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PRESUMPTIONS AND FICTIONS AS THE ELEMENTS OF A STATUTORY ACT TEXT

The article deals with the presumptions and fictions in relation to their technical and legal significance and the peculiarities of their capturing in the text of a statutory act. The case studies discussed in the article show that they can be captured both directly and indirectly in the case where they can be identified only by the text interpretation. At the same time it is noted that indirect presumptions should be transformed into direct ones for their better enforcement, and indirect fictions do not need this since no difficulties in their identification arise, and this way of capturing is efficient for them. Fictions should necessarily be separated from negative fictitious phenomena since they as well as presumptions participate in the development of legal terms and due to their unique nature optimize not only legal regulation but also law-making work of a legislator thus contributing to linguistic economy, making the text of the statutory act concise, laconic and unambiguous all of which contributes to the compliance with the rules of legal technique imposed on it. Presumption in the meaning of an assumption with high degree of logical and historical probability is used not only in law but also in other sciences and everyday life where it functions as fiction by means of which the knowingly false is recognized as true in order to overcome the situation uncertainty and in order to propose normal development of social relations. Thus, presumptions and fictions are necessary elements of the text of a statutory act allowing to explain its meaning to the addressees.

Key words: legal technique, presumption, fiction, efficiency of law-making, linguistic economy.

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Legal technique is a system of tools, techniques and rules that are used when creating, designing, and organizing normative legal acts in order to ensure their effectiveness of their regulatory impact. The main object of a legal technique is the text of a statutory act, therefore, the legal technique is aimed to structure it, make it clear, concise and unambiguous [Legal technique and its significance for law-making 2015].

This paper considers such means of legal technique as presumptions and fictions, features of their consolidation in the statutory acts text and the significance of such consolidation.

Let us start with the legal presumption. According to one of the most famous definitions of this concept, formulated by V. Babaev, "legal presumption is an assumption of legal existence or lack of legal facts based on the relationship between them and available facts and confirmed by previous experience" [Babaev 1991: 91].

This definition reveals the origin of legal presumptions, but its main features such as refutability are not indicated, as well as there is no indication of the application purpose.

Therefore, we think that the legal presumption is one of the means of legal technique. It consolidates a probable assumption which is considered true and fixed in legal rules until facts refuting it are proven, and used to protect various interests (of individuals, society, and the state).

In the text of a statutory act, legal presumption may be fixed in two ways: direct and indirect.

Direct method means direct fastening that does not require interpretations. It is implemented in three ways: using expressions "... unless proven otherwise", "...unless proved", "... is supposed" and others; by using the term "presumption" in a legal rule; by using the term "presumption" in the title of a Rule containing legal assumption [Kaminskaya 1948: 79–80].

For example, according to Part 1 of Rule 152 of the Civil Procedure Rules of the Russian Federation, establishing *the presumption good name of a citizen*, this presumption is valid if disseminating defamatory evidence will not prove that they correspond reality"; Part 2 of Rule 3 of the Federal Law on the Protection of Rights legal entities and individual entrepreneurs in the implementation state control (supervision) and municipal control" secures "*the presumption of good faith of legal entities, individual entrepreneurs*." Sometimes the legislator combines these options. So, Rule 315 of the Merchant Shipping Code of the Russian Federation, entitled "Presumption the innocence of the vessels" states that "none of those involved in the accident vessels are not supposed to be guilty unless otherwise proven," and Part 2 and Part 3 of Rule 1.5 of the Administrative Offenses Code of the Russian Federation, entitled "Presumption of innocence", contain the expression "until the fault is proved" and "is not obliged to prove his innocence".

Indirect presumptions may only be inferred by the text interpretation of a statutory act (for example, *the presumption of innocence of the defendant* (Rules 6 and 12 of the Civil Procedure Code of the Russian Federation), *the presumption of impartiality of a judge and some other persons participating in legal proceedings* (Rule 120 of the Constitution of the Russian Federation, Part 3 of Rule 16 of the Civil Procedure Code of the Russian Federation and Part 2 of Rule 18 of the Civil Procedure Code of the Russian Federation) and *the presumption of misunderstanding*

of the deed a person under the age of criminal responsibility (Part 1 of Rule 20 of the Criminal Procedure Code of the Russian Federation)).

Considering this feature of indirect presumptions, many scientists do not recognize their legal significance, believing that they are factual, not legal and constitute the motive that guides the legislator, in fixing the relevant legal norm, and argue that the only possible way to consolidate legal presumptions are direct presumptions (Tsukanov 2001; Davydova 2009; Bronnikova 2006; Gros' 1999; and others).

E. Vedeneev rightly believes that for the better application assumptions should be enshrined in laws so that they are not required interpretation, since the identification, interpretation, and practical application of indirect presumption cause certain difficulties and, as a result, leads to the discussions on this issue [Vedeneev 1998: 46].

But denying of the existence and legal significance of the given legal presumption is pointless, since each of them plays an active role in legal regulation, causing relevant legal consequences.

In addition, many indirect presumptions are formulated by the Constitutional Court of the Russian Federation (such as: *the presumption of activities conformity of legally elected representative bodies of entities to the Russian Federation Constitution and the Russian Federation legislation, the presumption of federal provisions constitutionality, the presumption of good faith and reasonableness of constitutional bodies actions, the presumption of good faith of an income taxpayer, the presumption of legislator's integrity and their commitment to common legal principles, the presumption of the law knowledge* [Serikov 2008: 19]), which determines their special status and leaves no doubt in their legal significance.

Therefore, we think that it is necessary to transform indirect presumptions to the direct ones and continue to use the direct method of presumptions consolidation, as this meets the requirement of legal techniques for conciseness, clarity, and unambiguity of the statutory acts texts in which they are enshrined. This will promote the effective identification and application of legal presumptions in practice, which will lead to both the optimization of legal regulation and procedural economy, and to rationalize the legislative work of the legislator and linguistic economy.

In general, legal presumptions have very important technical legal value, they participate in the formation of many legal terms (*presumption of paternity, presumption of authorship, presumption good faith, presumption of guilt, presumption of innocence*, etc.) and contribute to the rationalization of legal terminology.

However, G. Sinchenko gives the use of presumptions in law as one of the examples of hyperterminologization, arguing that "according to the explanatory dictionary, the term "presumption" is interpreted in two ways: in philosophy it is an assumption based on plausible assumptions; in jurisprudence it is an assumption that is considered true as long as its correctness is not disproved. But since the term is

unambiguous inside its terminological field, insofar as there is one foreign word that has taken place in the written speech" [Sinchenko 2017: 58].

This view begs the question because definitions do not contradict each other, the legal definition is overlapped on the philosophical one (it demonstrates more clearly definition of V. Babaev, mentioned above). In that sense (assumptions having a certain degree of probability, logical and historical), presumption is used in many sciences (psychology [Pervomaysky 2001: 107], biology [Pavlinov 2005: 436]) and in everyday life.

Some presumptions developed by a particular science or formed on the basis of everyday experience and common sense (for example, *the presumption that each personality type has appropriate psychological attitudes or the presumption of poor visibility in certain weather conditions*) are used by the legislator and law enforcer as an internal justification for decision making or a motive to establish a legal rule, although they do not have a legal value (such presumptions are called actual presumptions [Fedotov 2001: 48]).

The presumption is also used in the same sense in law (there its logical and philosophical aspects are manifested), since legal presumptions, highly probable (and they contain the majority of all the presumptions) are formed in this way.

Of course, there are improbable legal presumptions (for example, *the presumption of innocence*), but they are an exception to the rule. Moreover, they are also based on the previous experience; they only fix a completely contrary provision to the result of such generalization in order to defend the interests of the accused (as practice shows, most of them are guilty).

From the point of a legal, but not of a logical and philosophical approach (the defender of which is V. Babaev) legal presumption is defined as an evidence-based method by which under the presence of certain conditions, a conclusion is made about the presence or absence of some facts that cannot be proved [Volozhanin 1953: 5].

But since such an evidence-based method also has logical and philosophical origin, this definition does not contradict the definitions considered above, and is also superimposed on them. Therefore, in our opinion, it is not necessary to oppose the logical and philosophical and legal approaches to the essence of legal presumption, as they represent two equal aspects of it, characterizing its different features.

Thus, we suppose that there is a general term "presumption", which is used in all sciences (including law) and in everyday life, and its consolidation in the text of a statutory act, including its participation in the formation of other legal terms, has a huge positive impact and is not an example of hyperterminologization.

Now we turn to the consideration of a legal fiction.

According to V. Babaev, "legal fiction is technical and legal technique applicable in law through which the nonexistent position (attitude) is declared existing and acquires mandatory by virtue of its consolidation in the legal rule" [Babaev 1974: 28].

We offer the following authors' definition, characterizing it completely: legal fiction is a means of legal technique, through which deliberately false irrefutable position deforming reality in a certain way in order to protect various interests (individuals, societies, and state) is assigned in legal rules. In our opinion, the "means of legal technique" is a concept with a more generalized meaning being compared with the "technical and legal technique" (which characterizes a way of expressing the legislative will in the text of a legal act). It denotes a tool for regulating public relations [Filimonova 2013: 52]. A falsism is the main sign of legal fiction, emphasizing its uniqueness and allowing to delimit it from other means of legal technique; recognition of the non-existent provision as an existing one is only a type of reality deformation produced by legal fictions (V. Babaev also highlighted the recognition of the non-existent provision, equating different and even opposing concepts, recognition circumstances arising earlier or later than what it was at the very case [Babaev 2013: 345]); the target component of legal fiction should be indicated in the definition of its concept. In addition, it denotes its positive value.

Legal fiction, like legal presumption, may be enshrined in the text of a regulatory act, either directly or indirectly [Kovtun 2010: 231].

Direct fiction is fixed, as a rule, while using the words "considered", "not considered", "not taken into account", etc. For example, "*when timely directed notification of acceptance is received late, the acceptance is not considered late if the party that sent the offer does not immediately notify the other party of the acceptance received late. If the party who sent the offer immediately informs the other party of its acceptance received late, the contract is formed*" according to Rule 442 of the Civil Procedural Code of the Russian Federation, and according to Part 4 of Rule 18 of the Criminal Code certain criminal records established by the Russian Federation Criminal Code are not taken into account in recognition of relapse.

Indirect fictions are derived from the text of a legal act by interpreting it. For example, according to Part 5 of Rule 34 of the Criminal Code "*in the case of misconduct by the perpetrator of the crime the circumstances of the other Partners are criminally liable for preparing for a crime or attempted crime. The person who, due to circumstances beyond their control, failed to persuade others to commit a crime, is also criminally responsible for preparing a crime*", that is, the completed actions of the organizer, instigator, and accomplice are equated to the incomplete actions [Sitnikova 2008: 65].

It should be noted that the existence of indirect fictions, in contrast to indirect presumptions, does not cause the academic discussion, but their identification and the application does not entail difficulties in practice, so there is no need (moreover, it is not always possible or advisable) to transform indirect fictions into direct and use only direct method consolidation, as it is the case with legal presumptions.

Legal fiction with the help of reality deformations does not only optimizes legal regulation, but also makes the texts of legal acts more capacious, clear, concise, and unambiguous, participating in the formation of legal terms (*legal entity, uncertified*

security, "incorporeal" thing, etc.). Thus, they perform the function of legislative and linguistic economy, especially through equating and artificial assimilation of various and even opposite concepts (the extension of the legal regime of one object to another [Dzhazoyan 2006: 8]), as it eliminates the need to create separate modes for some objects and prevents unnecessary increase in number of legal rules and legislative acts (for example, *attribution of aircraft and sea vessels as well as inland vessels and other property specified in the law to the immovables subjected to state registration*, as it is said in Part 1 of Rule 130 of the Civil Procedural Code of the Russian Federation).

In everyday life, the concept of "fiction" has developed a negative relation due to identification with fictitious phenomena having negative value (fictitious states, fictitious actions, and fictitious norms). Fictitious states (e.g., *fictitious marriage, fictitious divorce, fictitious adoption*) and fictitious actions aimed at finding fictitious states (for example, *showing of fictitious documents, use of fictitious money*) have a goal to satisfy the interests, contrary to the interests of society and the state. And fictitious norms are norms that are not implemented in practice due to the incorrect reflection of reality in them, either lack of legal mechanisms for their implementation in legislation [Panko 1999: 1]. In our opinion, fiction as a means should be delimited from fictitious phenomena in order to its better understanding, researching and disclosure of its positive properties.

Fiction as a means of rationalizing certain rules in order to overcome a situation of uncertainty and normal development of public relations is used not only in law, but also in other sciences (for example, *proof by contradiction* in mathematics, when false is seen as true for a theorem proofing) or in everyday life (e.g. fictions are used in establishing rules for board games when calculating points earned by players). Fiction is also used when setting payment rules, publication of academic papers (e.g. in some magazines the cost is calculated per page, while less than half of the page is not counted, and more than half of it is considered a full page).

Thus, presumptions and fictions are necessary elements of the text of a statutory act which allow expressing its meaning to the addressees.

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