Pázmány Law Review
VI. 2018. • 105–130

ARTICLES

PRESUMPTION AND FICTION
Or the Gist of Legal Technicalities

Csaba Varga
Professor Emeritus, Pázmány Péter Catholic University

1. Introduction

Legal technique is a complex phenomenon, consisting of a set of various skills, methods, ways and procedures, organized into a functioning unity. It is an instrumental phenomenon, established in order to make the law's functioning possible in a way it is considered socially desirable, by properly shaping its norms, their judicial interpretation and practical implementation. It is the medium to filter – by transforming considerations outside the law into components inside the law as in-built elements of that law – all impetuses, theoretical or practical, cognitive, evaluational or volitional, which may exert an influence on its jurisprudential development.[1] Or, legal technique is the carrier of the distinctively juristic genius. It features all the characteristics that make legal system a socially useful artificial system, conventionalized through formalized human practice.[2] It is the reason why presumption and fiction are usually described as *par excellence* means of legal technique, representative of its inventiveness. Their artificial instrumentality gets emphasized to such a degree that even their distinction is most often minimized. Therefore, their common characterization from the point of view of their artificiality sometimes risks achieving their misrepresentation. However, as it will be argued

[1] Csaba Varga – József Szájer: Legal Technique. In: Erhard Mock – Csaba Varga (eds.): *Rechtskultur – Denkkultur. Ergebnisse des ungarisch–österreichischen Symposiums der Internationale Vereinigung für Rechts- und Sozialphilosophie 1987.* [ARSP Beiheft 35]. Wiesbaden–Stuttgart, Franz Steiner, 1989. 136–147. {in reprint: http://mek.oszk.hu/14600/14657/ 368–383.}

[2] Csaba Varga: Theory and Practice in Law. On the Magical Role of Legal Technique. *Acta Juridica Hungarica*, vol. 47., no. 4. (2006) 351–372., http://real-j.mtak.hu/761/1/ACTAJURIDICA_47.pdf; Csaba Varga: Doctrine and Technique in Law. *Iustum Aequum Salutare*, vol. 4., no. 1. (2008) http://ias.jak.ppke.hu/hir/ias/20081sz/02.pdf 23–37.

upon later on, presumption and fiction are heterogeneous phenomena between each other.

Technical aspects of human practice, its notional constructions and ideological expressions may be bound to a common name even in the case they are only genetically somehow related to, but both structurally and functionally differing from, each other. The want of commonness may be concealed by their theoretical characterization with one feature, characteristic of only one of their particular historical manifestations, notwithstanding, generalized as the feature characteristic of the phenomenon itself. As it will also be argued for later on, both as to their differing historical manifestations and fields of realization, too, presumption and fiction[3] are by and large heterogeneous phenomena in themselves as well.

2. Presumption

In its original meaning, "»assumption from the outset« on the truth of the facts of a case"[4] or, with a logical reconstruction, "probability consequence",[5] „l'argumentatio probabilis »posita in communi omnium intellectu«"[6] or, in most general terms, "presupposition without full evidence"[7] that "substitutes to the constatation of a fact something deduced from elements only indirectly connected to this fact",[8] by "anticipating what has not been proved".[9] Speaking in the language of pure logic, the structure is simple, moreover, partly it covers fiction, too. For there is a sequence of assertions hidden in them: "Given the existence of A, the existence of B must be assumed. A is the basic fact, B is the assumed fact."[10] In its specially legal meaning, it is a technique of constructing the facts that constitute a legal case in a way that the

---

3 For a first approach by the author, with József Szájer having co-authored, cf. http://mek.oszk.hu/15300/15333/#_168–185.

4 „Die 'Annahme im voraus', die Annahme der Wahrheit einer Tatsache, Vermutung". Hermann Gottlieb Heumann: *Heumanns Handlexikon zu den Quellen des römischen Rechts*. Hrsg: Emil Seckel [1851.]. Jena, Fischer, [9]1907. 454.

5 „Wahrscheinlichkeitsfolgerung" Joseph Unger: *System des österreichischen allgemeinen Privatrechts.* Bd. II. [1863.] Leipzig, Breitkopf und Härtel, [3]1868. 579.

6 Quint. *Inst. Or.* 5, 10, 18, cf. Virgilio Andrioli: Presunzioni. In: Antonio Azara – Ernesto Eula (dir.): *Novissimo Digesto Italiano.* Vol. 13. Torino, Editrice Torinese, 1968. 765–772., 765.

7 „Voraussetzen – ohne vollkommenen Beweis". Ernst Rudolf Bierling: Rechtsvermutungen. In: Franz Holtzendorff (Hrsg.): *Encyclopädie der Rechtswissenschaft.* Bd. III. [1870.]. Leipzig, Duncker & Humblot, [3]1881. 301–307., 301.

8 „Substituer à la constation d'un fait une donnée déduite d'éléments qui ne touchent qu'indirectement ce fait". François Russo: *Réalité juridique et réalité sociale: Étude sur les rapports entre le droit et la sociologie et sur le rôle du droit dans la vie sociale.* Paris, Sirey, 1942. xvi+211., 103.

9 „Une anticipation sur ce qui n'est pas prouvé". André Lalande: *Vocabulaire technique et critique de la philosophie.* [1926.]. Paris, Presses Universitaires de France, [5]1947. 802.

10 Edmund M. Morgan: Presumptions. *Washington Law Review and State Bar Journal*, vol. 12., no. 4. (1937) 255. et seq. 257., quoted by Ernest F. Roberts: Introduction to the Study of Presumptions. *Villanova Law Review*, vol. 4., no. 1. (1958). http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1461&context=vlr 1.

proof of normatively selected and defined facts shall be sufficient for a qualification otherwise not justified.

As a construction of law and a specific way of expressing its norms, it is widespread from the age of classical Roman law. It may also be normatively defined. According to the French *Code civil* Art. 1349, e.g., "Presumptions are consequences that the law or the court draws from a known fact to an unknown fact."[11] or, as defined by canon law, "a probable conjecture about an uncertain matter; a presumption of law is one which the law itself establishes; a human presumption is one which a judge formulates.",[12] or, in an American formulation, "A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action."[13]

A distinction between the cognitive and the normative usages of presumption –"preferred by humans" and "ordered by the legal order"[14] – was made by the Digest, early interpolated in the Middle Ages. A further distinction within its normative usage was made by early specialists of civil and canon law in the following manner: „Dispositio legis, aliquid praesumentis et super praesumpt o tamquam sibi comparto statuentis. Juris, quia a lege introducta est, et de jure, quia super tali praesumptione lex inducit firmum ius et habet earn pro veritate."[15]

2.1. In the judicial process of establishing the facts: *praesumptio homini vel facti*

It is termed mostly without determiner: 'presumption'; or, with expressedly disqualifying determiner: 'general'[16] or 'simple presumption'[17], sometimes with determiner: 'simply judicial or factual presumption'.[18] It is „[r]easoning by which an uncertain but probable conclusion on issue of facts is reached".[19] It has

---

[11] „Les présomptions sont des conséquences que la loi ou le magistrat tire d'un fait connu à un fait inconnu".

[12] *Codex Iuris Canonici* / *Code of Canon Law. Latin–English edition.* Translation prepared under the auspices of the Canon Law Society of America. Washington, Canon Law Society of America, 1983. c. 1584.

[13] *The Uniform Rules of Evidence* adoped by the National Conference of Commissioners of Uniform State Laws at its annual meeting in Boston in 1953. Published: Judson F. Falknor: Evidence. *Annual Survey of American Law*, (1953) 755. et seq. 787., Rule 13. Or, according to an almost contemporary authorial definition, "A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise." Roberts op. cit. 35.

[14] „Die von gewissen Personen gehegte Vermutung / die von der Rechtsordnung befohlene Vermutung". Heumann op. cit. 454.

[15] Alciatus: *De Praesumptionibus.* Cf. Aleksander Kunicki: *Domniemania w prawie przeczowym.* [Presumption in law]. Warszawa, Wyd. Prawnicze, 1969. 187., 18.

[16] „Gemeine Vermutung". Unger (1868) op. cit. 580.

[17] „Présomption simple". Lalande op. cit. 802.

[18] „Einfache richterliche oder faktische Vermutung". Bierling op. cit. 301.

[19] „Raisonnement par lequel on pose, en matière de fait, une conclusion probable, quoique incertaine". Lalande op. cit. 802.

cognitive character, substituting a definite degree of circumstantial evidence for positive proof. "Presuming [...] is accepting the truth of what can generally be true but in the case is only probable or simply possible",[20] or, more precisely, "one recognizes as demonstrated a fact, which according to the rules of the experience has existed, because another fact has had existed, according to conclusive proofs".[21] Consequently, though it may be established and disposed of normatively – e.g., the *Code civil* Art. 1353 provides that "Presumptions not established by statute are left to the learning and wisdom of the judge, who shall only admit serious, precise, and consistent presumptions [...]."[22] – still it preconditions a kind of cognitive process through inductive reasoning. Or, the specificity of this cognitive process is defined by »intimate conviction« substituting for proof, as stated by the *Cour de cassation*: "being indirect and acquired by induction, it is sufficient that it be of a nature to reassure the judge's conscience and to dictate his decision".[23]

2.2. In the normative definition of the facts to be established in order that, in the absence of proof to the contrary, a case is constituted: *praesumptio juris tantum*

"Inconclusive or rebuttable to be drawn from given facts, and which are conclusive until disproved by evidence to the contrary."[24] According to the *Code civil* Art. 1350 and 1352, "A legal presumption is one that a special statute attaches to certain acts or to certain facts [...] A legal presumption dispenses him in whose favor it exists from any proof."[25] Or, it is in respect of what is called 'statutory'[26] or 'legal presumption'[27] that it is emphasized: "presumption is a legal imperative"[28] and "a legal norm

---

[20] Jean Dabin: *La technique de l'élaboration du droit positif. Spécialement du droit privé.* Bruxelles–Paris, Bruylant–Sirey, 1935. xii+367., 235.: „Présumer [...] c'est poser d'avance comme vrai dans tous les cas ce qui est peut-être vrai d'une manière générale, mais qui, en chaque cas particulier, n'est que probable ou même, parfois simplement possible".

[21] „On reconnaît comme démontré un fait, qui selon les règles de l'expérience a existé, car un autre fait avait existé, d'après des preuves conclusives.» Jerzy Wróblewski: Structure et fonctions des présomptions juridiques. In: Chaïm Perelman – Paul Foriers (publ.): *Les présomptions et les fictions en droit.* Bruxelles, Brulylant, 1974. 43–71., 66.

[22] „Les présomptions qui ne sont point établies par la loi, sont abandonnées aux lumières et à la prudence du magistrat, qui ne doit admettre que des présomptions graves, précises et concordantes".

[23] „Cette preuve étant indirecte et acquise par voie d'induction, il suffit qu'elle soit de nature à rassurer la conscience du juge et à lui dicter sa décision." In: Cass., 23 avril 1914, 192., I[ère] colonne; cf. Paul Foriers: Présomptions et Fictions. In: Perelman–Foriers op. cit. 7–43., 10.

[24] Earl Jowitt: *A Dictionary of English Law.* Ed.: Clifford Walsh. Vol. 2. London, Sweet and Maxwell, 1959. 1398.

[25] „La présomption légale est celle qui est attachée par une loi spéciale à certains faits. [...] La présomption légale dispense de toute preuve celui au profit duquel elle existe".

[26] „Gesetzliche Vermutung". Unger (1868) op. cit. 580.

[27] „Rechtsvermutung". Bierling op. cit. 304.

[28] „La présomption est un impératif légal". Kunicki op. cit. 187.

itself";[29] or, in other words: "Each presumption is a construction of the legal language and the result of a legislative decision that links the premises and conclusions of the presumptions".[30] At the same time, the historical analysis of the development of judicial practice can show that "presumption of jurisprudential origin" has been the prime factor of presumptive jurisprudence, constructing and making use of both *praesumptiones juris tantum* and *praesumptiones juris et de jure*.[31]

2.3. In the normative definition of the facts to be established in order that, by the wording and force of the law, a case is constituted: *praesumptio juris et de jure*

Rarely also termed as 'violent'[32]; these "irrebuttable or conclusive presumptions are absolute inferences established by law".[33] They are quite artificial a legal construction, conceivable and interpretable within—as permitted by—a normative context only. "The structure of this *praesumptio* is simple: it specifies the conditions under which certain legal consequences must be recognized. It corresponds to the basic form of the legal norm".[34]

Or, according to theoretical reconstruction, although it may have been developed through extrapolation from genuine presumptions but, however, it stands in and for itself, even if a misleading name is then given to it. For "[i]t is a part of the very definition of a presumption that it is rebuttable. An irrebuttable or conclusive presumption would be a contradiction in terms. The conclusive presumption – the old *presumptio juris et de jure* – is therefore in no true sense a presumption at all",[35] "but a rule of the substantive law of the legal field within which it operates".[36] Otherwise speaking, terms of description and logic of operation are running against one another here. American pragmatism emphasizes what is at stake here genuinely. Accordingly, "»[c]onclusive presumptions« or »irrebuttable presumptions« are usually mere

---

[29] „È una norma giuridica". Guido Donatuti: Le praesumptions iuris in diritto romano. In: Guido Donatuti: *Studi in diritto romano.* Vol. 1. A cura di Robero Reggi. Milano, Giuffrè, 1976. 421–486., 421.

[30] Wróblewski op cit. 51.: „Chaque présomption est une construction de la langue juridique et le résultat d'une décision législative qui lie les prémisses et les conclusions des présomptions".

[31] „Présomption d'origine jurisprudentielle". Chaïm Perelman: *Logique juridique. Nouvelle rhétorique.* Paris, Dalloz, 1976. 61.

[32] William Blackstone: *Commentaries on the Laws of England.* Vol. III. [1765–1769.]. London, Print Strahan-Cadell-Prince, [6]1774. 372.

[33] Jowitt op. cit. 1398.

[34] Wróblewski op. cit. 69.: „La structure de cette *praesumptio* est simple – elle précise les conditions dans lesquelles on doit reconnaître certaines conséquences juridiques. Elle correspond à la forme élémentaire de la norme juridique".

[35] Charles Frederic Chamberlayn: *A Treatise on the Modern Law of Evidence.* Vol. V. Albany, N.Y., Matthew Bender, 1915. 1161., quoted by Paul Brosman: The Statutory Presumption. *Tulane Law Review*, vol. 5. (1930–1931) 17–54., 25., note 28.

[36] Paul Brosman: The Statutory Presumption. *Tulane Law Review*, vol. 6. (1930–1931) 178–210., 209.

fictions, to disguise a rule of substantive law",[37] for an option made to it "concerns the law of proof to exactly the same extent as other changes in the substantive law" (or, as summarized by the same author in the end of his explanation, "[s]uch a presumption is a rule of law, and since, until rebutted, it so far establishes a fact as to require the adjudication of the rights of litigants on the basis of its existence, it is a rule of the law of evidence.").[38]

2.4. Theoretical reconstruction

Having in mind a possible theoretical reconstruction, approaches to and understandings of presumption in the legal domain divide into two main tendencies:

A) those directed by *epistemological considerations* and

a) based on the bare probability of the presuming facts establishing a *logically necessary link* to the presumed facts. As presumption being considered epistemologically here, this linkage seems to be a *sine qua non* of avoiding false identification. "In order for the presumption rationally justify, it is necessary that it be supported by plausibility. Only what is normal can be presumed by the law […], otherwise it degenerates into fiction".[39] For "the presumption establishes an inference that experience and common sense justify; it is based on the fact of social life";[40]

b) identifying presumption as a specific technique of evidence *allotting the burden of proof.* At earlier times, induction and inference as components of the judicial manipulation of facts were emphasized. Prime role was played in it by the *Code civil* Section III, § 2, disposing of "Presumptions not established by statute" and advancing, as most general definition in Art. 1349, that "Presumptions are consequences that the law or the court draws from a known fact to an unknown fact."[41] Several authors have arrived at similar conclusions. For a 19th century author, "a law providing for a legal presumption requires the judge to accept an assertion not only for probable, but for true (certain), once some well-defined other assertion gets proved (certain)".[42] For a 20th century interwar author, "a

---

[37] John Henry Wigmore: *A Student's Textbook of the Law of Evidence.* Chicago, The Foundation Press, 1935. § 451(4)., quoted by Roberts op. cit. 15.

[38] Francis H. Bohlen: The Effect of Rebuttable Presumptions of Law upon the Burden of Proof. *University of Pennsylvania Law Review*, vol. 68., no. 4. (1920) 307–321., http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7784&context=penn_law_review 311–312., respectively 313., quoted by Brosman *Tulane Law Review*, vol. 5. (1930–1931), op. cit. 25., note 28, respectively 54.

[39] Jean Dabin: *Théorie générale du droit.* [1944.] Bruxelles, Bruylant, ²1953. 227.: „Encore faut-il, pour que rationellement la présomption se justifie, qu'elle prenne appui sur des vraisemblances. La loi ne peut présumer, même sous réserve de preuve contraire, que ce qui est normal, ou, sinon, la présomption dégénère en fiction".

[40] Lon L. Fuller: *Legal Fictions.* Stanford, Stanford University Press, 1967. xiii+142., 43.

[41] „Des présomptions qui ne sont point établies par la loi" / „Les présomptions sont des conséquences que la loi ou le magistrat tire d'un fait connu à un fait inconnu".

[42] Unger (1868) op. cit. 580.: „Ein Gesetz, welches eine Rechtsvermutung aufstellt, schreibt dem Richter vor, eine Behauptung nicht bloß für wahrscheinlich, sondern für wahr (gewiß) anzunehmen,

certain fact is held to be true independently of any verification equivalent to proof".[43] This latter opinion has in the meantime turned into a rather general stand. Even modern logical reconstruction is influenced by it to the effect that, for the theoretical explanation of legal presumption in general, it sometimes refers to the historical antecedents of why to permit a presuming norm (e.g., to "difficult proofs", to the regulatory wish to "place the burden of proof in a special way", or to the ensuing circumstance intervening the whole process that "the norm of presumption predefines the direction of the decision"[44]). For, as a means of allotting the burden of proof between litigants, any construction of presumption is a clear intervention into their game, changing the chances of its outcome.[45]

B) those seeing in presumption a purely technical-legal instrument, only dictated by considerations of *practical expediency*

a) in a rather simplifying way, accepting the law's technical features and regarding them as *added outwardly* to (and also in duplication of) the law's organic components. For instance, "Courts are sometimes bound to accept certain well-established legal presumptions and artificial facts-in-law instead of real and ascertainable facts"[46] – as if facts in law, able to ascertain, could be bare facts without their prior transcription in the law, that is, without their transformation into and homogenization within its conceptual system from the beginning;

b) and developing, at the same time, an idea(l) of *modern formal law* consequentially to the end. "From a logical side, presumptions promote easy and rapid applicability, with comprehensible and clear features replacing difficult-to-comprehend beings."[47] This is an early formulation of the criterion of modern formal law, according to which "[l]aw [...] is »formal« to the extent that, in both substantive and procedural matters, only unambiguous general characteristics of the facts of the case are taken into account." Within this formalism, as it is known, „the legally relevant characteristics are of a tangible nature, i.e., that they are perceptible as sense data. This adherence to external characteristics of the facts [...] represents the most rigorous type of legal formalism. The other type of the legally relevant characteristics of

---

sobald eine bestimmte andere Behauptung erwiesen (gewiß) ist".

43 „Un certain fait est tenu pour vrai en dehors de toute vérification équivalente à preuve". Dabin (1935) op. cit. 238.

44 „Preuves difficiles", „placer d'une façon spéciale le fardeau de la preuve", „la norme de présomption détermine la direction de la décision". In Wróblewski op. cit. 56.

45 Shi-guo Luo: The Analyses of game on legal presumption. (In Chinese language). *US–China Law Review*, vol. 9., no. 9. (2007) 37–42.

46 Paul Vinogradoff: *Common-Sense in Law.* [1913.] [Home university library of modern knowledge 83]. London, Butterworth, 1933. 94.

47 Adolf Trendelenburg: *Naturrecht auf dem Grunde der Ethik.* [1860.] Leipzig, Hirzel, ²1868. 173.: „Von der logischen Seite fördern [die Präsumptionen] leichte und rasche Anwendbarkeit, indem faßliche und anschauliche Merkmale an die Stelle des schwer zu ergründenen Wesens treten".

the facts are disclosed through the logical analysis of meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied."[48] If facts constituting a legal case are to be defined exclusively by the law, then presumption will be nothing else but a specific way of constructing a legal norm. "The legal presumption is merely a special form of the statutory definition of the facts that constitute a case", in which, at least in point of principle, one can construe "two, duplicated circles of such facts": the 'original' one which is presumed by the legal norm and the 'other, practical one' through which the legal norm presumes. In case of *praesumptio juris tantum*, presuming facts are weakened in so far as "only the exception in favor of the ideal circle of facts is dropped", but in case of *praesumptio juris et de jure* they are "equally strong", if not completely overlapping each other.[49]

3. On presumption

In general, literary treatments of presumption survey the usage in law of *praesumptiones homini vel facti* as well. However, most of authors agree that legal presumptions are practically considered and imbued with technical elements to such an extent that they form a separate group and need a separate analysis.

3.1. Function

For the sake of conceptual simplicity, authors in general approach to legal presumption as if it were the usage of ordinary presumption in a special domain. What is law doing? It is said to order, by selecting and defining facts to which, if ascertained in a judicial process, legal consequences will be attached. In order to impute legal consequences, selection of such facts may be needed whose ascertainment can meet difficulties in practice. This is the field of presumptions.

---

[48] Max Weber: *Rechtssoziologie.* Hrsg.: Johannes Winckelmann. Neuwied, Luchterhand, 1960. 102.: „'Formal' aber ist ein Recht insoweit, als ausschließlich eindeutige generelle Tatbestandsmerkmale materiell-rechtlich und prozessual beachtet werden." / „können die rechtlich relevanten Merkmale sinnlich anschaulichen Charakter besitzen. Das Haften an diesen äußerlichen Merkmalen [...] bedeutet die strengste Art des Rechtsformalismus. Oder die rechtlich relevanten Merkmale werden durch logische Sinndeutung erschlossen und danach feste Rechtsbegriffe in Gestalt streng abstrakter Regeln gebildet und angewendet". The quotation in English is taken from Max Rheinstein (ed.): *Max Weber on Law in Economy and Society.* Wirtschaft und Gesellschaft. [2]1925. Trans.: Edward Shils [1954.]. [A Clarion Book] New York, Simon and Schuster, 1967. & https://archive.org/stream/in.ernet.dli.2015.130910/2015.130910.Max-Weber-On-Law-In-Economy-And-Society_djvu.txt

[49] „Ist die gesetzliche Vermutung bloß eine besondere Form der gesetzlichen Festsetzung des Tatbestandes" / „einen doppelten Tatbestand" / „ursprünglichen" / „anderen praktischen Tatbestand" / „nur die Ausnahme zugunsten des idealen Tatbestandes ist fallengelassen" / „gleichkräftig". Alexander Sándor Plósz: Die Natur der gesetzlichen Vermutungen. In: *Festschrift für Adolf Wach*. Bd. II. Leipzig, Meiner, 1913. 3–40., 15. and with definition, 21.

> "Positive proof is always required, where from the nature of the case it appears it might possibly have been had. But, next to positive proof" – Blackstone explains,[50] viewing the matter from the point of judicial cognition and subsequent decision – circumstantial evidence of the doctrine of presumptions must take place: for when the fact itself cannot be demonstratively evidenced, that which comes nearest to the proof of the fact is the proof of such circumstances which either necessarily, or usually, attend such facts; and those are called presumptions, which are only to be relied upon till the contrary be actually proved. *Stabitur praesumptioni donec probetur in contrarium.*"

This is to mean that presumption is from the very start a normative (and, in this sense, arbitrary) intervention into inductive reasoning, given the fact that it "attaches to any given possibility a degree of certainty to which it normally has no right. It knowingly gives an insufficient proof the value of a sufficient one".[51] In simple words, "presumptions anticipate a possible answer to a controversial question, in order to bring about a decision."[52]

Presuming practice, while preserving something of a primitive cognitive character, will also touch upon reality by breaking down its complexity to indices making up its elementary structure(s). "Through the use of presumptions the law confers upon facts a clarity of outline lacking in nature. The presumption introduces into an entangled mass of interrelated events a certain tractable simplicity".[53] For it "facilitates the course of proof, deliberately distorting elusive realities to firm frames".[54] Or,

> "Legal presumptions are recognized legal provisions that restrict the free evaluation of evidence: The judge has to consider a fact that is significant in the case of a dispute, even if it does not prove this very fact but another, usually simpler and more easily provable fact, with which, according to general life experience, the legally relevant fact is associated."[55]

---

50 Blackstone op. cit. 371.

51 Pierre de Tourtoulon: *Philosophy in the Development of Law.* Trans.: M. McC. Read. New York, Kelley, 1922. (New Yersey, Rothman Reprints, 1969.) 398.

52 Daniel Mendonca: Presumptions. *Ratio Juris*, vol. 11., no. 4. (1998) 399–412., 399.

53 Fuller op cit. 108.

54 „Facilite le cours de la preuve, en déformant délibérément des réalités insaisissables pour les ramener à des cadres fermes". René Dekkers: *La fiction juridique. Étude du droit romain et de droit comparé.* Paris, Sirey, 1935. 250., 25.

55 Max Kaser: Beweislast und Vermutung im römischen Formularprozess. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, vol. 71. (1954) 221–241., 231.: „Rechtsvermutungen sind anerkannte Rechtssätze, die die freie Beweiswürdigung einschränken: Der Richter hat eine im Streitfall erhebliche Tatsache auch dann für gegeben zu halten, wenn ihm nicht diese Tatsache selbst bewiesen wird, sondern ein anderer, meist einfacherer und leichter beweisbarer Sachverhalt, mit dem jene rechtserhebliche Tatsache nach allgemeiner Lebenserfahrung verbunden zu sein pflegt".

All this characterization holds true: presumption is a free judicial means of abridging and simplifying the proof of the case, under conditions in which "as its basis, not logic or truth, but expediency"[56] is to prevail. Yet once the act of presuming becomes normative by its inclusion in the formal prescription of a law, presuming facts transform into facts that, as selected and defined by law, will then constitute a case in the law. That is, presuming facts transform into facts on equal footing with the facts that might have been judicially presumed should the facts of the case had not been ascertained but presumed by the judge of the instance.

3.3. Irrelevancy of epistemological foundations in respect of the normative field

Having in mind the fundamental structural difference between fiction and presumption, epistemological consideration is to miss the point even if we admit that connections of probability may have had their role to play both in the genesis and formation of presumptive practice. Still, such an epistemological background may have at most been but a by chance, incidental historical motive, for the only thing that in a normative relationship matters is the normative qualification of facts (normative presumption being one possibility of it, albeit most technical and instrumentally subordinated to further norms making normative qualification complete) and, with reference to such a qualification, the normative imputation of normatively determined consequences to normatively selected and defined facts. And in normative imputation, as known, practical considerations and their justifiable formulation within the normative context play the role of prime factors and whatever theoretical consideration can only assert itself through, and as mediated by, them.

Accordingly, there is a visualisable contrast between presumption and fiction in what old jurisprudents made explicit – „Praesumptio iuris et de iure est declaratoria rei dubiae, quia presumptio est verorum; fictio est falsorum"[57] or, as the theory-builder of fictionism echoed this stand a century ago, "In the praesumptio a presumption is made until the opposite is established. By contrast, the fiction ist the assumption of a statement of a fact, even though the opposite is certain."[58] –, but hardly suggesting

---

[56] Otis H. Fisk: *Presumptions in the Law. A Suggestion.* (no place, no press) 1921. & https://babel.hathitrust.org/cgi/pt?id=mdp.35112104259009;view=1up;seq=7 4., 9., resp. 11.

[57] Ubadi Perusini Baldo: *In secundam Digesti Veteris partem commentaria.* Venezia, 1599. Fol. 137 rb, ad tit. De ritu nuptiarum 1: Qui in provincia § Divus, quoted from L. Barassi: Le fictiones iuris in Baldo. In: *L'opera di Baldo.* Per cura dell'Univesità di Perugia nel V centenario della morte del grande giureconsulto. [Annali dell'Università di Perugia Facoltà di Giurisprudenza X–XI] Perugia, 1901. 113–138 on 124.; by Antonio Fiori: Praesumptio violenta o iuris et de iure? Qualche annotzione sul contributo canonistica alla teoria delle presunzioni. In: Orazio Condorelli– Franck Roumy – Mathias Schmoeckel (Hrsg.): *Der Einfluss der Kanonistik auf die europäische Rechtskultur.* Vol. 1. *Zivil- und Zivilprozessrecht.* Köln, etc., Böhlau, 2009. 75–106 at 102, note 114.; cf. Franco Todescan: *Diritto e realtà. Storia e teorie della fictio iuris.* [Pubblicazioni della Facoltà di giurisprudenza dell'Università di Padova 81]. Padova, CEDAM, 1979. xi+479., 172.

[58] Hans Vaihinger: *Die Philosophie des Als Ob. System der theoretischen, praktischen und religiösen Fiktionen der Menschheit auf Grund eines idealistischen Positivismus.* Berlin, Reutner und Reichard, 1911. xxxv+804., 258., quoted by Hans Kelsen: Zur Theorie der juristischen Fiktionen. Mit besonders

anything more than probably common genetical roots; and therefore, it has no relevance in the normative context of legal regulation.

Consequently, classifications of legal presumption based on epistemological considerations – e.g., the ones having in view "the normative relationship instituted by the presuming norm" and differentiating between 'anti-empirical, non-empirical et para-empirical' presumptions 'of fact' and 'of law' or, in another aspect, 'formal and material' ones[59] – are not reasonable enough within a normative context. For they seem to conceal that for and within the law a fact can only exist in so far as it is relevant. And it can only be relevant in so far as it leads to a legal consequence. And it can do so exclusively in virtue and with the mediation of a legal prescription normatively attaching a given consequence to a selected fact.

3.4. The technique of presumption

Doctrinal studies of law make a distinction between presumptions 'processual' and 'material',[60] ones 'in a strict sense' and 'in a large sense',[61] taken as 'presumption-proof' and 'presumption-concept',[62] meaning by the first the presumption by which facts presume those facts that constitute a case, which could be established by other means as well (e.g. paternity), in contrast to the second, by the force of which presuming fact is the one to which a legal consequence is imputed (e.g., "irrebuttable presumption of rejection" in case of the silence of administration for four months in France).[63] Indeed, from the point of view of the statutory construction of the set(s) of the facts to be ascertained in order that the facts constituting a legal case be established, there is a difference between them. However, both are common in their fundamental structure of determining the '*gesetzliche Tatsache*' by the selection and definition of the facts the proof of which shall be considered sufficient (with the admission or exclusion of a counterproof) for the official realisation of its establishment, in contrast to the direct formulation of the facts constituting a legal case, which leaves to the free judicial weighing of proofs to assess what are the reasons for and against its official establishment.

Berücksichtigung von Vaihinger's Philosophy des Als Ob. *Annalen der Philosophie*, no. 1. (1919) 630–658. {Transl. in: Maksymilian Del Mar – William Twining (ed.): *Legal Fictions in Theory and Practice.* [Law and Philosophy 110]. Cham, Springer, 2015. xxxvi+413., 110.}.

[59] „La relation normative institutée par la norme de la présomption" / „relations anti-empirique, non-empirique et para-empirique" / „présomption de fait et de droit" / „présomptions formelle et matérielle". Wróblewski op. cit. 59., 46., 49–50., 52–55.

[60] „Prozessualische Präsumption" / „materielle Präsumption". Hugo Burckhard: *Die civilistischen Präsumtionen.* Weimar, Landes-Industrie-Comptoir, 1866. xx+407., 166–193.

[61] „Présomption au sens strict" / présomption au sens large". François Gény: *Science et technique en droit prive positive. Nouvelle contribution à la critique de la méthode juridique.* Tome 3. Paris, Sirey, 1921. 264–270., 334–341.

[62] „Présomption-preuve" / „présomption-concept". Dabin (1935) op. cit. 240–241.

[63] „Présomption irréfragable de rejet"; cf. Jean Rivero: Fictions et présomptions en droit public français. In: Perelman–Foriers op. cit. 101–113., 102–103.

It is to be noted, too, that admission of counterproof and its exclusion are two extremes only in theory. In the practice of regulation, there is a variety of the possibilities of limitation ranging from the restriction of evidence (at *praesumptio juris tantum*) to the admission of counterproof as an exception (at *praesumptio juris et de jure*).[64]

Or, presumption is not the exclusively conceivable means of achieving the original target: it is a kind of legal technique substitutable by others. For instance, legal definition of the statuses of filiation is equally manageable through a search of »fatherhood« to be proved positively, with the help of a construction of »paternity« to be presumed, or by formulating a general rule about the conditions of imputing related rights and duties and making exceptions to them.

4. Fiction

As a phenomon and term known from imperial Roman culture onward, the use of fictions is widespread in legal cultures in which conceptualization and formalization have strongly developed. It is, "[i]n a general manner, what is feigned or produced by the mind".[65] Or, philosophically speaking, "an assumed fact notoriously false, upon which one reasons as if it were true",[66] or "feigning or assuming, »that something which obviously was, was not; or that something which obviously was not, was«".[67] That is, fiction being "any conscious, purposeful, but wrong assumption",[68] it is "an ideal modification and correction of concrete reality".[69] Its concept being a function of its differing use characteristic of systems of Roman Law, Common Law, and Civil Law, neither its definition nor its theoretical conception forms a historical continuum. They rather reflect its case to case changing prime application and typical manifestation.

64 Plósz op. cit. 15.

65 „D'une façon générale, ce qui est feint ou fabriqué par l'esprit". Lalande op. cit. 355.

66 Jeremy Bentham: *Theory of Legislation.* Ed.: C. K. Ogden. London, K. Paul, Trench, Trubner & Co. Ltd., 1931. Cf. also Pierre J. J. Olivier: *Legal Fictions in Practice and Legal Science.* Rotterdam, Rotterdam University Press, 1975. viii+176., 32.

67 John Austin: *Lectures on Jurisprudence, Or Philosophy of Positive Law.* Ed.: Robert Campbell. London, Murray, [4]1873. 629.

68 „Jede bewußte, zweckmäßige, aber falsche Annahme". Vaihinger op. cit. 130.

69 „Une ideale modificazione e correzione della realtà concreta". Vicenso Colacino: Fictio iuris. In: Antonio Azara – Ernesto Eula (dir.): *Novissimo Digesto Italiano.* Vol. 7. Torino, Editrice Torinese, 1968. 269–271., 270.

4.1. In the linguistic formulation of legal norms

It is termed mostly without determiner: 'fiction'. From 19th century onward, frequently with distinguisher: 'fiction by the law',[70] 'legislative fiction',[71] or 'statutory fiction'.[72] Sometimes, also with a qualified distinguisher: 'legitimate legal fiction'.[73] Moreover, it may be termed with an adjective questioning the appropriateness of its own terming, e.g., 'so-called legal fiction'.[74] It gets defined as "»merely normative« equation",[75] "employed, ordered or permitted by a legislator in statutory enactments".[76] Its core is seen in "the attachment of a legal consequence to a legal proposition that triggers another legal proposition",[77] i.e., in "an abbreviating mode of expression. The law is to order the same for one case as for another".[78] Or, from the point of view of linguistic formulation, there is a fiction "whenever natural reality undergoes conscious denial or denaturation on behalf of the law-constructor jurist",[79] when they "actually designate something with a word that is commonly used in everyday language or the language of law to designate something very different".[80]

4.2. In the judicial application of legal norms

In Roman sources[81] and in English–American literature, it is termed mostly without determiner: 'fiction', or with the qualifying one: 'the typical legal fiction',[82] suggesting

---

70 „Gesetzesfiktion". In: Josef Esser: *Wert und Bedeutung der Rechtsfiktionen. Kritisches zur Technik der Gesetzgebung und zur bisherigen Dogmatik des Privatrechts.* Frankfurt am Main, Klostermann, 1940. 29. as well as Dieter Meurer: Fiktion als Gegenstand der Gesetzgebungslehre. In: Jürgen Rödig (Hrsg.): *Studien zu einer Theorie der Gesetzgebung.* Berlin–Heidelberg–New York, Springer, 1976. 281–296., 24.

71 Olivier op. cit. 95.

72 „Gesetzliche Fiktion". Oskar Bülow: Zivilprozessualische Fiktionen und Wahrheiten. *Archiv für die civilistische Praxis*, vol. 62. (1879) 1–96., 3., as well as Fuller op. cit. 90.

73 Jerome Frank: *Law and the Modern Mind.* [1930.] [Anchor books A350]. New York, Doubleday, 1963. xxxv+404., 348.

74 „Sogenannte juristische Fiktion". Rudolf Stammler: *Theorie der Rechtswissenschaft.* Halle, Waisenhaus, 1911. 328. et seq.

75 „'Bloß normative' Gleichsetzung". Esser op. cit. 29.

76 Olivier op. cit. 95.

77 „Der Anknüpfung einer Rechtsfolge an einen Rechtssatz, die ein anderer Rechtssatz auslöst". Meurer (1976) op. cit. 284–285.

78 „Einer abrevierenden Ausdrucksweise. Das Gesetz will für einen Fall dasselbe anordnen wie für einen anderen". Kelsen (1919) op. cit. 640.

79 „Chaque fois qu'une réalité naturelle subit de la part du juriste constructeur du droit, dénégation ou dénaturation consciente". Dabin (1935) op. cit. 321.

80 „Bezeichnen eigentlich etwas mit einem Worte, das in der Alltagssprache oder in der Sprache des Rechts gewöhnlicherweise zur Bezeichnung eines ganz anderen Begriffes gebräuchlich ist". Julius [Gyula] Moór: Das Logische im Recht. *Revue Internationale de la Théorie du Droit*, vol. 2. (1927–1928) 157–203., 166.

81 Heumann op. cit. 216. no. 2.

82 Fuller op. cit. 5.

its representativeness. Occasionally termed with distinguisher: 'historical fiction',[83] 'judicial fiction',[84] 'jurisprudential fiction',[85] 'particular' and 'procedural' fiction[86] or, having in view a logico-functional reconstruction, as 'foundational fiction'.[87] Confusion may arise from the fact that Civil Law approaches, too, sometimes speak of fictions in general, although they mean this very special usage of it.[88] Dekkers sees in it "a technical process by which a fact, a thing or a person is mentally placed in a category knowingly unfit, for the benefit, as a result of such a practical solution, specific to that category"[89] and, Capitant, "a means of legal technique to assume a fact or situation different from reality for that legal consequences can be inferred therefrom".[90] As to its definition, "fictio est in re certa eius quod possibile contra veritatem pro veritate a iure facta assumptio".[91] Common Law approach stresses its character implying the latent innovation of the law: "a wilful falsehood, having for its object the stealing of legislative power, by and for hands which could not, or durst not, openly claim it",[92] taking the form of "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified",[93] in brief, "procedural pretense by means of which rules of law are changed",[94] that is, "used by the judge when he wishes to create an assimilation obviously inaccurate but necessary to obtain a desired result",[95] for "[w]hen [...] the pressure of newly asserted interests compels change, those who administer the law seeks to make the change as slight as possible".[96] As to their logical structure, they are "normative individual statements which, by the impossible assumption that a given state of affairs is similar to some dissimilar state of affairs, tie those legal consequences to this latter state of affairs which the

---

83 Ibid. 56.

84 Olivier op. cit. 115.

85 „Fiction jurisprudentielle". Foriers op. cit. 23.

86 Roscoe Pound: *Jurisprudence.* Vol. III. St. Paul, West, 1959. 450.

87 „Begründungsfiktion". Dieter Meurer: *Fiktion und Strafurteil. Untersuchungen einer Denk- und Sprachform in der Rechtsanwendung.* Berlin–New York, Gruyter, 1973. xviii+82.

88 E.g., Salvatore Pugliatti: Finzione. In: *Enciclopedia del diritto.* Vol. XVII. Milano, Giuffrè, 1968. 658–673.

89 „Un procédé technique qui consiste à placer par la pensée un fait, une chose ou une personne dans une catégorie sciemment impropre pour la faire bénéficier, par voie de conséquence de telle solution pratique, propre à cette catégorie". Dekkers op. cit. 86.

90 „Procédé de technique juridique consistant à supposer un fait ou une situation différente de la réalité pour en déduire des conséquences juridiques". Henri Capitant (réd.): *Vocabulaire juridique.* Paris, Presses Universitaires de France, 1936. 253.

91 Bartolus de Saxoferrato: *Commentaria.* Venice, 1596. No. 21 ad D. 41. 3. 15 pr; cf. Olivier op. cit. 16.

92 Jeremy Bentham: *Works.* Ed.: John Bowring. Vol. I. Edinburgh, W. Tait, 1843. 243.

93 Henry Summer Maine: *The Ancient Law, Its Connection with the Early History of Society and its Relations to Modern Ideas.* [1861] London, Murray, ^{3}1890. 26.

94 Fuller op. cit. 5.

95 „Utilisé par le juge lorsqu'il désire créer une assimilation évidemment inexacte mais nécessaire pour obtenir un résultat souhaité". Foriers op. cit. 23.

96 Pound op. cit. 461.

assuming state of affairs has".[97] In any of these definitions, the core gets reduced to "the false qualification of facts".[98]

4.3. In the doctrinal processing of legal norms

In most of the cases, it is termed as 'dogmatic fiction', or sometimes as a 'theoretical'[99] one 'issued from legal scholarship'.[100] As "a means of explanation",[101] it is "developed in legal science, i.e. in the explanation or systematising of the positive law".[102] Generally speaking, "factions worked out after the event by justice thinking in order to give or appear to give a notional explanation of existing precepts [...] represent first attempts of a legal system at classification and generalization".[103] Its relationship to valid law is of *de lege data*, and not *de lege ferenda*. And not because of the subject, or of the nature of theoretical operation itself: "they do nothing; they only explain by comparison and thereby facilitate the presentation and understanding of the valid law".[104] For no question of subsuming facts by adjudicating or imputing them is raised here. Norms are doctrinally arranged through simplifying their relationship, by building in their system artificial links and common denominators for making their conceptual breakdown and/or reduction possible.

4.4. In the theoretical understanding of legal norms

Lalande writes of 'representative fiction', serving as a theoretical model: "Hypothesis useful to represent the law or the mechanism of a phenomenon, but which we use without asserting its objective reality".[105] This is the usual object of philosophical definitions: "assumptions are called (scientific) fictions that we make for heuristic purposes".[106] Following this pattern, several theories of law characterize legal norms as mere fiction. "[I]n a sense, all legal rules, principles, precepts, concepts, standards

---

97 „Verweisende normative Individualsätze, die durch die unmögliche Annahme, der gegebene Sachverhalt sei einem anderen ungleichen Sachverhalt gleich, die Rechtsfolgen an den gegebenen Sachverhalt knüpfen, die der angenommene Sachverhalt hat". Meurer (1973) op. cit. 74.

98 „La fausse qualification des faits". Perelman op. cit. 146.

99 „Theoretische". Joseph Unger: Die Verträge zu gunsten Dritter. *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, vol. 10. (1871) 1–109., 9. note 12. as well as Meurer (1973) op. cit.

100 „Rechtswissenschaftliche". Stammler op. cit. 332.

101 „Ein Mittel der Darstellung". Eduard Holder: Die Einheit der Correalobligation und die Bedeutung juristischer Fiktionen. *Archiv für die civilistische Praxis*, vol. 69. (1886) 203–240., 223.

102 Olivier op. cit. 87.

103 Pound op. cit. 450., 462.

104 „Sie bewirken nichts, sie erklären nur mittels Vergleichung und erleichtern hierdurch die Darstellung und Auffassung des geltenden Rechts". Unger (1871) op. cit.

105 „Hypothèse utile pour représenter la loi ou le mécanisme d'un phénomène, mais dont on se sert sans en affirmer la réalité objective". Lalande op. cit. 355.

106 „Fiktionen (wissenschaftliche) heißen Annahmen, die wir zu heuristischen Zwecken machen". Rudolf Eisler: *Wörterbuch der juristischen Begriffe.* Bd. I. [1899] Berlin, Mittler, ^{3}1910. 369.

– all generalized statements of law – are fictions. In their application to any precise state of facts they must be taken with a lively sense of their unexpressed qualifications of their purely 'operational' character. Used without awareness of their artificial character they become harmful dogmas".[107] Some theories emphasize the fictitious character of legal concepts as means defined by the regulatory need and wish, quite independently of any epistemological consideration in view of reality. "From this point of view, however, every legal norm should appear as a fiction, since through the law's general concepts, always necessarily a plurality of never quite similar concrete cases are subject to the same legal judgment";[108] or, in another formulation, "legal concepts and categories are fictions again, abstract and analogical (etc.) ones, that is, deliberately purposeful deviations from reality, the very object of law".[109] Other theories explain legal constructions as fictions having an instrumental function, most known of them being the conceptual construction of right – "The word right is the name of fictitous entity: one of those objects, the existence of which is feigned for the purpose of discourse, by a fiction so necessary, that without it human discourse could not be carried on. A man is said to have it, to hold it, to possess it, to acquire it, to lose it. It is thus spoken of as if it were a portion of matter such as a man may take into his hand, keep it for a time and let it go again"[110] – and corporation.[111] Finally, there are some schools of thought, e.g. Hans Vaihinger's *Philosophie des Als Ob* (1911), as well as Karl Olivecrona's *Law as Fact* (1939) and Alf Ross's *Tû-tû* (1951) from the school of so-called Scandinavian realism,[112] that point to the internal contradiction implied by the fact that law is an artificial conceptual expression, on the one hand, notwithstanding, it is made to function in practice, on the other, as if it were a real property, or abstraction, of actual events taking place in human practice Or, "the

---

107 Frank op. cit. 179.

108 Moór (1927–1928) op. cit. 180.: „Aus diesem Gesichtspunkte müßte aber jede Rechtsnorm als eine Fiktion erscheinen, da durch die allgemeinen Begriffe des Rechts immer eine Mehrzahl niemals ganz gleichartiger konkreter Fälle notwendigerweise der gleichen rechtlichen Beurteilung unterworfen wird".

109 „Rechtsbegriffe und -kategorien wiederum Fiktionen sind, abstrakte, analogische usw. Fiktionen, d.h. bewußt zweckmäßige Abweichungen von der Wirklichkeit, des eigentlichen Gegenstandes des Rechts". Karl Baumhoer: *Die Fiktion im Straf- und Prozeßrecht.* [Archiv für Rechts- und Wirtschaftsphilosophie Beiheft 24]. Berlin–Grunewald, Rotschield, 1930. 130., 22.

110 Bentham (1843) op. cit. Vol. III. 217.

111 Cf., for Civil Law theories, Gyula [Julius] Moór: *A jogi személyek elmélete.* (Theory of legal persons). Budapest, Magyar Tudományos Akadémia, 1931. and respectively, for the Common Law doctrine, Vera Bolgár: The Fiction of Corporative Fiction. From Pope Innocent IV to the Pinto Case. In: Ronald H. Graveson – Karl Kreuzer – André Tunc – Konrad Zweigert (Hrsg.): *Festschrift für Imre Zajtay.* Tübingen, Mohr, 1982. 67–96.

112 Karl Olivecrona: *Law as Fact.* Copenhagen, Munksgaard–London, Oxford University Press, 1939. 220. resp. Alf Ross: Tû-Tû. *Harvard Law Review*, vol. 70., no. 5. (1957) 812–825. {Originally: Oscar A. Borum – Knud Illum (eds.): *Festskrift til Henry Ussing 5. Maj 1951.* København, Juristforbundet, 1951.}

conditions should be governed by the law, as if the law were something factual, really given".[113]

4.5. Theoretical reconstruction

In the last analysis, approaches to and understandings of fiction in the legal domain divide into two main tendencies:

A) those which hold that fictions in law are *genuine fictions*,

- *a*) characterized by "a complete consciousness of its falsity"[114] in an epistemological sense. This is the first concept of legal fiction, made by jurisprudents of the Roman republican period (e.g. Gaius) and glossators of the modern age (e.g. Bartolus), formulating the criteria of „assumptio, contra veritatem, pro veritate and in re recta".[115] This very conception was later on extended as a matter of course to all kinds of fictions to be found in a legal context, considering them "a false assertion [...] which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true",[116] or "a false factual assumption [...] contained in a legal »rule»,[117] or simply «a false identification, or a false analogy«";[118]
- *b*) specific only in that they contradict earlier law, and not reality: "instead of contradiction against reality, which lies in the concept of fiction, there is here a contradiction to the previous law modified by its remaking only"[119] or, in an apparently more sophisticated version, excluding fictions from legislative enactments as from the original, sovereign factors of creating and shaping 'juridical reality', "a qualification of facts always in a way contrary to the legal reality";[120]
- *c*) specific only in that they are "a contrast between two different [i.e. 'natural' and 'legal' – Cs. V.] classification of facts", instead of one "between rules and facts";[121]

---

113 „Die Verhältnisse sollen sich nach dem Recht richten, als ob das Recht etwas Tatsächliches, wirklich Gegebens wäre". Walter Strauch: *Die Philosophie des »Als-Ob« und die hauptsächlichsten Probleme der Rechtswissenschaft.* München, Rösl, 1923. 86., 17.

114 Fuller op. cit. 9–10.

115 Cf. Olivier op. cit. 8–14., 67–69.

116 Bentham (1843) op. cit. Vol. IX. 77.

117 Olivier op. cit. 4.

118 Peschka Vilmos: A fikció a jogban és a jogelméletben. (Fiction in law and in legal theory). Állam- és *Jogtudomány*, 1966/1. 40–82.

119 „Anstatt des Widerspruches gegen die Realität, welche im Begriffe der Fiktion liegt, besteht bei ihnen nur ein Widerspruch gegen das bisherige durch die betreffende Neuerung abgeänderte Recht". Holder op. cit. 223.

120 „Une qualification des faits toujours contraire à la réalité juridique". Perelman op. cit. 62.

121 Kenneth Campbell: Fuller on Legal Fictions. *Law and Philosophy*, vol. 3. (1983) 339–370. 360., 369.

B) those which hold that so-called fictions in law are, per definitionem, *by far not fictions at all*, because

a) their actual result makes them, "as synonymous with legal phenomenon", genuine reality: "there is no fiction anywhere [...]. This is a legal reality in the broad sense of the word, since there is a perfectly real legal effect that occurs";[122]

b) they are, by their very structure, "a given form of designation, a tool of juristic terminology", i.e. "a rule of the law particularly expressed";[123] "an abbreviated form of the version of the basic legal proposition to be applied, a reference",[124] or, simply, the result of the discrepancy between notions which, for the sake of regulation, have to have the same meaning in given respects and, in order to achieve this, also provide a definition normatively equalizing them with "significant deviations from the usual language";[125]

c) in want of "assertion" in law, there are no "»proper« legal fictions taken »in a strict sense«"[126] either, only "items of determination" and, for their formulation in an economical and widely comprehensible way, "only linguistic metaphors, idioms, terminological conveniences";[127]

d) both in thinking and also in professional communication, all kinds of linguistic expression, including norms and concepts as well, "are but psychological pulleys, psychical levers, mental bridges or ladders, means of orientation, modes of reflection, »As-Ifs«, convenient hypostatisations, provisional formulations, sign-posts, guides".[128]

---

122 Raymond Saleilles: *De la personnalité juridique. Histoire et théories.* [1910]. Paris, Rousseau, [2]1922. 53., 612–613.: „comme synonyme de phénomène juridique", „il n'y a de fiction nulle part [...]. C'est bien là une réalité juridique au sens large du mot, puisqu'il y a un effet de droit parfaitement réel qui se produit".

123 „Eine Bezeichnungsform, ein Werkzeug juristischer Terminologie" / „eine Rechtsregel besonderen Ausdrucks". Gustav Demelius: *Die Rechtsfiktion in ihrer geschichtlichen und dogmatischen Bedeutung. Eine juristische Untersuchung.* Weimar, Böhlau, 1858. 79., 92.

124 „Eine abgekürzte Form der Fassung der anzuwendenden Rechtsgrundsätze, eine Verweisung". Rudolf von Jhering: *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung.* 3. Teil. 1. Abt. Leipzig, Breitkopf und Härtel, 1865. 289., and also Stammler op. cit. 331.

125 „Erhebliche Abweichungen von der gewohnten Ausdrucksweise". Moór (1927–1928) op. cit. 166.

126 „Aussagen" / „'eigentliche', 'echte' Rechtsfiktionen". Esser op. cit. 26.

127 „Bestimmungssätze" / „nur sprachliche Metaphern, Redewendungen, terminologische Bequemlichkeiten". Felix [Bódog] Somló: *Juristische Grundlehre.* Leipzig, Meiner, 1917.

128 Frank op. cit. 179–180.

5. On fiction

The word seems to have been first used, and maybe also invented, by Quintilianus.[129]

5.1. History

As it is generally assumed, fiction-patterned thinking is rooted in the ancient practice of 'human sacrifice', later gradually substituted to by 'animal sacrifice' and then further simplified to becoming a mere 'symbol'.[130] Others suppose a direct development line between Roman 'symbol' (manifesting itself in the ritual formalities of *mancipatio*), on the one hand, and 'open fiction', on the other, through the mediation of 'hiding fiction' (in the ancient Greek law, e.g., debtors were qualified to be Persian in order to gain a status of more strength while execution).[131] But service to God, if interpretable from a legal point of view at all, and also symbolic acts qualify rather conclusive presumption. For, in the case of sacrifice, reduced performance will be held to be good enough for proving human subordination and fulfilling. In the case of symbols, ceremony will be established as a wholly formalized procedure in order to take over the burden of material proof. However, as stated by the contemporary commentator of Maine's *The Ancient Law*, this derivation is simply "not justifiable. Everywhere, where any kind of some definite legal system has been established and has acquired sacred authority, the articulation of new needs makes place to extending interpretation also in the development phase ruled by custom, provided that custom has transformed into a close system. The rules of the system get extended as a matter of course to cover new cases as well".[132] This aspect of early laws "is not only a cause in part of the extreme formalism of the strict law, but it also operates as one of the agents in producing the first solvent of formalism, namely, fictions".[133]

Jhering, classifying "the artificial means used for the purposes of legal economy", specifies "construct acts, business *simulacra* and the fictions".[134] There is indeed a logical sequence in this line of instrumental development, albeit the first two items are either "legal lies"[135] or presumptions. And legal lie has nothing to do with "legitimate legal fiction":[136] the deliberate falsity of an assumption of fact in a norm or normative

---

129 Inst. Or. 6, 3, 61; cf. Antoine Ernout – Alfred Meillet: *Dictionnaire étymologique de la langue latine. Histoire des mots.* [1932]. Nouv. éd. rev. Paris, Klincksieck, 1939. 362.

130 „Menschenopfer" / „Tieropfer" / „Symbol". Demelius op. cit. 8.

131 „Offene Fiktion" / „verdeckende Fiktion". Fritz Pringsheim: Symbol und Fiktion in antiken Rechten. In: Fritz Pringsheim: *Gesammelte Abhandlungen.* Bd. II. Heidelberg, Winter, 1961. 382–400.

132 Pulszky Ágost: Jegyzetek Maine: *A jog* őskora c. műhöz. (Notes to Maine's *The Ancient Law*). In: Henry Summer Maine: *A jog* őskora. Transl.: Ágost Pulszky. Budapest, Magyar Tudományos Akadémia, 1857. 327–443., 526., 527., 361.

133 Pound op. cit. 461.

134 „Die künstlichen Mittel, deren sie sich für die Zwecke der juristischen Ökonomie bedient hat" / „die Konstruktionshandlungen, die Scheingeschäfte und die Fiktionen". Jhering op. cit. 260–261.

135 Frank's sense, Frank op. cit. 348.

136 Frank's terminology, ibid. 348.

imputation does not turn it by itself and for this very reason into a legal fiction. Notwithstanding, the search of a development logic continues to challenge minds. Surveying "the agencies by which Law is brought into harmony with society", Maine specifies "Legal Fictions, Equity, and Legislation". They are common to him in that "[t]hey all [...] involve law-making" and distinguished in that legislation is considered "open law-making".[137]

Still, by the very idea of claiming the more while performing the less, i.e., of functional economization in the development of rites of sacrifice becoming a symbol, and also in the invention of ceremonies for the formal proof of actual change, some elements which were instrumental in the construction of the early forms of genuinely legal fiction had already developed, too. Such an element was the fictitious assumption of some second reality in order to achieve, by legal lie, another qualification within the classification system of the law. Here is the dividing line where fiction in the law starts to be a genuine legal fiction. Paradoxically, here is the line, too, where it ends to be fiction at all. Be it a case of Roman *responsa prudentium* or English case law, in judicial law-application both the manipulated establishment of those facts that constitute a case in law and the extending interpretation of legal rules (as two possibilities of establishing a judicial fiction) are just aspects of the same act, differing only in where they are approached to from. "The two kinds of operation [i.e. interpretation of norms and qualification of facts – Cs. V.] make up an indivisible unity in the act of law-application. For socially the *punctum saliens* of the whole process is the qualification of the facts. This is where and when projection onto one another, i.e. mediation, takes place. This is where and when the debated case gets a new quality: subsumed under the norm-structure applied as a decisional pattern".[138] Such double roots of the first known appearance of legal fiction, that of judicial fiction (prevailing in ancient law, Roman law, Common Law and partly also in Civil Law development), explains why historically – with the living memory of symbolic acts and of the judicial manipulation of the establishment of those facts that constitute a legal case – the epistemological approach to and conception of legal fictions is wholly justified. At the same time, however, judicial fictions will be characterized as having the same basic structure as legislative fictions do, as seen by a theoretical reconstruction that proceeds from the analysis of legislative fiction and conceptualizes it by comparing the precept which has been extended and the one which it has been extended to, through the normative interpretation of those precepts.

The function of judicial fiction can already be detected in the law of ancient Mesopotamia, although fiction was scarcely known there. "One can see there the [...] sign of a timid effort towards the logical construction of the law [...]. The analogical reasoning that leads form writers to support their innovations on unreal assumptions

---

137 Maine op. cit. 25., 30. as well as Peter Stein: *Legal Evolution. The Story of an Idea.* Cambridge (etc.), Cambridge University Press, 1980. 94.

138 Csaba Varga: Law-Application and its Theoretical Conception. *Archiv für Rechts- und Sozialphilophie*, vol. 67. (1981) 462–479., 466.

is a concern to rationally justify these creations."[139] All in all, "continuity all through the development" is emphasized as the main function.[140] "The purpose of fiction is to alleviate the difficulties involved in taking up and manipulating new, more or less incisive statements of the law, by allowing the traditional doctrine to be formally retained in its old form, without, however, practically bringing its full effectiveness towards the new somehow to wilt."[141] Or, having in mind its indirect effect as well, "at the same time, the internal connection between the new and the old is secured by [this organic enlargement of the law – Cs. V.], thus preserving the systematic unity of the whole body of law".[142] With the fictitious assumption of the existence of a "general immemorial custom [...] from time to time declared in the courts of justice" and of the fiction's "proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law",[143] the same was said of judicial fictions in English law. At the same time, however, Blackstone saw "awkward shifts, subtile refinements, and strange reasoning" in this judicial way of legal development and, characteristically enough of a puristic stream of the use of language, he condemned also the idea of some Original Contract used as the fictitious foundation-stone of social theories at his age. As he concluded, "while we may applaud the end, we cannot admire the means".[144] It is to be noted, however, that although Bentham, too, argued against "the pestilential breath of Fiction [which] poisons the sense of every instrument it comes near" and he stated proudly that "the season of Fiction is now over",[145] he did so only in this convention. In another context he realized as a matter of course that fiction "may give support to useful rule or institution, as well as to a pernicious one", moreover, he formulated as a received opinion that "[t]he virtues of a useful institution will not be destroyed by any lie or lies that may have accompanied the establishment of it".[146]

---

139 Georges Boyer: Sur quelques emplois de la Fiction dans l'ancien droit oriental. *Revue Internationale des Droits de l'Antiquité*, vol. 1. (1954), 73–100., 99.: „On peut y voir [...] l'indice d'un timide effort vers la construction logique du droit [...]. Le raisonnement analogique qui conduit les rédacteurs de formulaires à appuyer leurs innovations sur des hypothèses irréelles, correspond à un souci de justifier rationellement ces créations".

140 „La continuité dans l'évolution" Dekkers op. cit. 234.

141 Jhering op. cit. 387.: „Der Zweck der Fiktion besteht in der Erleichterung der Schwierigkeiten, die mit der Aufnahme und Bearbeitung neuer, mehr oder weniger einschneidender Rechtssätze verbunden sind, in der Ermöglichung, die traditionelle Lehre formell ganz in ihrer alten Gestalt zu belassen, ohne doch dem Neuen praktisch seine volle Wirksamkeit dadurch irgendwie zu verkümmern".

142 „Durch [diese organische Erweiterung des Rechts – Cs. V.] wird zugleich der innere Zusammenhang des Neuen mit dem Alten gesichert und so die systematische Einheit des gesammten Rechts erhalten". Carl Friedrich von Savigny: *System des heutigen römischen Rechts.* Bd. 1. Berlin, Veit und Compf, 1840. 295.

143 Blackstone op. cit. Vol. I. 73., Vol. III. 43.

144 Ibid.Vol. II. 360.

145 Ibid. Vol. I. 235., 269.

146 Ibid. Vol. VII. 287.

5.2. Classification

It is usual, mainly in German literature, to classify fictions into two groups, 'practical', and 'dogmatical'[147] or 'theoretical',[148] or 'legal' and 'made by legal scholarship'.[149] The dividing line is well drawn between fictions in and on the law, relevant or irrelevant from a juristic point of view. Esser also differentiaties legislative and judicial fictions by enumerating 'economical', 'historical', 'dogmatical' and 'definitional' ones.[150]

Though the usage of fiction is technical in legislative fiction and ideological in the judicial one, this functional difference is counterbalanced by structural similarity. For judicial fiction aiming at extending a legal norm in action is completed through manipulating either the facts (by the false establishment of the facts that constitute a legal case) or the norms (by the false establishment of the relevant norm in a way that it shall cover the facts of the case). It will be distinguished (and only relatively) from judicial arbitrariness by virtue of its special purpose in the first case. It displays the same feature as legislative fiction does (except to the subject and way of its formulation) in the second case.

Finally, there is a dilemma of the transparency of functions. As Demelius[151] and Gény[152] observe, historical and dogmatic functions are mostly fulfilled by the same fictions: „the fiction is always necessarily a historical and dogmatic function".[153] This is a case of the dialectical interplay of basic functions in the sense that "many [fictions] that once have served a historical purpose have been retained for their descriptive power"[154] (and vice versa as well). However, transparency of functions does not involve structural community between judicial fiction as a declaratory (normative) operation within the law and dogmatic fiction as an explanatory (theoretical) operation on and outside the law.

5.3. Law as fiction

In connection with fictions used for the theoretical reconstruction of legal norms, the problem of conceiving law as fiction is formulated usually on three levels. First, there are specific legal concepts which are fictitious in their character. For instance, both the existence and extension of legal rights and duties are bound to rules. Moreover, although they are defined by rules, their true existence and extension will only be manifest in the rules' being referred to and also imputed to in actual practice.

147 „Praktische" / „dogmatische". Jhering op. cit.

148 „Theoretische". Unger (1871) op. cit. 9. note 12.

149 „Juristische" / „rechtswissenschaftliche". Stammler op. cit. 332.

150 „Ökonomische" / „historische" / „dogmatische" / „definitorische". Esser op. cit.

151 Demelius op. cit. 86.

152 Gény op. cit. Tome III. 377.

153 „La finzione svogle sempre necessariamente une funzione e storica e dogmatica". Todescan op. cit. 458.

154 Fuller op. cit. 8.

Secondly, in legal language, potentially at least, every concept is specific, i.e. fictitious in character. One cannot define previously what is to remain in its ordinary meaning and to what extent; the law's practical meaning can be reconstructed posteriorly at the most. Moreover, the motive of all this is beyond language; it is to be found in the politico-sociological context of the enactment and enforcement of rules. Thirdly, as a basic stand, legal language and its practical usage are fictitious in their character.

As a matter of fact, there is a basic incongruence between true or false conceptual description and striving for practical influence by the projection of norms, setting consequentiality as the only aim of its conceptual system, on the one hand, and recoursing to the use of fiction exclusively for reasons of efficiency, on the other. This is why Jones is mistaken in supposing that "when in course of time the concept has come to be regarded as normal in relation to the facts, the fiction has become a reality".[155] For the "normalization" of its relation to the facts can render its given state more justified at most, still it cannot make it congruent. Anyway, linguistic expression, terminological choice and the wording (or conceptual shaping) of the law are a direct function of its norms. And the projection of norms is a direct function of practical considerations, subordinating epistemological ones to those which are purely purposeful in the given situation. This is so in the case both when legal meaning departs from ordinary one (in what? in which direction? to what extent?) and when legal meaning coincides with ordinary one (even if momentarily or partly). For no coincidence is motivated by the lack of "anormalization" when norm-projection is taking place: they only coincide because (and to the extent that) coincidence has normatively been disposed of for practical reasons, by the way. Or, legal concepts are pragmatic concerning their fundamental definition. And this is to mean that they are further and further removed from the point where they can be *in merito* examined epistemologically. Nevertheless, elements and interconnections of reality are reflected in their development. But the content and the extent of the concept developing from these are not ultimately determined by the copying of reality, but purely by practical considerations and the regulation techniques available.

> "Such an estrangement from reality is not an autotelic process. Its real purpose is to provide a suitable means for the optimum operation of the legal complex. But this makes legal »reflection« specific and heterogeneous, and this is also expressed to a smaller or greater degree in the handling of juridical concepts as mere means. As Lukács put it: »an epistemological objective identity or convergence can in no way provide the decisive motive for choice or rejection; this motive consists in an actual applicability in concrete present circumstances,

[155] J. Walter Jones: *Historical Introduction to the Theory of Law.* [1940] Oxford, Clarendon Press, [2]1964. 185.

> from the standpoint of a resultant in the struggle between concrete social interests.«"[156]

To sum up, are legal concepts by definition fictitious from the very start? Kelsen warns us:

> "Fiction does not lie in the contents of a concept deduced from other than real facts, but it lies in the wrong judgment that this concept implies a real fact belonging to the world of being, which is not the case factually. The fault of such a mental development is precisely the logical contradiction contained in it, that something not existing in reality is presented as real, that is, the methodical mistake of seeking something needed to be in a concept not abstracted from the world of being."

And the same is said of juristic construction which

> "is issued from very specific thinking processes arisen by normative consideration within the abstracting person himself. Thus, for instance, the concept of imputation is not an abstraction of facts given outside that what is to be imputed or what is given in its immediate range of feeling or willing, but this concept arises from the abstracting summation of the given specific thought processes (judgments) of the abstracting person himself, by which he associates certain perceived facts of the external world with given persons".[157]

Consequently, legal concept is not a fiction for Kelsen. Legislative fiction is not a true fiction to him, either. However, if legislative fiction is still considered a fiction in a limited, figurative sense, its properties can be generalized as being the ones of

---

156 Csaba Varga: *The Place of Law in Lukács' World Concept.* Budapest, Akadémiai, 1985., http://mek.oszk.hu/14200/14249/ 133–134., quoting George Lukács: *The Ontology of Social Being. Marx's Basic Ontological Principles.* Transl.: David Fernbach. London, Merlin, 1978. 128.

157 Hans Kelsen: *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre von den Rechtssätzen.* Tübingen, Mohr, 1911. 180.,181.: „Die Fiktion liegt nicht im Wesen eines Begriffes, der aus andern als realen Tatsachen abgezogen ist, sondern in dem falschen Urteile, daß dieser Begriff eine reale Tatsache beinhalte, daß etwas zur Welt des Seins gehöre, was tatsächlich nicht ist. Das Verwerfliche an diesem geistigen Vorgange ist eben der logische Widerspruch, der darin enthalten ist, daß etwas, was in Wirklichkeit nicht ist, als wirklich ausgegeben wird, ist der methodische Fehler, daß in einem Begriff, der nicht aus der Welt des Seins abstrahiert wurde, ein Seiendes gesucht wird." / „Erfolgt aus ganz bestimmten der normativen Betrachtung entspringenden Denkvorgängen innerhalb des Abstrahierenden selbst. So ist der Begriff der Zurechnung z.B. keine Abstraktion von Tatsachen, die außerhalb des Zurechnenden oder in dessen unmittelbarem Empfindungs- oder Willensleben gegeben sind, sondern dieser Begriff entsteht durch die abstrahierende Zusammenfassung einzelner spezifischer Gedankenvorgänge (Urteile) des Abstrahierenden selbst, durch die er gewisse wahrgenommene Tatbestände der Außenwelt mit bestimmten Personen verknüpft".

legal concept, too. And the same can be said of legal construction as well. It is not a fiction by definition. Only mistaken practice or its ideology can turn it into a fiction. Or, there are no strictly fictitious phenomena outside of "legal lies" and "myths",[158] in addition to theoretical fictions, including representative ones, embodying ideal types.

6. Presumption and fiction

6.1. The basic difference

In the field of normative regulation, where the specific technique sublates all cognitive component as mere antecedent, pure epistemological considerations, or speculation about probabilities, may turn to be misleading, necessarily missing the point. Or, what does happen if legal presumption attaches the establishment of the facts that constitute a case to the ascertainment of such facts that are not probable to produce the facts constituting a case? What does happen if a legal presumption does not comply with Fuller's three requirements of "escaping the charge of »fiction«": "(1) be based on an inference justified by common experience, (2) be freely rebuttable, (3) be phrased in realistic terms"?[159]

Fiction is an operation with the extension of at least two concepts. For it rearranges the extension of concepts which would otherwise have differing contents, by declaring them to be at least partially overlapping each other.

With presumption, the question of conceptual identity will not even be raised, for presumption does not operate with concepts at all. It does only settle in a procedural way that the proof of which facts shall be sufficient for the official realisation that the facts constituting a legal case are established.

6.2. The perspective of legal technique

In all its appearances, usages and understandings, 'fiction' is nothing else than the attribution of certain contents (features, etc.) to given concepts. Apparently, fictions and presumptions are bordering phenomena, moreover, inseparable from one another in many cases. However, in contrast to fiction, presumption is only conceivable as defined in a legal norm disposing of the facts the proof of which shall be considered sufficient or conclusive enough to construct the facts that constitute a legal case. Having in mind the connection between facts actually proven and legal facts considered proven, epistemological approaches emphasize that fiction is „assumptio contra veritatem in re certa" while presumption is „assumptio pro veritate in re dubio";[160] that fiction is "a conscious, intentional invention" while presumption is just „an assumption".[161] The constitutive character of legal fiction is stressed by the

158 Frank's terms, Frank op cit. 348.

159 Fuller op. cit. 45.

160 Olivier op. cit. 73.

161 „Eine absichtliche, eine bewußte Erfindung" / „eine Vermutung". Vaihinger op. cit. 48.

differentiation attributing „deontological validity" („equation between the true and the false") to fiction while „ontological validity" ("equation between the true and the likely") to presumption.[162] Such conclusions are condensed in a definition stating that "Fiction is a legal provision with particular expression while presumption is a legal provision with particular contents".[163] The irrelevancy of epistemological approach to fiction is shown by characterizing analogy as "major premise [...] obtained by induction" and fiction as a logically "arbitrary" operation taking place in it.[164] This feature points to the basically practical nature of fiction, the fact that it is "an essentially operative instrument without being the object of abstract speculation".[165]

[162] „Validité deontologica" („equazione si pone trail vero e il falso") / „validité ontologica" („equazione fra il vero e il verosimile"). Todescan op. cit. 8–9.

[163] „Die Fiktion ist eine Rechtsregel besonderen Ausdrucks, die Präsumption ist eine Rechtsregel besonderen Inhalts". Demelius op. cit. 92.

[164] „Obersatz [...] durch Induktion gewonnen" / „willkürlich". Meurer (1973) op. cit. 26.

[165] „Une strumento essenzialmente operativo, non l'ogetto di un'astratta speculazione". Todescan op. cit. 22.