



## PRESUMPTION OF INNOCENCE AND SOME PROVISIONS OF THE NOTE TO ARTICLE 131 OF THE CRIMINAL CODE OF RUSSIA

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### ABSTRACT

This paper deals with the issues of compliance with the principles of criminal law and the presumption of innocence of the note to Art. 131 of the Criminal Code of the Russian Federation, which applies to all crimes against sexual freedom and immunity. The authors analyze the issues of the admissibility of using fictitious fiction constructions when describing the signs of the objective side of crimes and conclude that the said note does not comply with the Constitution of the Russian Federation as violating the principles of legal certainty, subjective imputation and contrary to the presumption of innocence. The authors believe that the changes made deprive the criminal law of the unity, system, strict interrelatedness of criminal law with each other and do not take into account the various public danger of encroachment on the sexual inviolability of minors associated with the use of violence and without such.

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## 1. INTRODUCTION

It seems that few people doubt the significance of the role that legal presumptions play for criminal law - the basic fundamental ideas that form the foundation of legal regulation. There is no doubt that one of the most significant and indisputable presumptions for both criminal law and the criminal process is the presumption of innocence, which lies at the basis of the legal regulation of these branches of law.

Indeed, the Constitution of the Russian Federation, imposing on the state the obligation to protect the identity of any of its citizens, enshrines the postulate that everyone accused of committing a crime is presumed innocent until his guilt is proved in accordance with the

procedure established by federal law and established by a court verdict that entered into force (Part one of Article 49 of the Constitution of the Russian Federation).

The Constitutional Court of the Russian Federation has repeatedly drawn attention to the fact that the rights, including those listed in Article 49 of the Constitution, as follows from Articles 17 (Part 1) and 56 (Part 3) of the Constitution of the Russian Federation, are not subject to limitation, they are recognized and guaranteed in Russian Federation in accordance with generally accepted principles and norms of international law, including those expressed in the Universal Declaration of Human Rights (Articles 7, 8, 10 and 11), the International Covenant on Civil and Political Rights (Article 14) and the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6), according to which, when considering any criminal charge against it, it has the right to a fair and public trial within a reasonable time by a competent, independent and impartial court established by law; everyone accused of a crime has the right to be presumed innocent until his guilt is proved by law<sup>1</sup>.

Meanwhile, some of the short stories introduced by the domestic legislator in the text of the Criminal Code of the Russian Federation, in our opinion, cast doubt on the implementation of both the presumption of innocence principle and another fundamental principle for criminal law, the principle of subjective imputation, in criminal law. In our opinion, this is caused not so much by the mistakes and imperfection of the legislative technique, which could be blamed on the legislator, but by outright campaigning in the fight against crime, which, unfortunately, the State Duma of the last four convocations has sinned.

We should note that the results of the campaign against pedophilia, drunk drivers, terrorism, extremism, corruption et cetera, carried out by the State Duma, introduce norms to the Criminal Code that do not differ in logic or consistency, and often do not have criminological soundness. Moreover, the changes made deprive the criminal law of unity, system, strict interconnectedness of criminal law with each other, turning the Russian Criminal Code into a kind of “patchwork quilt”, which is increasingly spreading at the seams as another attempt to eradicate any negative social phenomenon by exposure to it solely with the help of the “criminal law club”. At the same time, an obvious novelty used by the legislator in the framework of the latest campaigns was the use of a relatively new for the Russian criminal law reception technique in the construction of offenses - fictitious constructions, which, in fact, eliminate both the presumption of innocence and the principle of subjective imputation.

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<sup>1</sup> See: Resolution of the Constitutional Court of the Russian Federation No. 16-P dated July 14, 2011, St. Petersburg “On the case of verifying the constitutionality of the provisions of clause 4 of part one of Article 24 and clause 1 of Article 254 of the Criminal Procedure Code of the Russian Federation in connection with complaints by citizens S.I. Aleksandrina and Iu.F. Vashchenko” // Rossiiskaia gazeta - Federal issue No. 5541 (165). July 29, 2011.

The “first sign” on the way of denying the presumption of innocence by using the design of legal fiction in the newest criminal legislation of Russia was the Federal Law No. 14-FZ of February 29, 2012, which added to the Article 131 of the Criminal Code of the Russian Federation, according to which “crimes stipulated by paragraph “b” of part four of Article 131 of the criminal code of the Russian Federation, as well as paragraph “b” of part four of Article 132 of the Criminal Code of the Russian Federation, also include acts that are subject to the signs of crimes provided for by parts 3-5 of the Article 134 and Article 135 of the Criminal Code, committed against a person under the age of twelve, because such a person is in a helpless state because of his age, that is, he/she cannot understand the nature and significance of the actions committed”.

In the mentioned note, the legislator, having formulated such a sign of the victim as the latter’s failure to reach the age of 12 years, in fact, introduced into the criminal law not a new criminal law regulation, but directly fixed specific rules for qualifying infringements of sexual inviolability of a separate category of minors - under 12 years old. According to the logic proposed by the legislator, persons under 12 years old are automatically considered helpless, and encroachment on them, regardless of other elements of the objective side of the crime, is subject to qualification according to the norms of the Criminal Code criminalizing rape or sexual assault, that is, by analogy and with automatic recognition in criminal law of the presence of those circumstances that may actually be absent in a real act.

Such an objective sign of violent sexual crimes as the use of the helpless state of the victim is included by the legislator as constitutive in the offenses provided for by Art. 131 and 132 of the Criminal Code, since its adoption in 1996.

## **2. METHODS**

The research is based on the use of a set of methods of formal logic, systems analysis and complex interpretation applied to the text of the Criminal Code of Russia and the Constitution of the Russian Federation, as well as to the established judicial practice, which leads to the scientifically based conclusions and proposals

## **3. RESULTS AND DISCUSSION**

### **3.1 Helplessness of a victim of sexual crimes in theory and practice**

The substantiation of the inclusion in the criminal law of the helplessness of a victim as constitutive in the structure of rape was disputed neither by the doctrine of criminal law, nor by the law enforcement practice: according to the position of the highest court instance, rape and sexual assault should be considered committed using the helpless state of the injured person when it is by virtue of its physical or mental condition (dementia or other mental disorder, physical disability, or other painful or unconscious state), age (juvenile or elderly person), or other circumstances, could not understand the nature and importance of the

actions committed by him, or to resist the perpetrator. In this case, the person committing rape or violent sexual acts should be aware that the victim is in a helpless state<sup>2</sup>.

Please note that a similar interpretation of the helpless state is contained in paragraph 7 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 1 of January 27, 1999 “On judicial practice in murder cases (Article 105 of the Criminal Code of the Russian Federation)”. The plenum explained that killing a person knowingly for a guilty person being in a helpless state must be qualified as the intentional causing of death to the victim, who is unable to protect himself due to his/her physical or mental condition, to actively resist the guilty when the latter, committing the murder, is aware of this circumstance. Helpless persons can be classified as, in particular, seriously ill patients and elderly, young children, persons suffering from mental disorders that deprive them of the ability to correctly perceive what is happening.

Thus, the supreme judicial authority (as well as the prevailing judicial practice) reveals a helpless state through two signs: a) an inability to understand the nature and significance of actions performed with a person; and b) inability to resist the perpetrator.

### **3.2 Juvenile age as a sign of helpless condition**

By no means denying the public danger of infringements on the sexual integrity of minors, we note that the very fact of the legislator’s message that a victim who has not reached the age of twelve cannot understand the nature and significance of the sexual acts done with him, raises serious doubts. It has long been noticed that the onset of puberty is constantly decreasing. In the XIX century girls reached sexual maturity at 15, and boys – at 17, in the 60s of the XX century the age of puberty decreased to 12 and 14 years, respectively. Both girls and boys continue to reach the age of puberty earlier. Starting from the XVIII century, this happens about 2.5 months earlier in each decade. And in recent decades, the process has accelerated even more (Gafurov et al, 2018; Baglai, 2015). We believe that the exception from Art. 134 of the Criminal Code of the Russian Federation by the Federal Law No. 14-FZ of February 29, 2012 of such a characteristic of the victim as failure to reach sexual maturity was associated with this circumstance.

In recent years, researchers have repeatedly noted that focusing only on the young age of victims of 8-12 years in determining the helpless state in sexual crimes is far from sufficient due to the active sexual education of children and accelerative processes (John McGarry, 2014; Nick Howard 2013). We support the point of view according to which it cannot be confidently asserted that all adolescents under 12 years of age due to physical and mental

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<sup>2</sup> Resolution of the Plenum of the Supreme Court of the Russian Federation No. 16 of December 4, 2014 "On judicial practice in cases of crimes against sexual inviolability and sexual freedom of the individual" // Bulletin of the Supreme Court of the Russian Federation. 2015. No.2.

development are not able to understand the nature and content of the actions they are subject to (Peter Joyce, 2002).

It seems that the very fact of awareness of the nature and content of actions performed with a person cannot be unambiguously determined either by puberty or by minority of such a person. It is easy to imagine a situation in which an 11-year-old adult victim will be able to realize the actual nature of the actions committed with him and, moreover, not to object to such actions or to desire them. Consequently, only the age criterion in determining the ability to realize the nature of the actions performed with the victim cannot be absolute and must be assessed individually in each particular case, by carrying out appropriate expertise, taking into account the level of psychophysiological development and the level of socialization of a particular teenager.

### **3.3 THE SOCIAL DANGER OF SEXUAL ABUSE WITH VIOLENCE**

In addition, the qualification rules proposed by the legislator lead to another paradox, which for some reason neither the researchers nor the legislator pay attention to. Obviously, in their absolute majority, juvenile victims are fully capable of recognizing the difference between the violent and non-violent nature of sexual activities. The conclusion about a much greater degree of social danger of violent sexual assault is obvious, does not require comments and is not in doubt. However, the qualification of sexual assault on juvenile, either violent or not, based on the rules of qualification proposed by the legislator, cannot be differentiated and does not take into account the increased public danger of sexual violence, which is especially dangerous for minors. The current revision of the notes to Art. 131, as well as the text of Art. 134 and 135 of the Criminal Code do not allow differentiating the criminal responsibility of persons who have committed violent and non-violent sexual abuse of minors, which is in contradiction with the principle of proportionality of restricting rights and freedoms in bringing to criminal responsibility for acts with varying degrees of social danger. The answer to the question of why the legislator, guided by considerations unknown to us, does not consider the use of violence in the situation we have considered more socially dangerous, will be left out of the scope of this work.

This approach of the legislator, in our opinion, grossly violates not only the principle of legality, but also raises the question of the practical implementation of the presumption of innocence, introducing a fictitious feature that does not exist in a real act, which acts as a constitutive sign of the objective side of a crime, which, in turn, indicates ignorance of the requirement of certainty of legal regulation and allows for the application of criminal law by analogy.

### **3.4 LEGAL FICTION AS AN ELEMENT OF THE OBJECTIVE SIDE OF A CRIME**

Even more questions and bewilderment arise in the reference in the note to Art. 131 of the Criminal Code to the need to qualify under clause "b" of part four of Art. 131 of the Criminal Code of the Russian Federation for acts provided for in parts two and four of Art. 135 of the Criminal Code of the Russian Federation, committed against persons aged under

12 years. Before the adoption of the Federal Law No. 14-FZ of February 29, 2012, they were qualified under Part 3 of Art. 135 of the Criminal Code of the Russian Federation, while according to the new rules, the legislator proposes to quite seriously accept sexual abuse against minors as rape.

From the point of view of the analysis of the objective side, Art. 135 of the Criminal Code of the Russian Federation establishes responsibility only for sexual abuse, but not for rape and sexual assault. Special literature rightly points to the fact that the main criterion for differentiating responsibility for rape, sexual assault and sexual abuse, in addition to the violent nature of the act or the helpless state of the victim, is a sign of the objective side, like sexual penetration (Gumerova et al, 2017). We believe that the use of this particular criterion makes it possible to most clearly distinguish between crimes, the objective side of which is constituted by sexual intercourse and other acts of a sexual nature, with the objective side of sexual abuse. However, in the case of committing sexual abuse, sexual penetration is absent on the basis of the construction of the objective side of the named crime.

Meanwhile, the legislator, using legal fiction in the construction of the objective side of the composition of crimes provided for in Articles 131 and 132 of the Criminal Code of the Russian Federation, by a willful decision equates to each other sexual abuse, rape and violent acts of a sexual nature, based on the only common feature of the objective compositions named in accordance with the note - the age of the victim. In our opinion, there are no other objective criteria for such qualification in criminal law, nor can it exist in principle. Legal fiction in the notes to Art. 131 of the Criminal Code of the Russian Federation introduces into the offense non-existent signs artificially increasing the social danger of the offense, and gives a direct indication of the application of criminal law by analogy. Obviously, the legislator forgets about the principle of subjective imputation, as well as the principle of legality.

In addition, from the point of view of formal logic and common sense, the very idea of using legal fiction in the text of a criminal law, prescribing to qualify an act provided for by one article of the Criminal Code of the Russian Federation, according to another article, when the acts themselves have different legal nature, pose different social danger and differ in the characteristics of the objective side. That is why, in our opinion, the exclusion from the criminal law of the previous wording of Part 3 of Art. 135 of the Criminal Code of the Russian Federation was absolutely unjustified.

Considering the above, we believe that the appearance in the Constitutional Court of the Russian Federation of complaints about the unconstitutionality of the aforementioned norms is only a matter of time, since the law enforcement practice will not be able to resolve the contradictions that have arisen as a result of the substandard performance of the legislator

#### **4. CONCLUSION**

Summarizing these examples, a quite fair question arises: does the use of legal fiction in criminal law always lead to legal uncertainty and to violation of basic principles and

presumptions of criminal law? It seems no. Fictions in criminal law are quite permissible, they do and will exist primarily as an instrument of legislative technique. At one time, R. Iering wrote: "The essence of the fictions in general and legal in particular consists in likening, or rather in equating what actually exists, to what is not really in this case, but that happens and is legally standardized earlier" (Shakhbanova et al, 2016). One should remember that traditionally the subject of fictitious provisions in criminal law most often is a rather limited list of institutions of the Common Part of Criminal Law (for example, Art. 86 of the Criminal Code of the Russian Federation), which, as a rule, limit the scope of criminal law or outline the boundaries of criminal liability. In this case, the purpose of using fictitious structures, as a rule, is justified by the requirements of legal technology and does not go beyond it.

The given examples, on the contrary, testify to the use of fictitious premises in the structure of the objective side of a crime, which contradicts both the set of basic principles of criminal law that we have mentioned and the goals of using fictitious provisions in criminal law. The use of fictions in the structure of the objective side and the subject of the crime cannot be justified by the needs of the legislative technique, and the very idea of this, in our opinion, is deeply flawed, since it does not correspond to the essence of the legal nature of the objective side of the crime as a reflection of the criminal act in the reality surrounding us and is unacceptably broad divides the boundaries of the concept of a "subject of a crime".

As a result of such decisions of the legislator, not only the objective side and the subject of the crime are fictitious, but all those signs of the crime that are reflected in these elements or related to them: the public danger of the act, guilt, signs that characterize the personality of the criminal. Moreover, the fictitious (even if only in part) social danger of the act inevitably leads to the conclusion about the fictitious nature of the crime in general. It should be remembered that the fictitious structure of a crime with elements that do not exist in reality, entails in no way a fictitious criminal liability and punishment, which in the situation in question cannot be fair and does not meet the requirements of taking into account the public danger of the act or the requirements of the public danger of the identity of the offender.

In our opinion, the legislator, pursuing even the best (but short-term) goals, should not forget about the constitutional legal principles of criminal regulation and the basic provisions of the criminal law doctrine. The contradiction of the criminal law to the Constitution of Russia cannot be justified by any, even the best intentions of the legislator in the fight against crime, and the rule of law can never be replaced by expediency without gross violations of the rights of man and citizen.

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