LEGAL ARGUMENTATION WHEN WORKING WITH PRESUMPTIONS IN THE PROCESS OF APPLYING THE LAW IN THE CONTINENTAL LEGAL SYSTEM

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Abstract: *This article deals with the process of application of presumptions in law. Legal argumentation is part of all proceedings of applying the law. Every act of court's jurisdiction should be justified and motivated as a guarantee of its correctness and lawfulness. In the proceedings of applying the law in the continental legal system, legal facts are not always proved through instruments of evidence. The legislator in modern society provides for the use of legal and factual presumptions in procedural laws.*

This article analyzes the specifics in legal proceedings when working with presumptions in the continental legal system. The question when and how the presumptions should be applied, how and for what reasons unfoundedness of judicial acts is allowed, is raised. The scientific work offers a methodology for construction of the legal justification in the acts on application of the law. In view of the presence of assumptions when comparing the factual and the normative, categorization of the logical variants of the conclusion is being derived. We emphasis on the analysis of factual presumptions and degrees of probability of court's conclusions when working with them.

Keywords: *presumptions, grounds, judicial argumentation, justification of judicial decisions*

I. INTRODUCTION

The realization of law is the law in its action. The realization of legal norms is the practical implementation, embodiment of law in social practice.

From the standpoint of the law theory in the continental legal system, realization is of two types – direct and indirect. It is direct when the subjective rights, legal obligations and imperatives arise directly for the legal subjects without the intervention of a subject of authority being required, and indirectly when the legislator has provided for participation of a competent authority. In the second case realization of the law is defined as law enforcement.

Proceedings for application of the law include particular social relations, where due to opposition of the individual private interests of the legal subjects, the private and public interests,[1] due to legal certainty and predictability in the course of legal life, a law enforcement authority is involved. In a number of the proceedings, the authority deals with presumptions, and the legislator defines the legal possibilities for it in the different legislation of the states in the continental legal system. However, there is no regulation on what the

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[1] On the balance between private and public interests, as well as on the impact of private law on the construction of a "responsible" society: HURDIK, J. Responsible society and private law. *The Lawyer Quarterly*. 2021, Vol. 11, No. 3.

mechanism of the use of presumptions is. What is the methodology that the court or other authorities should observe in order to rule justified, correct and lawful acts when using presumptions. Presuming is a logical operation and therefore it finds its support in predicate logic. When used in legal proceedings, the particularities that law gives to them should be strictly effected.

This article raises and seeks answers to the following questions:

1. When and how should presumptions be applied in legal proceedings?
2. Can a mechanism for deriving factual presumptions be proposed?
3. Can degrees of probability of the conclusion for factual presumption be derived?

In the process of application of presumptions in law, the importance of legal argumentation stands out.

II. EXPOSE

The term "application of law" in the continental legal system means bringing a legal case as a legal fact to the normative fact defined in the hypothesis of a relevant legal norm and connecting it with the legal consequences of the same legal norm – application of the legal norm to the case.[2] In this case the legislator considered it necessary, in the process of applying the law, the state through a purposely authorized body (the court) to be involved again when it is necessary to ensure the priority of the social interest.[3] The range of regulated social relations related to this particular form of realization of the law is huge, and the legislation of separate states determines the prerequisites under which it is permissible to use the various presumptions.

The legislation of the different states expressly regulates the possibility for the court to use legal and factual presumptions. One part of the requirements for the circumstances that are regulated are the same, but in other, certain differences stand are outlined:

II.1 In German legislation

Legal presumption (gesetzliche Vermutung) is considered when the law stipulates that in the presence of certain circumstances it is assumed that certain other circumstances are present, and that the latter must be accepted as a basis for performing of legal assessment. Statutory presumptions are intended to relieve burden of proof for one of the parties, who should present and prove only the facts constituting the hypothesis of the presumption. According to Article 292 of the Civil Procedure Code (Zivilprozessordnung, ZPO) it is permissible the presumption to be rebutted. Legal presumptions may concern facts (e.g. Article 1117, paragraph 3 of the Civil Code), but they may also concern rights (Article 2365 of the Civil Code).

[2] RÜTHERS, B., FISCHER, C., BIRK, A. *Rechtstheorie: und Juristische Methodenlehre: mit Juristischer Methodenlehre (Grundrisse des Rechts)*. München: C. H. Beck, 2021.

[3] The authoritative nature of application of law is expressed in the fact that this activity is carried out only by special state bodies, local self-government bodies and public legal entities (organizations and individuals) under express authorization and under defined control of the results. For more details on the involving of the state, see DACHEV, L. *General study of the state.* 2001.

Human (factual) presumption (tatsächliche Vermutung) is present if, based on its own experience or the experience of judicial experts, the court can reach a conclusion about unproven facts on the basis of facts that have been proven (circumstantial evidence). The opposing party may argue the presumption through facts that put serious doubt on whether the phenomenon was indeed typical in the normal course of events.

Article 286 of the Civil Procedure Code regulates the basic principle of civil procedural law of free assessment of evidence (Freiheit der Beweiswürdigung). According to this principle, the court must freely decide on the truth of the alleged facts, taking into consideration all evidence presented in the proceedings and the conclusions drawn from them.

Only predominant or high degree of probability is not sufficient to prove a fact, but on the other hand, it is not necessary to exclude all doubt. There should be a degree of certainty which is practically sufficient and which dispels any remaining doubt without necessarily excluding them altogether.

II.2. In French legislation

According to Article 9 of the Civil Procedure Code, it is provided that "each party should prove, according to the law, the facts necessary for his petition to be honored." In certain cases presumptions are provided, which exempt from the necessity to present evidence of a given fact when it is impossible or difficult to establish it.

Legal presumptions reverse burden of proof, which is borne by the person who should prove the existence of the fact alleged by him. The principle is that presumptions can be rebutted by evidence. For example: when a child is born in wedlock, the mother's husband is presumed to be the father of the child, but there is also provision a claim to be filed to challenge paternity. In rare cases rebuttable presumptions are provided.

II.3. In Italian legislation

In Italian legal system evidence is regulated in two different acts: procedural norms are provided for in Articles 228 and 229 of the Civil Procedure Code, and substantive norms are regulated in Articles 2730-2735 of the Civil Code.

Article 115 of the Civil Procedure Code enables the court to accept the facts as proven regardless of the evidence presented by the plaintiff, unless they are specifically challenged by the opposing party. This way the law introduces a special presumption that a given fact is considered proven if it is not challenged in timely manner. This rule does not apply if the case is heard in absentia: if the defendant does not appear, burden of proof is mitigated when presumption exists, i.e. when the law determines the probative value of certain facts or allows the court to draw a conclusion about the existence of an unknown fact based on an established fact (Article 2727 of the Civil Code). Legal presumptions have been introduced, i.e. presumptions which are legally established and which may be rebuttable or irrebuttable. Factual presumptions are also admissible, which the court should analyze based on its judgment, accepting only serious, accurate and consistent presumptions. Article 2729 of the Civil Code explicitly provides that application of this type of presumption is not permitted in relation to facts that the law does not accept to be proven on the basis of testimony.

II.4. In Austrian legislation

The principle that each party to the trial is obliged to present all the facts on which he grounds his claims (Behauptungslast) and to present evidence (Article 226, paragraph 1 and Article 239, paragraph 1 of the Austrian Code of Civil Procedure (Zivilprozessordnung) is introduced. The facts, which are essential to the decision, should be proved, unless exempted from the requirement of proof. It is not necessary to prove facts which have been acknowledged (Articles 266 and 267), obvious facts (Article 269) or legal presumptions (Article 270). The legal presumption derives directly from the law and has the effect of reversing burden of proof. The opposing party of the party who benefits from such a presumption should present evidence for the contrary. It should prove that despite the existence of a legal presumption, the presumed facts or legal status do not exist.

The gradation of the degree of proof is determined partially by the law and partially by the case law, starting from the lowest degree of "substantial probability" and reaching the highest degree of "probability bordering on certainty". In the first case, according to the Civil Procedure Code (Article 274), a presumption or certificate is sufficient for proof. Prima facie evidence also entails a lower standard of proof and plays a role in overcoming the difficulties of providing evidence in claims for damages. If there is a typical course of events where, based on life experience, a specific causation or fault is assumed, those circumstances are considered to be established on the basis of prima facie evidence, even in individual cases.

II.5. In Czech legislation

Civil Procedure Code stipulates that each party should prove its claims by providing the respective evidence – this obligation is known as "burden of proof." As a general rule, all persons who allege a fact related to a particular case bear the burden of proving the allegation.

All litigants are bound by obligations regarding the burden of allegation and proof according to the scope of their claims. In case the facts claimed by a party and the presented evidence are incomplete, the court is obliged to notify the party thereof.

Particular laws provide for presumptions for certain categories of facts. Presumptions can be rebuttable and, exceptionally, irrebuttable. In the case of a rebuttable presumption, the court assumes that it has been proven if none of the parties offers evidence to rebut it, thus proving that the fact does not exist. For certain rebuttable presumptions, the rebuttal can only be carried out within a statutory period. A special type of rebuttable presumption is facts alleging that a party has been, directly or indirectly, subject to discrimination based on sex, race, beliefs, or other circumstances. In this case, burden of proof bears the defendant, who should prove that the party was not discriminated against. When the facts are proven by a public instrument[4] burden of proof has the party wishing to dis-

[4] For the nature of the public instrument and the use of presumptions in detail, see: VALDHANS, J., SEHNÁLEK, D., LAVICKÝ, P. *Evidence in Civil Law – CZECH REPUBLIC*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2017, p. 28, DOI 10.4335/978-961-6842-74-7.

prove the authenticity of these instruments. Conversely, when private instruments are used, burden of proof is on the party invoking them. In court proceedings, the principle of free assessment of evidence is applied, i.e. the law does not provide precise limits that determine when the court should accept a given fact as proven or unproven. The Civil Procedure Code provides that "the court assesses the evidence at its discretion, each individual piece of evidence is assessed separately, and all evidence is assessed in its general context; the court duly takes into account everything found within the proceedings, including the facts presented by the parties". Findings represent a state about which there is no reasonable or grounded doubt.

II.6. In Spanish legislation

In Spanish legislation, Chapters V and VI of Title I, Volume II (Articles 281-386) of the Civil Procedure Code (Ley de Enjuiciamiento Civil) (Law 1/2000 of 7 January 2000) regulate the collection of evidence. The parties to the proceedings should prove the facts they claim and which are the ground of their claims. The party bearing burden of proof bears the prejudicial consequences of the lack of evidence. In order to attribute to either party the absence of proof of a particular fact, the court will take into consideration the ease with which each party can prove that fact.

It is not necessary to prove facts that are fully known and common knowledge or facts about which the parties agree, except in cases where the subject matter of the proceedings is beyond the control of the parties.

Statutory presumptions exempt the party benefiting from the presumption from presenting evidence of the presumed fact. In the event of such presumptions, evidence to the contrary is admissible unless explicitly prohibited by law (for example, the presumption that a missing person is alive until declared dead).

The principle is that the defendant's failure to respond to the claim and failure to appear does not relieve the other party of burden of proof. There are exceptions where the absence of objections from the defendant leads to a court decision that supports the claims of the plaintiff (for example: in small claims proceedings).

II.7. In Polish legislation

The matter of collection of evidence is regulated by the Civil Code (kodeks cywilny, Article 6) and the Civil Procedure Code (kodeks pośenia cywilnego, Articles 227-315).

According to Article 6 of the Civil Code, burden of proof for proving a fact bears the person who claims the legal consequences arising from that fact. According to Article 234 of the Code of Civil Procedure, the legal presumption is binding on the court. As a general rule, it is permissible to rebut a legal presumption.

Legal presumptions that change the rules about evidence concern, for example, acts in good faith or in bad faith – for example in the case of debtor's intentional damage to a creditor (Article 527, paragraph 3 and Article 529 of the Civil Code).

The court may consider as established facts that are relevant to the decision of the case if this conclusion can be drawn from other established facts (factual presumption, Article 231 of the Code of Civil Procedure).

II.8. In Croatian legislation

The articles 291-276 of the Civil Procedure Code (Zakon o parničnom postupku) contain the gathering of evidence, the examination and estimation of evidence means. The principle of competitive start predominates in the Croatian (civil) procedure law regarding the gathering of facts and the presentation of evidence. Each party should prove the truthfulness of statements regarding the existence of facts that are favorable for it. If on the ground of the presented evidence the court is not able to establish a particular fact with certainty (Article 8 of the CPC), then it will decide on the existence of this fact by applying the rules on the burden of proof. The facts, which existence is presumed by law, do not need to be proved but it is possible to prove that they do not exist, unless otherwise provided by law. Party that maintains that the general norm of the refutable presumption can`t be applied to the case has to prove it. There are cases, where the law does not allow to be proved that facts, which are presumed by law, do not exist.

II.9. In Portuguese legislation

According to Article 342 of the Portuguese Civil Code the general rule is that the person, who refers to concrete law is to prove the facts, on which it is grounded. The party against whom the right is asserted, should prove the availability of facts that prevent it, change it or cease it. In case of doubt, the facts should be presumed compositional.

If the law on which the claimant refers to is bound by a termination condition (Article 270 of the Portuguese Civil Code) or has deadline (Article 278 of the Portuguese Civil Code), then the defendant should prove the condition has come true or the deadline has come (Article 343, Paragraph 3 of the Portuguese Civil Code).

According to Article 344, Paragraph 1 of the Portuguese Civil Code these rules are to be applied in the opposite sense where there is a legal presumption – Article 344, Paragraph 1 of the Portuguese Civil Code. There is reversal of the burden of proof also when the defendant party has culpably prevented the presentation of evidence by the party that in principle bears the burden of proof (Article 344, Paragraph 2 of the Portuguese Civil Code.

II.10. In Bulgarian legislation

In a number of substantive laws in Bulgarian legislation, there are rebuttable and irrebuttable presumptions (for example the presumption that the mother's husband is the child's father – Article 61 of the Family Code; the one born alive is viable – Article 2 of the Law on Inheritance; presumption for notification in civil proceedings – Article 41 of the Civil Procedure Code, etc.) In the repealed Civil Procedure Act of 1982 in Article 430 the assumptions were established – "consequences that the law or the court deduces from one known fact for another unknown fact." In the current version of the Bulgarian Civil Procedure Code, only the presumptions established by law are included. An important rule, although it does not find normative support today, establishes the norm of Article 439 of the repealed Civil Procedure Act, namely, that "the presumption is left to the discretion of the court, which cannot admit any other presumption than those which are relevant, accurate and mutually agreeable, and only in those cases where the law allows testimony." Despite the lack of explicit legal regulation, in civil and administrative proceedings, the court in the Republic of Bulgaria uses factual presumptions.

The following conclusions can be drawn from the analysis:

First, in the national laws of the listed countries, the parties in the legal proceedings set out facts relevant to the proceeding which they claim to have occurred. In general, each party is required to present evidence of the facts that are favorable to it.

According to the source, presumptions are divided into legal and factual. When they are established in an explicit legal prescription, in a normative act, they are legal. When they are carried out by the applying subject, according to "the rules of logic – they are factual (they are also called "human" or "judicial"). There is no branch of law that in one way or another avoids the use of presumptions. Presumptions, for obvious and easily understood reasons, are most often used in various procedural laws, but they also exist in branches of substantial law.[5]

III. DISCUSSION

In the continental legal system, the normative establishment of statutory presumptions makes their application considerably easier. The law directly connects the known fact with the unknown one. The fact-grounds for the particular presumption is explicitly stated in the legal norm.

With a view to the possibility to be proved the opposite assumption of what was supposed with presumption – presumptions are subdivided into rebuttable and irrebuttable. Rebuttable and irrebuttable presumptions themselves may be statutory. But factual presumptions are only rebuttable.

Argumentation on irrebuttable presumptions is inadmissible. Irrebuttable presumption (juris et de jure) is "a rule of substantive law equating the presumptive premise with the presumed fact in terms of legal consequences."[6] That is, the possibility of other consequences or non-occurrence of the consequences is not admissible at all. Irrebuttable legal presumptions are rare.

The legal rebuttable presumptions (juris tantum) oblige the court to assume that once a fact provided in the hypothesis of the rebuttable presumption has been established, then the alleged fact has also been realized. The fact of the hypothesis of the presumption must be proved as a condition to draw the consequence that the presumptive one also exists. The rebuttable presumptions shift the evidential burden of facts. "The same legal norm that establishes them …, gives the court the right to abandon the conclusion imposed by it, if only the court finds the availability of objectively perceived or directly proven facts."[7] The one who claims that the supposed fact didn't take place, must prove that. The rebuttal of presumptions is carried out by different evidential means and the various legislations provide specific possibilities for that.

The analysis of the studied legislations shows that the application of factual presumptions (praesumptio hominis) in the continental system is much more complicated. Their

[5] RUDZKIS T., PANOMARIOVAS, A. Legal presumptions in the context of contemporary criminal justice. Different expressions of presumptions: Formulation of a Paradigm. *Hungarian Journal of Legal Studies*. 2016, Vol. 57, No. 4, pp. 359–360, DOI:10.1556/2052.2016.57.4.5.

[6] STALEV, Z., MINGOVA, A., POPOVA V., IVANOVA, R. *Bulgarian Civil Procedure Law*. 2004, p. 269.

[7] GANEV, V. *Textbook of general theory of law. Volume I*. 1932, p. 503.

use is always given to the discretionary power of the court. It is free to apply factual presumption, if appropriate, in view of the specifics, as well as when direct proof of a certain legal fact was fruitless or impossible.[8] In the case of factual presumptions, the legal facts that can be established through assumptions are not normatively defined. This means that the court itself will judge whether a given fact could be at all established by presumption in the specific case and whether it could gather "data" for its manifestation from another known and established fact.[9]

It can be concluded that factual presumptions are innumerable, but should be emphasized that they cannot be used when there is direct evidence of a certain fact.[10] Various legislations expressly prevent from this type of presumption being used in criminal proceedings. For example, Article 303, Paragraph 1 of the Bulgarian Code of Criminal Procedure provides that "The sentence cannot be grounded on assumptions" and according to Paragraph 2 of the same code – "The court finds the defendant guilty when the charge is proven beyond doubt." This requirement categorically excludes the possibility that the verdict, in particular the court's conclusion about the defendant's guilt, is grounded on an assumption.

Factual presumptions are widely used in civil and administrative law enforcement.

Next, it can be concluded that the purpose of presumption is always to infer from the existence of one established fact the existence of another fact that has not been proven. The assumption thus established will have the character of truth until its veracity is disproved.

When the court uses a factual presumption argument, that has several consequences in the enforcement process:

- The presumption contains an inference of the presence of a specific fact of legal significance for the case.
- Shifts the burden of proof to the procedural proceedings. As for the party to whose detriment the existence of the fact was established, it should refute it by presenting new evidence of the absence of the fact.
- In the final act of implementation, through the reasons of the authority, it is justified what are the prerequisites, what are the concrete connections between the existing and the alleged fact, for the decision-making authority to reach the conclusion about the existence of the fact.
- Leads to the justification of the decision. At the same time, the specificity of the reasoning can become a reason for cassation appeal in some legislations, and the act can be qualified as unfounded if the authority has failed to substantiate the causality and the connections between the two facts.

Through the argument for the existence of a factual presumption, the decision-making authority substantiates a conclusion that the alleged fact probably manifested itself in legal reality. As Valdhans and Sehnalek emphasize "the factual basis for the applicability of the given presumption must be proven."[11]

[8] KOLEV, T. *Theory of law*. 2015, p. 513.
[9] As long as he is convinced of this and upholds the rule of law, SEGAL, J. L. *Judicial Behavior*. Oxford: Oxford University Press, 2009, p. 21, https://doi.org/10.1093/oxfordhb/9780199208425.003.0002.
[10] VALDHANS, J., SEHNÁLEK, D., LAVICKÝ, P. *Evidence in Civil Law – CZECH REPUBLIC*. p. 33.
[11] Ibid., pp. 33–34.

A presumption is a statement that a certain fact exists without being proven.[12] Logically, the factual presumption is deduced by induction. The argument for a factual presumption from the point of view of logic consists of two propositions and one inference. Judgment 1: fact "A" is proved; judgment 2: a judgment about fact B and an inference that fact B exists. And fact "B" is relevant. It is included in the normative fact of the legal norm. The presumption is in the conclusion that the relevant fact, its feature or phenomenon probably exists, or probably existed, or is likely to exist because of the fact that another fact, its feature or phenomenon currently exists or has existed or will exist in the future. Rudzkis and Panomariovas emphasize that it would be wrong to equate presumption with logical conclusion. Logical reasoning is the "path" that leads to the "objective" conclusion. However, a logical conclusion, like a presumption, is a logical result of reasoning.[13] In this case, the logical premise of the presumption argument is the claim that there is a caus -and-effect relationship between the factually established fact and the presumed fact. Thus, the probably existing fact is to be bound by the authority's conclusion to the legal consequences of the norm. The degree of probability of a presumption conclusion depends on the manifestation and proof of the individual premises.

A main feature of factual presumptions is that the premises on which the conclusion is built are not sustainable and permanent. Kotsoglou K. emphasizes that the issue is particularly debatable.[14] Therefore, factual presumptions refer to specific, unique conditions characteristic of only the individual case. In contrast to legal presumptions, where the prerequisites are always sustainable and determined by the legal norm.[15] Thus, the factual presumption applicable to one case is inapplicable under the same premise in another case.

In the case of the same proven fact – for example, the fact of inflicted bodily injuries in one case, that justify the crime damaging human integrity, and in another case, it might be about the same injuries, but caused for the purpose of robbery. The motive for committing a specific crime is not a sufficient condition to proceed to a conclusion about the manifested fact. The uniqueness of the conditions, facts and circumstances, which are not an element of the composition of the bodily injury, will enable the court to reach a conclusion about the form of guilt in which the act was committed and its purpose. Only from the system of separate, specific and proven facts and circumstances an objective conclusion of factual presumption can be drawn.

This conclusion is also supported by the practice of the Court of the European Union. More than once it had reason to conclude that serious, specific and uncontradicted presumptions could be used. The use of presumptions that neither deny nor prove the occurrence of a given fact is not allowed. In other words, when the inference can be used

[12] For the requirement that the fact not be proved in detail, see: LEIPOLD, D. *Beweislastregeln und gesetzliche Vermutungen, besondere bei Verweisungen zwischenverschiedenen Rechtsgebieten.* Berlin: Duncker & Humblot, 1966, p. 23.

[13] RUDZKIS, T., PANOMARIOVAS, A. *Legal presumptions in the context of contemporary criminal justice. Different expressions of presumptions: Formulation of a Paradigm. p.* 467.

[14] KOTSOGLOU, K. Zur Theorie gesetzlicher Vermutungen. Beweislast oder Defeasibility? *Rechtstheorie.* 2014, Vol. 45, pp. 7–9. DOI: 10.3790/rth.45.2.243.

[15] For more details WHARTON, F. Disputed Questions of Evidence; Relevance: Presumptions of Law and Presumptions of Fact. *The Pamphlet Collection of Sir Robert Stout.* 1877, Vol. 43, p. 18–21.

both as a negative and as an affirmative of the fact. In this way, it is inadmissible to justify cause-and-effect relationships between phenomena.[16]

The present article comes to the conclusion that in the process of applying the law, when comparing the facts of the case with those of the norms, three options are possible:

1. comparison of a certain hypothesis and proven facts;
2. alleged hypothesis and proven facts;
3. certain hypothesis and alleged facts.

The third hypothesis is particularly relative.

The alleged facts may or may not exist. We define them as conjectural because they have not been proven either directly or indirectly. Their existence is assumed. Also assumed is the circumstance that the facts express the signs of the concepts in the hypothesis of the legal norm. Finally, the correspondence between them is also assumed (the factual, manifested in reality and the normative – from the content of the legal norm), which is a reason to apply the legal norm.

Argumentation as an activity of deducing arguments (reasons) for the identity of the case with the norm is presupposed and tied to the possibility of disputing and refuting the factual.

The assumed fact is possible and probable, logical, and the basis for it is the connections and relations between objects and phenomena. In enforcement proceedings in the continental legal system, presumptions "declare a fact which is merely probable" to be proved.[17] The basis is the connection between the two facts. It can be cause-effect, action-result or other, but at its core is the connection between the two facts, which is not arbitrary, but always logically grounded. Presumptions are assumptions that are based on the typical signs of objects and phenomena, the relationships between them, their properties. The known fact is an "indication" of the manifestation of the unknown fact.

The presumptions are built on the basis of the connections between the phenomena: cause – effect; action – result; means – goal. As the presumption can be made in both directions – from the cause to the effect, but also from the effect to the cause; from the action to the result, but also from the result to the action; from the means to the goal, but also from the goal to the means.

When the relevant facts are directly proved and established, the authority's task of conceptualizing the facts and drawing the conclusion is greatly facilitated. The argumentation of the law enforcement body in particular – also. It will much easier logically justify its decision in the proceedings. There are a number of cases where this cannot be achieved despite the efforts of the body and the parties. Sometimes this process is deliberately made difficult by the parties, so that the court cannot establish the facts, and thereby bind the subjects with the corresponding legal consequences. In this case, in order to draw its con-

[16] For more details: Decision (second chamber) of the CJEU dated 21. 6. 2017 – case C N 621/15. The same establishes that: "Art. 4 of Directive 85/374 does not allow rules of evidence based on presumptions according to which, where medical tests neither establish nor exclude the existence of a link between the administration of the vaccine and the onset of the disease from which the injured person suffers, the existence of a causal link between the defect attributed to a given vaccine and the harm suffered by the injured person is considered established whenever there is some predetermined evidence of facts pointing to a cause-and-effect relation."

[17] TASHEV, R. *General theory of law.* 2007, p. 232.

clusion, the adjudicating authority resorts to presumptive arguments. Often, through the procedural evidence, several facts from the factual composition of the legal norm are established, but for one there is no evidence or objectively there cannot be. In this case, the decision-making body reaches a conclusion about the existence of the unproven legal fact from the *composition of the legal norm through an argument for presumption from certain known facts and circumstances.*

A mechanism for the use of factual presumptions by law enforcement could be proposed.

Always in legal proceedings it is required to establish certain legal facts which constitute conditions in order to realize the corresponding consequences of the same legal norm.[18]

In order to proceed with application, the court must first clarify the meaning of the legal norm through the activity of interpretation; to deduce the major premise in the syllogism. Legal facts in the legal norm are expressed through certain concepts. Each concept summarizes the essential signs and properties of objects and phenomena. A concept is "a form of reflection of the world in thinking". "The main logical function of the concept is within the mental separation of certain signs of the objects of interest to us in practice and knowledge."[19] Because of this function, it becomes possible for each concept to establish the exact meaning of the words in order to use them. Concepts in legal norms are general, and this is determined by the general and abstract nature of legal norms.

The small premise of the syllogism is that separate relevant facts of reality have occurred. They are deduced by the court, through interpretation of the facts or by analysis of their essential features. These single facts of reality have their unique characteristics, but they bear the essential marks of a certain phenomenon. Single facts bear the essential features of general concepts. This is the court's basis for its conclusion that a specific relevant fact of reality is identical to that of the legal norm.

The basis of the court's reasoning in syllogism is the general logical law of the unity of the general, the particular and the singular.[20] This unity embraces the signs of the facts inherent in a given genus or species, and of its elements expressed by concepts. According to Hegel, every concept contains three moments – of universality, particularity and singularity.[21] The general concept (of the legal norm) contains "within itself a measure by which this form of its identity for itself is actually a determination and a distinction."[22] The single fact manifested in reality bears the signs of the common, but at the same time contains separate, single marks that distinguish it.

The court compares the certainty of the concept (general), the given in the normative fact and its reflection (the manifested legal fact in reality). The purpose of this logical judgment is to reach a reliable conclusion – about the presence or absence of identity, in order to proceed with the application of the legal norm. The assessment will give an answer to

[18] KELSEN, H. *Allgemeine Theorie der Normen.* Wien: MANZ Verlag, 1979.
[19] ROSENTHAL, M. M., YUDIN, P. F. *A Dictionary of Philosophy.* New Delhi: Progress Publishers, 1968, p. 423.
[20] HEGEL, G. W .F. *The Science of Logic. Volume I.* Cambridge: Cambridge University Press, 2001, pp. 30–33.
[21] Ibid., p. 31.
[22] Ibid., pp. 30–33.

the question whether the legal fact possesses qualitatively and quantitatively the necessary signs to be perceived as identical to the fact of the legal norm.

This makes the task of the law enforcement body even more difficult, but it "expands" the scope of its freedom in the formation of its internal conviction. Hubert Smekal and Ladislav Vyhnánek conclude that in decision-making in court proceedings, in particularly complex cases, has "considerable room for judicial discretion and that in fact the decisions in these cases are influenced by various extra-legal factors."[23]

Factual presumptions are a means by which the court freely infers the facts that have to be proved, from the signs and circumstances which make them highly probable. The theory of the derivation of the signs of legal concepts is also confirmed by Jean-Louis Bergel. The court, he writes, will derive its inner conviction from the free assessment of the signs and circumstances on the case.[24]

Discussion:

Factual presumptions are built on the facts and circumstances of the particular case. They reflect the usual order of social relations.[25] The possibility to build the assumption, and from it to draw a conclusion about the existence of the fact, is based on the universal connection between processes and phenomena.

A guess always contains a degree of probability. A court's finding of a factual presumption will not make the assumption credible, only probable.[26] Therefore, in applying a factual presumption argument, there is always the possibility that there will be no match both with respect to the alleged fact itself and the implications associated with it.

When the implementing authority applies factual presumptions, its factual and legal conclusions must be consistently and substantially argued, including the existence of the presumed fact. In essence, it is an activity of legal argumentation.

Legal argumentation is a type of logical activity based on legal analysis of the facts to derive arguments regarding their compliance with the signs of the legal concept, through which the decision to apply the relevant legal norm is justified. First, the authority will interpret the normative /relevant legal norms/ and will derive arguments for the meaning of the legal norm. In the second stage, it will perform an activity on interpretation and argumentation of the factual /from the individual case study/. In this part, the authority will derive arguments about the legal significance of what has been manifested in reality and its relevance. This new conclusion of the subject applying the law must also be based on arguments – arguments about the essential signs of what was manifested in reality, leading to the conclusion that they coincide with the signs of the normative facts provided by the legislator. The essence of this activity of legal argumentation, which, in addition to being legal, also has a logical nature, often makes practice extremely difficult. The difficulties in this aspect are explored in more detail by numerous authors – H. Kelsen,[27] R. Ale-

[23] SMEKAL, H., VYHNÁNEK, L. Determinants of judicial decision-making: he state of the art and the Czech perspective. *The Lawyer Quarterly*. 2020, Vol. 10, No. 2, p. 106.
[24] BERGEL, J. L. *The general theory of law*. Paris: Dalloz, 1993, p. 343.
[25] FISK, O. H. Presumptions. *Cornell Law Review*. 1925, Vol. 11, No. 1, pp. 24–25.
[26] SERIKOV, Y. A. *Presumptions in civil proceedings*. 2006, pp. 2–3.
[27] KELSEN, H. *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*. Leipzig: Mohr Siebeck, 1934, pp. 5–20.

xy,[28] L. Manuc,[29] W. Benoit,[30] Fr. Terre,[31] Ch. Plantin[32] and others. The degree of probability of the conclusion is an essential mark of factual presumption.

The essence of the judicial act is to bring forth legal consequences for the parties. On one hand, the facts to be proven are in the past. On the other hand, there is a category of facts that exist at the time of law enforcement and at that point their existence must be established. In arguing on a factual presumption, this category of legal facts is established through other facts that existed before. This will be done precisely by establishing the connections between the facts that existed in the past and the currently existing facts. This is the reason why Zhivko Stalev categorized, in the process of proof, the facts as "main" – the legally relevant facts for the disputed law, and as "evidential" – all other facts that indirectly carry information about the existence/non-existence of the main fact. The subject of proof in civil law and process can also be the connections between the facts.[33]

Factual presumption is a logical conclusion built on the basis of social experience, scientific laws and research – physical, biological, psychological, etc., applied to the exceptional conditions of a specific legal case.

The concrete proven empirical facts are a prerequisite for the degree of probability of the presumption.

The conclusion of the decision-making body based on a judgment of factual presumption has different degree of probability.

In view of the practically limitless possibilities for application of presumption arguments, conclusions about factual presumptions of the deciding entity can be divided into two categories: high-probability presumption conclusions and low-probability presumption conclusions.

In the first case, assumptions that adequately and "naturally" reflect the facts of life are covered, their signs and the regularities between them. Based on such premises, the decision-making body's conclusion on the existence of a legal fact will be with a high degree of probability. The decision-making body will achieve a very high degree of probability if the consequence resulting from the manifestation of the fact (whose existence it is trying to establish) brings forth only one well-defined fact or at least a very small number of legal facts as a prerequisite for the sought fact. Stable cause-and-effect relations make possible drawing a reliable conclusion about the existence of the fact as a cause, for the existence of the presumed fact – consequently and vice versa – a reliable conclusion about the alleged fact, due to the realized fact.

An assumption will be with a low degree of probability where it is assumed to be an established fact, which very rarely could be causally related to the existing fact. In this case, the presumption will be easily rebutted. The unstable cause-and-effect relationship between the presumed fact and the existing one is present when the presumed fact as a result

[28] ALEXY, R. *Theory of legal argumentation.* Oxford: Oxford University Press, 2010.
[29] MANUC, L., NEAL, C., WRIGHT, C., FRECHETTE, S. *General Considerations on Presumptions. 4th World Congress on the Advancement of Scholarly Research in Science, Economics, Law, and Culture.* New York: Addleton Academic Publishers, 2010.
[30] BENOIT, W. *Readings in Argumentation.* New York: Foris Publications, 1992.
[31] TERRE, Fr. *Introduction generale au droit.* Paris: L.G.D.J, 1994.
[32] PLANTIN, C. *Dictionnaire de largumentation.* Lyon: ENS Editions, 2016.
[33] STALEV, Z., MINGOVA, A., POPOVA, V., IVANOVA, R. *Bulgarian Civil Procedure Law.* pp. 267–268.

occurs extremely rarely, sometimes sporadically, which is sufficient reason in the mental activity of the authorities to not consider this relationship as probable at all.

It should be noted, for the purposes of achieving a high degree of plausibility, that we cannot reduce arguments for presumptions to only very likely and unlikely regarding the degree of probability.

In view to the content of the signs – prerequisites, they can be divided into three groups:

1. When all the signs of a given concept are proven;
2. When some signs are proven, but others remain unproven, undetermined;

Two hypotheses are possible here:

- The number of proven signs exceeds the number of unproven ones to determine the content of the concept.
- The number of proven signs is smaller than the number of unproven ones to determine the content of the concept.

3. When all signs of the concept remain unproven.

In this case, it cannot be assumed that the specific fact has taken place, exists at the moment or will exist in the future. If the court substantiates its conclusion by assuming that such a fact exists, it (the decision) will be unfounded.

This concept, derived from the present report, is also confirmed by L. Manuc, who emphasizes that one of the essential characteristics when working with presumptions is the derivation of a dominant characteristic[34] (indication) of the fact.

IV. CONCLUSION

When using factual presumptions, the court should always strive for achieving a high degree of probability of its conclusion. In a specific judicial act, the factual presumption contained in the argument is always from the category of rebuttable presumptions.

As Bergel points out, "Putting himself on the terrain of probability, the judge uses them (the presumptions) only to build his conviction."[35] Whether his conviction is actually well-founded and to what extent it is justified to lead to the concrete conclusions of the decision-making authority can be established from the reasons of the act. Unreasonableness taints the actual findings, due to mistakes made in forming the internal belief. A process that is not covered by imperative legal norms. Such are the errors precisely in the rules for logical thinking, on the occasion of causal relations between phenomena, in the laws of science, etc.

At the beginning, the present article posed three questions. In the present study, I reached the following conclusions:

1. The analysis of the studied legislation of certain countries applying the continental system shows that the presumptions, in view of their source, are of two types – legal and factual. The legal ones are regulated in the normative acts and do not pose any particular difficulties. There the court directly applies the consequence that the law provides for the realization of the fact provided for in the norm. Factual presump-

[34] MANUC, L., NEAL, C., WRIGHT, C., FRECHETTE, S. *General Considerations on Presumptions. 4th World Congress on the Advancement of Scholarly Research in Science, Economics, Law, and Culture.* pp. 224–32.
[35] BERGEL, J. L. *The general theory of law.* p. 345.

tions, part of the legislation, do not regulate at all, while others require special conditions for their application. The application of factual presumptions is associated with the discretionary power and independence of the court when resolving each legal case. To a large extent, the mistakes of law enforcement authorities and in particular of justice are result of unreasonableness – wrong conclusions of arguments for factual presumptions and wrong assessment of the legal significance of a given legal fact.

2. The present article proposes a mechanism for deriving factual presumptions based on the logical law of the general, the particular, and the singular. I advocate the opinion that when applying the syllogism in procedural proceedings, when comparing the facts of the case with those of the norms, three options are possible: comparing a certain hypothesis and proven facts, an assumed hypothesis and proven facts, and a certain hypothesis and assumed facts. The last hypothesis contains the possibility of using factual presumptions. Presumptions are assumptions that are based on the typical features of the facts. The court derives the signs of the general concepts of the normative facts, analyzes the signs of the facts manifested in reality and compares the definiteness of the general concept with its reflection. The conclusion of the comparison is a reason, an argument for the use of factual presumption.
3. The degree of probability is extremely important for the legality, correctness and certainty of the legal act of the court. Undoubtedly, the aim is to achieve a high degree of probability. Individual laws in different countries testify for various attempts for achieving this high probability of conclusion by introducing principles-guarantees for "certainty", "internal conviction", "completeness", "logicalness", "consistency", etc. In none of acts, no mechanism for achieving this high degree of probability of logical conclusions about the presumed fact is found. The present article derives two degrees of probability – for low-degree conclusions and high-probability conclusions. The proposed criterion is content and number of established individual signs of the concepts prerequisites of the normative fact versus the manifested legal fact.

When drawing a conclusion about the presence of a given legal fact, using a factual presumption, the authority should illustrate its arguments regarding the essential signs, due to which it considers that, although it cannot be proven, the fact has actually occurred. This is a legal argument activity. Together with the rest of the activities in the process of applying the law, argumentation is a guarantor for legal certainty, legality, justice – requirements for achieving the rule of law in modern society.