burden of pleading may be included in this burden. The party with this burden has to prepare a legally sound claim or cause of action, or depending on the nature of the proceeding and stage of the process to prepare a legally sound defense or counter-claim. For some background information read the following: Sedler, note 67, at 120- 138; Belton, note 25, at 1205-1223; Cleary, Edward W. (1959- 1960), *'Presuming and Pleading: An Essay on Juristic Immaturity,'* 12 Stan L Rev. at 5-28; Wexler, Stephen and Efron, Jack (1983- 1984), *'Burden of Proof and Cause of Action,'* 29 McGill L.J. at 468- 480. Cleary wrote, "Since plaintiff is the party seeking to disturb the existing situation by inducing the court to take some

*action*. The plaintiff should thus present the material propositions of fact that constitute the subject matter of a dispute and should annex evidence to support the assertions in the statement of claim.<sup>94</sup> A defendant, on the other hand, is expected to respond to such an allegation brought against him/her by *admitting or denying* the truth of each allegation.<sup>95</sup> As is the case for the plaintiff, the defendant *must allege* material propositions that constitute his/her defense.<sup>96</sup> In other words, the defendant bears another burden of pleading, more appropriately *burden of response*. As Sedler notes “primary responsibility rests with the parties [even if] the court has some responsibility for developing the case”, and, in effect, each party “must present his version of the case to the court, that is, he must allege facts to support his claim or defense and introduce evidence that will prove the existence of those facts.”<sup>97</sup>

In responding, a defendant may deny each claim and avoid liability- this is what is referred to as “avoidance” in the common law tradition. A defendant in a contractual case, for example, may, deny the existence of the alleged contract or may, *inter alia*, argue that the alleged contract is not valid. Or, defendant may admit some or all allegations of the plaintiff and plead additional facts that deprive the admitted facts of adverse legal effects- this is referred to as “confession and avoidance”. In contractual cases such defenses may include *counter-claim, set-off, force majeure, mistake, defect of consent, payment* or other *grounds of extinction of obligation*. In other cases defendant may admit all or part of the claim thereby accepting full or partial liability.<sup>98</sup>

measure in his favor, it seems reasonable to require him to demonstrate his right to relief.”(at 7.) Professor Belton also wrote:

The burden of pleading imposes upon a party the obligation to notify his opponent and the court, in the appropriate manner, of the elements upon which he intends to rely either to sustain or to defeat liability. The policy behind the pleading burden is to provide notice to the courts and to the other party of the nature of a claim or defense upon which evidence will be presented to the court. (at 1216.)

<sup>94</sup> See Arts 80, 222-228 Of the Civil Procedure Code.

<sup>95</sup> See Art 234 (1) particularly (d) - (f) Civil Procedure Code.

<sup>96</sup> Art 247 (2) of the Civil Procedure Code provides:

“Material propositions are those propositions of fact or law which a *plaintiff must allege* in order to show a right to sue or a *defendant must allege* in order to constitute his *defense*.”

<sup>97</sup> Sedler, note 67, at 120.

<sup>98</sup> E.g. in a contractual claim of 60,000 birr for house rent brought by plaintiff, defendant may respond saying ‘yes I have agreed to pay 5,000 birr per month for the house I leased from plaintiff; yet I paid 50,000 birr for the last ten months and I’m left to pay 10,000 birr only.’

If the defendant fails to appear with his/her statement of defense, after being duly served of the summons, the court should proceed *ex-parte*” In failing to appear with his statement of defense, defendant has *waived his right to raise any ground of defense and the opportunity to rebut plaintiff’s evidence*. It is at his risk if s/he fails to respond, to give relevant factual data to the court and to present rebuttal evidence. In such instances the court should examine plaintiff’s case and evidence, and if it is satisfied that the plaintiff has a valid claim and has suffered some injury or damage, it should give judgment in his favor against defendant.<sup>99 100</sup>

As shown above, the *Agency for the Administration of Rented Houses* sued the defendant for failing to pay the debt he owed to it. It based its cause of action on the contract of rent of a specified house, and claimed that the defendant is in breach of contract by failing to perform his obligation. By virtue of Art 2001 (1) of the Civil Code this plaintiff bears the burden of proof in respect of the existence of the alleged obligation. Whether the defendant appears with his defense of any kind or not, the burden of adduction of evidence to show the existence of the alleged contract ought to have been borne by the plaintiff.<sup>99 100 101</sup> It appears from the case that the existence of the alleged contract, which was a basis for the plaintiff’s right to relief and of defendant’s obligation, was not disputed (or plaintiff must have produced documents that prove its existence).

Plaintiff alleged that defendant failed to pay monthly rental bills. As plaintiff pleaded and proved the existence of the obligation that defendant was bound to honor, it had no further obligation under the circumstances.<sup>102</sup> By virtue of Arts 247 (2) and 234 of the Civil Procedure Code it was the responsibility of the defendant to respond against this allegation. Depending on the facts on the ground, defendant (if willing) could have either admitted this allegation or could have raised grounds of defense, if any.<sup>103</sup> It was the responsibility of the defendant to plead grounds of defense such as payment - an affirmative defense, which should be alleged to avoid liability. Whether defendant did pay the claimed debt or not, could not be a subject matter of judicial notice. It is also clear that the court could not play a defendant’s role; it could not raise such defenses as nullity, variation, or extinction of that proved contract or it could not

<sup>99</sup> See Arts 233 and 70 (a) Civil Procedure Code.

<sup>100</sup> Sedler, note 67, at 163-164.

<sup>101</sup> In case of formal admission, plaintiff would be relieved of such burden.

<sup>102</sup> If it were not able to show the existence of valid claim, the court should have given judgment in favor of defendant and against plaintiff at that stage.

<sup>103</sup> See Arts 80 - 89 Cum Arts 234-237 of the Civil Procedure Code about the burden, or obligations of the defendant, if he wants to avoid the risk of losing on an issue of fact or on the whole of the case.

speculate and raise any other defenses such as force majeure, counter-claim or set-off. In this writer's opinion, the majority in the Cassation Division and the judges in the lower courts should not have invoked Article 2024 and raised an affirmative defense of payment of money on their own.

According to Art 2001(2), a person "who *alleges* that an obligation is void, has been varied or is extinguished shall *prove the facts* causing such nullity, variation or extinction." It is thus the responsibility of the defendant to raise any of these allegations or defenses. At the pleading and pre-trial stage, we do not talk about the party that bears the burden of proof, be it evidential or legal burden.<sup>104</sup> The issue of burden of proof comes into the picture at the *trial stage* of the proceeding. And it comes into the picture at that trial stage if there is at least one contentious issue of fact, which the court has framed in accordance with Art 246(1) of the Civil Procedure Code.

in the case at hand, whether defendant did pay the debt claimed by plaintiff or not *was not at issue* as defendant did not appear and submit such a defense. Nor was it framed as such by any of the courts that entertained the case from first instance through appeal and then at cassation level. As the minority in the Cassation Division properly observed in this regard and as Art 246(2) of the Civil Procedure Code provides, there was no issue to be framed. Judges of lower courts and the majority in the Cassation Division reached at a wrong conclusion because they merely and wrongly focused on burden of proof of the fact of payment as if it was a fact in issue. The holding of the majority that plaintiff did not express his intention to rely on the sworn statement of defendant as per Art 83 of the Civil Procedure Code is a result of this wrong focus on burden of proof on a party that did not bear the said burden.

As defendant did not raise any defense, there was no single fact in favour of defendant, which the court could have established. Defendant did not allege a fact that could be *established/proved* by drawing a conclusion from another *alleged* and *known* (that could be *judicially noticed*) or *admitted* or *proved fact*. There was *no basic fact*; and there was *no presumed fact* alleged by defendant that the court had to deduce from. As shown before, presumption of law envisages certain conditions. There are no ideal facts that exist in the vacuum. There had to be an *asserted fact*, the truthfulness or otherwise of which could be established by proving a related basic fact. in the case at hand, there was no fact, or circumstance that commands calling for and applying any presumption of law in favor of the defendant.

As made clear in section 4 above, there is some link between certain presumptions and some rules of burden of pleading. As Art 89 (titled 'Legal

<sup>104</sup> See Sedler, note 67, at 120-122.



Presumptions’) provides, “[n]either party needs in any pleading allege any matter of fact which the law presumes in his favor or as to which the burden of proof lies upon the other party, unless the same has first been specifically denied.”

This provision does not stipulate about the exemption of a party’s burden of pleading as such. It rather provides for an exception to the rules of pleading embodied in Articles 80 to 88 of the Civil Procedure Code. This pertains to the *exception rule* whereby a party to a lawsuit may be exempted under certain circumstances from pleading *some facts* in preparing his statement of claim or defense. *The facts that may fall within this exception are those that the law presumes in favor of one,<sup>105</sup> and those other facts that the other party to a dispute bears burden of proof.<sup>106</sup>* In such instances, the party that bears burden of pleading is not required, in principle, to plead specifically alleging such facts which the law presumes to exist in one’s favor or which the law imposed the burden of proving on the opponent. Again, this exception will not be applicable if such fact is already specifically denied by the other party in his pleading. By providing the exceptional situations where parties may be exempted from burden of pleading of some facts, the provision clearly states the need to allege other facts in pleadings. There hardly exists a principle of law or rule of positive law or case law that entirely relieves a party to a dispute from his burden of pleading on the assumption that a given rebuttable presumption of law will be applicable in the case.

The Civil Code does not presume the fact of payment of debts as such in favor of any defendant. Unlike the presumption of common property among spouses or the presumption of equal share of joint owners, there is no presumption of payment in the contractual relations of parties. Payment is one possible affirmative defense which can be invoked only by defendants. In the case at hand, this affirmative defense should not have been put on the judicial plate for it was not specifically pleaded by defendant.<sup>105 106 107</sup> It was not, and still is not, one of the facts that the law presumes in favor of a defendant in a contractual case; it is not a fact whose burden of proof rests on plaintiff.

<sup>105</sup> See for e.g., presumption of common matrimonial property (Art 63(1) Revised Family Code) or equality of shares in joint ownership of property (Art 1259 Civil Code).

<sup>106</sup> See for e.g., burden of proof of will (Arts 896 & 897 of the Civil Code).

<sup>107</sup> If courts are allowed to raise such defenses by their own, it appears that summoning of defendants would be unnecessary in many cases. And if such court initiatives are proper, there would be no reason to prohibit courts from raising issues such as set-off or merger or novation, or variation of the contract.

This author is of the opinion that the First Instance Court should have given judgment on the case in accordance with Art 254 of the Civil Procedure Code since plaintiff and defendant were not at issue as the minority maintained properly. The author however does not agree with what the minority maintained regarding the implication taken from defendant's absence. As mentioned before, the two dissenting judges took defendant's absence as amounting to admission. The dissenting opinion did not cite any provision/s of law to substantiate its position. A careful reading of Articles 82-89 in conjunction with Arts 235, 240-243, and Art 252 of the Civil Procedure Code, show what *statement* or *conduct* amounts to formal admission.<sup>108</sup> Defendant's absence is not listed therein. There is no justifiable reason for us to assume admission and to relieve the plaintiff from its evidential and persuasive burdens in such occasions. The opinion of the majority in this regard is proper, sound and in accordance with the law.

What the Criminal Procedure Code (1961) provides for under Arts 160 *ff* in respect of an accused person whose case is to be tried in *abstentia* can indeed substantiate what the majority maintained. in criminal trials conducted in *abstentia* the court (in the absence of plea of guilt) assumes that the defendant has pleaded not guilty, and orders the prosecution to produce evidence. Similarly, the absence or the non-appearance of the defendant in *ex parte* civil adjudication cannot be presumed as admission of the factual allegations stated in the statement of claim.

The principal basis of the decisions of the lower courts and of the Cassation Division is Art 2024 of the Civil Code. This provision is found under Section 3, Chapter 7 of the Civil Code, which deals with *Proof in Relation to Contracts*. As one can gather from this title and the sub-titles in the subsequent three sections, Arts 2001-2026 are *evidentiary rules* applicable to contractual disputes (and other non-contractual obligations by virtue of Art 1677/1).<sup>109</sup> Art 2024 is

<sup>108</sup> These are: Admitting expressly the facts alleged by the other party in one's pleading (*a contrario* reading of Art 234 (1)(e)) & Art 242; Admitting expressly the facts alleged by the other party during oral examination (Arts 241 & 242); Taken as admitting the other party's allegations when one fails to deny specifically or by necessary implication in ones pleading (Arts 82-89 & 235) ; Admitting documents, contents of documents or other related things upon notice to admit (Art 240); Agreement with the other party on some or all facts of the case (Art 252); Admitting when testifying as a witness (Art 124 (2) or Art 261(2)).

<sup>109</sup> It is not unlikely for evidentiary principles and rules to be incorporated in substantive and procedural laws of Ethiopia. That is a common occurrence until this day. It suffices here to remind our readers that the incorporation of such principles and rules for example in the Law of Property part of the Civil Code, in the Revised (Federal) Family Code, in the Anti-Terrorism Proclamation, etc. This is the case despite the dominant adversarial/accusatorial feature of the country's system of litigation.

one of the five provisions that provide for presumptions of payment of money debts.

All the presumptions in these five provisions are presumptions of law available in favor of parties that assert payment of debts. Although these provisions are incorporated in the substantive Civil Code, they are applicable when there are points or circumstantial facts that call for their operation. It is wrong to maintain that these presumptions are applicable in every civil proceeding without first checking the existence (or absence) of circumstances that may allow their operation. One should rather bear in mind that pleadings of parties to civil cases provide the basic foundation for the operations of *presumptions with basic facts*. It is only *presumptions without basic facts* that do not depend on pleadings of parties and proof thereof. Also, one needs to recognize that evidential and persuasive burdens usually follow the pleadings of parties which in turn may impact upon the operations of presumptions in some circumstances.

The majority opinion in the Cassation Division has thus erred in holding that presumptions of law operate against plaintiffs in civil cases irrespective of defendants' pleadings whether it is one of admission or denial. Rather, no presumption of law can be applicable against the plaintiff, for example, if defendant admits the plaintiff's allegations. Such presumptions of law as those indicated in Arts 2020-2024 of the Civil Code rather presuppose assertion of some affirmative defense and counterclaim by defendants. No such presumption will be applicable without the prior allegation and subsequent establishment of some basic facts. For stronger reasons, such presumptions do not come into operation if the cases proceed *ex-parte*.

However, the lower courts and the Cassation Division have failed to recognize that the existence of a basic fact is a prerequisite to the existence of the resultant presumed fact, both of which should be found in the pleadings of parties becoming contentious. This author is of the opinion that the presumptions of payment under Arts 2020- 2024 of the Civil Code are not applicable in circumstances where (i) defendants admit alleged debts, (ii) defendants fail to specifically deny alleged debts, and (iii) the cases are entertained *ex-parte*.

The presumptions in the five articles of the Civil Code are not types of evidence but are *rules of law*. The minority in the Cassation Division erred in treating the presumptions of law as types of evidence. Of course, Art 2002 seems to give the impression that presumptions are evidence or types of evidence. This provision titled "Means of Evidence", (rather it ought to have been "Means of Proof"), recognizes writings, witnesses, presumptions,

admissions of parties and oath, as means of proof, and its content provides for *means of proof*<sup>110</sup> of factual disputes. Evidence, which consists of testimony, documentary evidence and real evidence, is one of the *means* utilized to prove or disprove disputed facts.<sup>110 111</sup> As made clear in earlier sections of this Article, a given presumption of law, on the other hand, imposes burden of adduction of evidence or burden of persuasion or both on the other party provided that the beneficiary of the presumption proves certain other basic fact(s).

As discussed earlier, a rebuttable presumption of law comes into operation after establishment of a basic fact. in the case at hand, defendant did not plead the fact of payment. As he did not allege this fact, the judges that adjudicated the case had no legal ground to investigate about the truthfulness or falsity of this fact. Had defendant pleaded the fact of *payment*, the court could have framed this issue: *Can the defendant be presumed to have paid the claimed debt or not?* If that was the case, in principle, the defendant was the party that carried both burden of adducing supportive evidence and burden of proving the asserted fact to the required standard of proof (Art 2001(2) of the Civil Code).

But, defendant could have relieved himself of the evidential burden as the plaintiff gave a formal admission of one basic fact -i.e., plaintiff admitted that the debt had been due for more than two years. This could have forced the operation of a rebuttable presumption of law under Art 2024 of the Civil Code in favor of defendant.<sup>110 111 112</sup> From this lapse of more than two years, the court could have necessarily presumed payment of the debt. if that was the case, plaintiff could have been under evidential burden- the burden of persuasion imposed on

<sup>110</sup> Strictly speaking, *evidence* and *proof* are not synonymous terms. While evidence refers to the data or input that goes to establish the existence or non-existence, the truthfulness or falsity of an alleged matter of fact, proof refers to the end result, which we obtain in the process. Evidence is one of the means that take us to this end result. Others include admission of the other party, drawing of inference, ocular observation of judges, legal presumptions and statement of the other party given under oath.

<sup>111</sup> in the earlier times means of proving could include battling or fighting with dangerous animals or the adversary party or his representative; or, it could be requiring one of the parties to undergo an ordeal process such as capturing red-hot iron, or drowning in a big water body; or it could be requiring a party to swear in the name of God or any other supernatural force, i.e., oath, and later on system of compurgation.

<sup>112</sup> All the presumptions from Arts 2020-2024 are rebuttable presumptions of law. Because the party against whom these presumptions are operating can rebut the presumptions by proving either of the facts under Art 2025 or by requiring the other party to take oath and tell the truth. Of course, one may say that these are rebuttable presumptions of law that do not allow free rebuttal.

defendant by virtue of Art 2001(2) of the Civil Code. All these were not required in our case, as defendant did not plead payment of the alleged debt. Hence there was no point to raise the issue of presumption of payment.

Furthermore, it is wrong to say that a given presumption of law has both substantive and procedural aspects. As shown above, irrebuttable presumptions of law are rules of the substantive laws; legal presumptions without basic facts are also rules of substantive law that allocate legal burden of proof. The rules of presumptions of payment from Arts 2020 - 2024 of the Civil Code are clearly evidentiary rules incorporated in the Code. That classification of presumptions of law into rebuttable and irrebuttable should not be confused with a sub-classification of rebuttable presumptions of law into freely rebuttable ones and restrictively rebuttable presumptions of law.

The rules of presumptions of payment embodied in Arts 2020-2024 of the Civil Code are clearly presumptions of law. Whether these presumptions of law are irrebuttable (or rebuttable) presumptions of law can be checked from Arts 2025 and 2026. In the case of irrebuttable presumptions of law there is no chance or loophole for courts or adversely affected parties to rebut presumed facts. On the other hand, in the case of rebuttable presumptions of law it is clear that adversely affected parties can rebut the existence not only of basic facts but also of presumed facts. The scope may of course vary depending upon the elements of specific provisions. A reading of Arts 2025 and 2026 shows that a party against whom a presumption of payment is taken can rebut the existence of the presumed fact.<sup>113</sup> Nevertheless, the type of evidence and the means of rebuttal are limited by the legislature. The observation of the Cassation Division, which states that the rules of presumptions of payment from Arts 2020-2024 are basically irrebuttable is thus contrary to the explicit readings of Arts 2025 and 2026.<sup>114</sup>

The effects of presumptions in civil proceedings entail some legal consequences which vary greatly depending on the types of presumptions and on the strength of evidence that establish basic facts. Entailing “shift” of evidential or persuasive or both burdens are cases in point in this regard. Both the majority and the minority have wrongly maintained that the only effect of

<sup>113</sup> Beware, what is to be rebutted or disproved is not the rules of law existing in the Civil Code; only basic and presumed facts are to be an object of rebuttal.

<sup>114</sup> It is possible to rebut the presumptions of payment by proving *acknowledgment of debts in writing*, or by proving the *institution of proceedings* on the subject matter prior to that time which serves as a basic fact to the presumption, or by proving through the *sworn statement of defendant*. The Cassation Division has recently modified this in *Commercial Bank of Ethiopia v Ato Liyew Chekol & Ato Million Mengistu* case.

presumptions is the shift of burden of proof from one party to the other. The presumption of payment of a contractual debt under Art 2023 or Art 2024 of the Civil Code, for instance (assuming that it entered into operation following a specific assertion of payment of alleged debt that elapsed the time indicated in the articles of the law), do not entail shift of burden of persuasion. If the cogency of the evidence introduced by defendant and plaintiff in such a case appears to be at equilibrium, the plaintiff wins the case since defendant bears persuasive burden under Art 2001 (2) of the Civil Code.

The majority in the Cassation Division also held that the operation of presumptions of law requires the pursuance of special rules of procedure and evidence. This holding does not, however, indicate the ‘special rules’ that should be followed. As far as this author knows, there is no single rule of procedure or evidence in Ethiopia or in any other country that compels courts to follow special procedure or evidentiary norm if they are faced with cases involving some presumptions of law. Furthermore, there is no unique decision-making process due to presumptions of law. The operations of presumptions entail various consequences: some presumptions entail shift of tactical burden; others impose evidential burden on the adversely affected party; there are also some limited presumptions that determine the persuasive burden to be borne by the adversely affected party, etc. No special rule of procedure or evidence is thus necessary under all these circumstances as the minority properly maintained.

## Conclusions

The main focus of this article has been on cases of true presumptions of law, i.e., rebuttable presumptions of law. These presumptions clearly presuppose the establishment of basic facts before courts resort to drawing conclusions regarding the presumed facts. Such basic and presumed facts must be part of the allegations of the parties in dispute. It is the assertions of facts in the pleadings that provide the foundation for evidential and persuasive burdens. Mere allegations of facts may not force the coming into operation of such presumptions of law because proving of basic facts is indeed a requirement. Admission of such basic facts by an opponent may relieve the proponent from the burden of establishing the asserted basic fact. This is also true if the basic fact alleged is of a kind which courts may take judicial notice of. Otherwise, it is hardly possible to see the coming into operation of such presumptions.

The holding of the Cassation Division in *Agency for the Administration of Rented Houses v Bironi Atikpo* substantiates this point. As it stands now, the decision of the Cassation Court is the authoritative interpretation of Art 2024 of the Civil Code in respect of the operations of the presumptions. The binding precedent seems to give a function to courts to assume the role of the defendant

in raising affirmative defense of payment. This is a phenomenon that goes against common sense and the essence of our ‘predominantly adversarial’ system.

This line of interpretation is not only erroneous but it can also have adverse effects on economic, social and contractual transactions. A case in point can be difficulties that can be encountered by parties who seek judicial remedies from contracting parties in default. In other words, plaintiffs may be hindered from instituting lawsuits against defaulting contracting parties, because such suits can be considered as lacking cause of actions. The interpretation pursued by the Cassation Division gives definitive effects to rebuttable presumptions of law which is even stronger than the provisions on periods of limitation which at least should be raised by the defendant. This seems to be contrary to the intention of the legislature and perhaps to the wise formulation of Rene David in devising such open affirmative defenses which debtors can invoke against ‘lazy’ creditors.

Thus, this author submits that the Cassation Division of the Federal Supreme Court reconsider its binding interpretation of Art 2024 of the Civil Code in the light of the unique features of rebuttable presumptions of law and the justifications behind such presumptions in our substantive law. The author also hopes that the legislature will recognize the injustice that this interpretation can entail against honest creditors, and duly address the potential ‘ambiguities’ that are susceptible to erroneous interpretation. \_\_\_\_\_ ■



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