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THE LEGAL FICTION IN CRIMINAL PROCEEDINGS – IS IT HISTORICAL ANACHRONISM OR OBJECTIVELY CONDITIONAL NECESSITY?

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Abstract. *Quite often, for one or the other purpose, the fact (or phenomenon) that does not exist is presented to the society or individuals as the real, really existing although it (the fact or phenomenon) simply does not exist in the real life. And often the term "fiction" is used to describe such phenomena. Although fiction is considered an inseparable companion of a social life, the question arises what the actual (true) fiction is and whether the use of it in criminal proceeding does not mean an intentional law maker's (or the person's applying the law) fraud, deceit directed towards the addressee of the applicable law. Fiction and its impact on criminal proceedings is analyzed in this article. Features, characterizing fiction are discussed here as well.*

Keywords: *criminal proceedings, fiction, lie, truth.*

Introduction

Quite often, for one or the other purpose, the fact (or phenomenon) that does not exist is presented to the society or individuals as the real, really existing although it (the fact or phenomenon) simply does not exist in the real life. We encounter such trend

almost every day. Sometimes for such realistically non existing facts or phenomena, which are presented as real, the term "fiction" is used. We encounter so called "fictions" (in Latin *fictio* – creation, fib, something made up) or at least the facts (phenomena), reminiscent of them, every day and while applying and studying the legislation, only in this case the term "legal fiction" (in Latin *fictio legis*)[1] is used instead of the term of the actual "fiction", to describe the phenomenon. The classical example of legal fiction is *"nascitur"* rule in the Civil law, i. e. *nasciturus pro iam nato habetur, quotiens de commodis eius agitur* (the started child is considered as born when we talk about his benefit) and according to it the child, started while physical person was still alive and was born after his death, is to be considered as his successor and has the right to inherit his property rights as well as some moral rights and obligations.

Although "fiction" is inseparable companion of a social life, the question arises what the actual (true) fiction is and whether the use of it in criminal proceeding does not mean an intentional law maker's (or the person's applying the law) fraud, deceit directed towards the addressee of the applicable law? Even Jeremy Bentham (1748–1832) during his time has equated legal fiction to fraudulent trading[2] or syphilis, which transfers rot principles to the whole body system[3] while travelling through every vain. According to J. Bentham, any use of legal fiction confirms the moral folly of those who have created it and initially applied[4]. But perhaps, however, the legal fiction is the objectively conditional necessity, as according to R. von Jhering (1818–1892), jurisprudence is not fully developed to refuse the fiction[5], and law functioning is impossible and unimaginable without it. We shall try to answer these and similar questions while using the methods of deduction and document analysis and we'll study how the legal fiction influences the criminal proceedings. At the same time we'll try to verify the hypothesis, stating that fiction is certain anachronism, where the remains of it are successfully used in the law of criminal proceedings, yet the use of it is not compatible with the search for truth in this process.

1. Fiction and its Application in Criminal Proceedings

The following Latin phrase is sometimes used in law: *Fictio est contra veritatem, sed pro veritate habetur* – although fiction is opposed to truth, it is declared the truth[6].

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1 Kuzavinis, K. *Lotynų – lietuvių kalbų žodynas = Dictionarium Latino – Lituanicum* [Latin-Lithuanian Dictionary]. Vilnius: Mokslo ir enciklopedijų l-kla, 1996, p. 329.

2 Ogden, C. K. *Bentham's Theory of Fictions*. London: Paul, Trench, Trubner, 1932, p. 141.

3 Bentham, J. *The Works of Jeremy Bentham.* Published under the Superintendence of his Executor, John Bowring. Edinburgh: William Tait, 1838-1843, 11(5). Chapter: *CHAPTER VI.: Purposes To Which Influence On Juries May Be Made Subservient* [interactive]. [accessed 21-05-2011]. <http://oll.libertyfund.org/title/1996/130262/2571048>.

4 Moglen, E. Legal Fictions and Common Law Legal Theory: Some Historical Reflections. *Tel Aviv U. Stud*. 1990, 10: 35.

5 Kulakov, V. V. *Objazatelstvo i oslozhnenija ego struktury v grazhdanskom prave Rossii: monografija* [Commitment and the complications of its structure in the civil law in Russia: monograph]. Moskva: RAP; Volters Kluver, 2010, p. 86.

6 Smirnov, A. V.; Kalinovskij, K. B. *Ugolovnyj process* [Criminal proceedings]. SPb.: Piter, 2004, p. 75.

However, if talking about the classical (public prosecution) criminal procedure, we have to note, the other principal is working here – *fictio cedit veritati* – fiction gives a way to law, or in other words, fiction loses its legal power when it is opposed to truth[7]. Therefore, as soon as we start talking about the truth and fiction, we face the problem of lie and false[8] right away. The lie, false is antipode of truth. The legal fiction is certain kind of lie as well, or the way of expressing the lie in the law, if to be more exact. It is some kind of result of legal reasoning and thinking[9].

The term "fiction" is derived from the Latin word *fingere* (*fingo*), which means "modeling"[10], "modeling from clay"[11], "inventing", "making" first of all. Other meanings of this word, like "fabrication", "fib", "invention", "pretense" etc. have derived from this initial meaning of *fingere* (*fingo*). The legal fiction is always understood as "invention", artificial creation of something [12].

No coincidence that R. Jhering has called the legal fiction "the white lie" or "innocent lie" during his time[13], as it is a refined lie in law where it is used to declare the true some fact that was made up. R. Jhering's definition of legal fiction as "white (innocent) lie, according to L. Fuller's (1902–1978), is rather smart than accurate, as if we would not interpret the "white (innocent) lie" the true meaning would mean there is some kind of lie not meant to be believed in[14]. While thinking in standard categories, such approach of R. Jhering is rather "smart" than "accurate", for sure. As from the standard point of view the lie is deliberate distortion of the reality, intentionally presented wrong or false, seeking some kind of result: mislead, trick somebody else[15]. This standard definition of lie might be acceptable considering that in archaic period of ancient Roman civilization "fiction" had a religious context and was called religious ritual where in order to deceive the Gods fake animals were sacrificed[16] and only at a late period "fiction" was transformed from religious into a legal context.

The origin of legal fiction, as well as the "fiction" in whole, dates back to the early development period of Roman empire, i. e. II century B.C.[17]. When the issue of *lex Aebutia* has granted praetor the rights to reject the claims, which, even if they were based on the law, would have been wrong to be approved and approve the claims, which, even if they were not based on the law, have derived out of life[18]. The appearance of such rule is explained by conservativism of ancient Roman law[19].

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7 Smirnov, A. V.; Kalinovskij, K. B., *supra* note 6*,* p. 76.

8 Caratini, R. *Filosofijos įvadas* [Introduction of Philosophy]. Vilnius: Kronta, 2007, p. 492.

9 Knauer, N. J. Legal Fictions and Juristic Truth. *Saint Thomas Law Review.* 2010, 23(1): 3.

10 Kuzavinis, K., *supra* note 1, p. 331.

11 Garsia, G. M. H. *Rimskoe chastnoe pravo: Kazusy, iski, instituty* [Roman Private Law: The Case, actions, institutions]. Moskva: Statut, 2005, p. 116.

12 *Ibid*.

13 Fuller, L. L. *Legal Fictions*. Stanford, California: Stanford University Presss, 1967, p. 5.

14 *Ibid*.

15 Palskys, E. Melo problema teisėje [The Problem of Lie in Law]. *Socialistinė teisė.* 1981, 1: 42.

16 Vermeer-Künzli, A. As If: The Legal Fiction in Diplomatic Protection. *The European Journal of International Law.* 2007, 18(1): 42.

17 Nekrošius, I.; Nekrošius, V.; Vėlyvis, S. *Romėnų teisė* [Roman Law]. Vilnius: Justitia, 1999, p. 26.

18 *Ibid*.

19 Knauer, N. J., *supra* note 9, p. 4.

Because of its conservatism and lack of flexibility, the ancient Roman law failed to react rapidly and flexibly to the changing public relations and this, in turn, inhibited and constrained the further development of such relations. They were in need to find the way to adapt the existing law to the rising new requirements and realities of life. The help of praetors was used for that purpose. When the praetor was granted the right to approve the claims, which, even if they were not based on the law, have derived out of life (*actio praetoria ficta*), it created a legal fiction. While issuing the edicts, praetors have started applying the law in a way that was, if looking from the formal legal position, wrong application of law, contrary to the acts of law in force, however, considering the real life, it was justifiable. For example:

- The Roman citizen, held captive by foreigners (lot. *captivitas*), could not be considered a free Roman citizen, as he has become a slave. Thus, such person could not have property and other rights of a Roman citizen. However, in approx. 81 year B.C. the *lex Cornelia* was issued, which has determined the following – if the prisoner of war has died in foreign captivity, his property is inherited by will, as he has never been held captive. Under the use of this rule *fictio legis Cornelia* has been applied, considering the Roman citizen has died before he was taken as prisoner by foreigners[20], thus free Roman citizen, the one who has never lost his rights. Later on this legal fiction has been applied while dealing with other matters of inheritance[21]. In case the Roman citizen has managed to escape the captivity of foreign country, such Roman would regain his status of a free citizen, his individual rights would be restored in full, considering the Roman, who escaped the captivity, has never lost his rights[22].

It should be noted, that Roman lawyers, while trying to adjust one or another actual situation, would not create a fiction, since they did not have such right. While maintaining the logic of the law in force, the essence of it, they could interpret the text of law acts in broadening or narrowing manner, apply analogy, this way trying to fill in some gaps in law. The right to create a fiction, as a true measure, causing the logical and legal inaccuracies, was granted only to legislators or praetors. Fiction was entered into a legal system by volitional government act and in ancient Rome it was understood as the legal-technical measure, applied in order to overcome and remove certain legal obstacles and the one, that could be applied by praetors or legislators[23] only.

In XIX c. English lawyer and historian H. Maine (1822–1888) has stated it is hard to explain why such innovations, as fiction, appear[24]. The appearance of fictions in ancient Rome H. Maine has linked to feelings and special way of thinking, the one impossible to explain from the position of nowadays.

In principal, fiction disguises the fact, that the power of law was overcome with the help of it and statutory provision has changed substantially[25].

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20 Garsia, G. M. H., *supra* note 11, p. 250.

21 *Ibid*.

22 Nekrošius, I.; Nekrošius, V.; Vėlyvis, S., *supra* note 17, p. 74.

23 Garsia, G. M. H., *supra* note 11, p. 116.

24 Maine, H. *Ancient Law, 1861* [interactive]. [accessed 19-05-2011]. <http://avalon.law.yale.edu/19th_century/mainea02.asp.>

25 *Ibid*.

If during the early stages of human civilization fiction appears as priceless (necessary, valuable and purposeful) measure to overcome the severity of the law[26] and with the help of it the balance is achieved between some persons, willing to improve the existing law to match the current reality and others, objecting the change of law and trying to keep it the same by any measures. Thus, fiction has helped creating the illusion that the law has not been changed, therefore the powers of sovereign, the one authorized to change the law, have not been usurped or limited in one way or another and has satisfied both parties. Later, according to H. Maine, fiction should become the past[27], the relic of such past and it should be waived[28], as the fiction, according to J. Bentham, usurps the powers of the legislator[29], distorts his will.

Nevertheless, despite of the prognosis of H. Maine today legal fiction has become a sort of part of a legal culture, which covers the legal system like a clothing, not just a patch[30]. Fiction distorts the legal relationships in nowadays legal system, interferes with objective view, prevents understanding and evaluation of the phenomena, penetrating our legal culture[31]. With the help of the legal fiction the reality is imitated[32], which does not exist but is just established and authorized by the acts of law[33] or, for example, the court applies the legal provisions in a particular case. In other words, legal fiction is artificial legal facts[34]. Fictions are first of all created by the legislator and the one applying the certain provisions and not able to overcome their power, uses fiction to describe the provisions in order to solve a particular problem or case. For example:

- Criminal Procedure Code of Lithuania, as one of the basis for the termination of pre-trial investigation foresees the case (CPC article 212, section 5) when the suspect and the victim (injured person[35]) make a peace, under provision of certain conditions, set forth in the article 38, section 1 of the Criminal Procedure Code of the Republic of Lithuania. The Supreme Court of Lithuania, during the hearing of cassation case, where the victim (injured person) has died because of the criminal activity, has noted, that *"[...] according to the meaning of Article 38 of Criminal Code, the law allows for exemption from criminal charges when the perpetrator and the injured person make a peace, which means* ***in this case that is a injured person himself, injured during the criminal activity****, which is also emphasized in the title of the article. According to the Board, the term injured person and the victim (according to the description of the Article 28 of CPC) are not*

26 Maine, H., *supra* note 24.

27 *Ibid*.

28 *Ibid*.

29 Bentham, J., *supra* note 3, 11(1). Chapter: *Historical Preface, Intended For The Second Editon*.

30 Soifer, A. Reviewing Legal Fiction. *Georgia Law Review*. 1986, 20: 876.

31 *Ibid.*, p. 876.

32 Baublys, L.; Beinoravičius, D.; Kaluina, A., *et al*. *Teisės teorijos įvadas* [Introduction of Theory of Law]. Vilnius: Mes, 2010, p. 291.

33 *Ibid*., p. 291.

34 Poljakov, A. V. *Obwaja teorija prava: Problemy interpretacii v kontekste kommunikativnogo podhoda* [General Theory of Law: Problems of interpretation in the context of the communicative approach]. SPb.: Izdatelskij dom S.-Peterb. gos. un-ta, 2004, p. 787.

35 Under the Lithuanian Criminal Code, Article 38.

identical[36]*"*. Hence, in the case when the injured person is deceased, making a peace with such a person becomes impossible for objective reasons.

However, at a later stages, Lithuanian Supreme Court, seeking to overcome the provisions of law, uses fiction and states the following:

*"[...]**When the injured person, injured during the criminal activities, dies, the family members** (Article 38 CPC)* or (and) close relatives *(Article 248, Section 1 of Criminal Code)* ***are considered the victims**. When the victim dies because of criminal activities, these persons suffer a moral (spiritual) and material (medical treatment, funeral expenses) damage. They have all the rights of a victim, as well as the right set forth in the Article 44 of CPC to require identifying and justly punishing the person, who committed the criminal activities and receive the indemnity for losses and damage. These persons are not representatives according the law or authorized representatives, with the status and rights established in the Articles 53–56 of CPC"*[37].

The presented sample allows to observe how the fact that does not exist is transformed into a real, true through the court and the way of interpretation of law provisions.

It is obvious, if the person, who was injured during the criminal activities, dies, the fact of making peace with him becomes impossible. At that time, with the help of fiction, used by the Court, the fact of making peace with the relatives of the victim is equated to the fact of making peace with the injured person, who is deceased, by the way. The damage made directly to the victim of the criminal activity himself is not identical to the damage suffered by family members. Furthermore, the references made by the Court to the Article 38 of CPC and Article 248, section 1 of Criminal Code are useless in terms of theory and application of law, as the articles contain rule definitions, explaining the terms like "family members" and "close relatives", but they do not contain any provisions of transferring, passing the rights from one person (i. e. decedent) to the other.

It is one of the many examples, available in criminal proceedings, where the made up fact is presented as the real one. So no wonder when it is stated that fiction distorts the essence of the law, making things that do not exist the real ones, leaving the same script of the law but changing the content of it (meaning, idea)[38]. All of this allows us to explain in one way or another why the legal fiction is resented, but it does not explain the attempts to justify it. Here, for example:

- German philosopher H. Vaihinger (1852–1933) has stated, that fiction is the remedy, used to enhance our understanding and knowledge about the reality[39],

- English lawyer W. Blackstone (1723–1780) has wrote, that the courts were forced to use the fiction to overcome the static features of law[40] and

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36 The Supreme Court of Lithuania decision of 25 May 2004 (case No. 2K-372/2004).

37 The Supreme Court of Lithuania decision 14 November 2005 (case No. 2K-P-464/2005).

38 Muradjan, Je. M. *Istina kak problema sudebnogo prava* [Truth as a Problem of Judicial Law]. Moskva: Jurist, 2004, p. 239.

39 Vermeer-Künzli, A., *supra* note 16, p. 45.

40 Knauer, N. J., *supra* note 9, p. 14.

- L. Fuller has called fictions a metaphors and the remains of human psyche at the same time. The age of fictions is not over, wrote L. Fuler, in order to understand how do legal fictions work we need to study the processes of human thinking[41].

All do see, understand and acknowledge the falsity and lie of fiction, although they do not refuse it and nobody understands why. Here, the legislator has all the power not to use the fiction himself and take some actions to prevent others from using them[42], however, he is not just not doing anything, yet on the contrary, he creates fictions and this way approves them and validates the use of them.

In order to understand why the legal fiction and the use of it are not refused we should go back to the concept of fiction.

We have mentioned in the beginning that R. Jhering has called the legal fictions the "white (innocent) lie", which is used to make a made up fact the true one, or in other words, fiction is a lie, presented for the reason to be called the truth or at least might become the truth. So, while analyzing the concept of fiction, we face the phenomenon of paradox (in Greek *paradoxos* – unexpected, strange), when while modeling the concept of fiction we try to combine things that don't go along, in this case we combine "truth" and "lie" and if to be more exact "lie" and "truth" and present the conclusion that the lie evokes the truth or at least it should evoke the truth. The first impression of it is quite absurd, but this is similar to the paradox of "sandy hill", just on the contrary. For example, the grain of sand cannot form the hill of sand and if it cannot form the hill of sand it will not be formed even if we add another grain of sand. Therefore the logical conclusion should be as follows: no matter the amount of grains of sand added to one grain of sand, they would not form the sandy hill. But our experience proves the other.

The same is if we talk about the lie, our experience proves that the lie cannot become the truth, because the lie distorts the reality. The person who lies, misleads others, he is condemned and punished. Here, for example, in the criminal proceedings one of the main duties of a witness is presenting the truthful evidence (Article 83, section 1 of CPC), and this member of the process would be responsible in accordance with the criminal proceeding for the false evidence (Article 83, section 4 of CPC) and during the process, before the questioning, he is warned about the criminal responsibilities (Article 83, section 1 of CPC).

In terms of logic, lie and truth are two mutually incompatible things. But here again we remember the paradox or antinomy (in Greek *antinomia* – the contradiction of law), where two statements, contradicting one another at the same time are not only true (although it is contrary to the laws of logic) but derives from each other as well and justifies one another. The concept of fiction reminds us of Greek philosopher Eubulides (IV c. B.C.) who has formulated the paradox of a "liar" or antinomy[43], when, while analyzing the simple statement "I am a liar", you come to an incredible conclusions.

41 Fuller, L. L., *supra* note 13, p. 94.

42 Klerman, D. Legal Fictions as Strategic Instruments. *Conference on Positive Political. Theory of Law, January 15.* USC-Caltech Center for the Study of Law & Politics, 2009.

43 For more, see: Tarski, A. The Semantic Conception of Truth and the Foundations of Semantics. *Philosophy and Phenomenologicai Reseach*. 1944, 4(3): 341–375.

The paradox of a "liar" is the obvious example of something we consider the truth, that might become a lie and *vice versa.* Thus, if analyzing one feature of fiction – the lie, and ignoring its other features and then formulating all the conclusions according to lie only, there is a great chance to be wrong. On the other hand, human are not able of knowing everything that happens around them, therefore they constantly create one or another concept and pretend it is true.[44]

In ancient Rome as well as in nowadays legal literature[45], fiction is associated with the fact. For real, any fiction is related to matters of a fact, but legal fiction is always derived from the content of legal rules, where the matters of fact and law are often closely intertwined. The legal rule where legal questions are formed is not and cannot be false, i. e. it has no value of a lie. There is no room for the fiction in the law that is prepared carefully and responsibly[46]. But sometime the content of the rules, set out in the script of a law, is sometimes inadequate, misleading and in a rare cases even passing a reality. Then, in order to understand whether those rules are a true fiction, which is used to "attack" (influence) the general (principal) rule of law, or not, the one should look for the basic, or in other words for the principal rule, towards which the fiction is directed. The legal fiction is always working as parasite, on a top of another rule[47], because only then it can achieve its goals, i. e. overcome the power of a particular rule and cause certain legal consequences or help avoiding them.

For example, the rule that is formed in Article 199[1] of CPC could be treated as a "parasite" rule, intended to overcome the principal rule of Article 198 of CPC. The rule that is formed in Article 199[1] of CPC, seeking to protect the witness from criminal influence, allows to keep secret certain personal data of a witness or injured person, except the data of a witness or injured person related to the suspect. While at the same time Article 198, section 2 of CPC contains general, principal provision that "*prosecutor or an investigating officer [...]applies the anonymity towards the victim or the witness or takes other [...] measures to assure the secrecy of data indicating identity information of a person, subject to anonymity application*". According to the idea and purpose of the rule set in the Article 198 of CPC, if it is decided to apply the anonymity to the victim or the witness, then all the necessary data, directly or indirectly giving the opportunity to unauthorized individuals to logically derive (work out) the injured person or witness, subject to process security measures, needs to be kept secret. In case this data is not kept secret, hiding the other data (e.g. occupation of a victim or witness, workplace, etc.) does not make sense. The situation, that occurred when the rule, set in the Article 198 was accompanied with other rule, could be described by the words of H. Maine: the script is the same, but the application is different[48].

The most interesting is while applying the rule with the false (misleading) fact in the content and which, as we have mentioned before, "attacks" the principal rule (the one that consolidates a correct fact) it would be impossible to disclaim the fiction in the

44 Vermeer-Künzli, A., *supra* note 16, p. 45.

45 For example, see: Poljakov, A. V., *supra* note 34, p. 787.

46 Fuller, L. L., *supra* note 13, p. 33.

47 Cambell, K. Fuller on Legal Fictions. *Law and Philosophy*. 1983, 2: 366.

48 Maine, H., *supra* note 24.

same case. Person, applying fiction, will always be right from the legal point of view. At the same time the person, suffering negative consequences because of the fiction applied, for example, it will badly affect his health, his freedom will be restricted, property destroyed, etc., would not be able to do anything in the process order during the same process. If it was applied to a particular situation, it is impossible to overcome the fiction in the same criminal case.

But is that true? The answer to this question should be positive, i. e. yes, if the fiction was applied, it is impossible to overcome it in the same criminal case. On the other hand, in terms of logic (mathematics) it should be possible to overcome the legal fiction, if it is opposed to the other fiction. Here, same as in mathematics, two minuses should make a plus or in logic, two negatives following one another should make a positive. But in order to be able to oppose one fiction with the other, new fiction, the will of a legislator is absolutely necessary. In this case he is the only one, able to consolidate a new fiction, intended to neutralize the old one, but then the old rule will be in force, the rule with no fiction in the content, the rule, that is still valid, because nobody has deleted it. So, there is no point in entering a new fiction to "attack" the old one with its power. If there would be a need to "attack" the fiction that was already applied, it would mean that in a particular case the fiction was applied unduly.

The false fact is always presented to overcome the rule, containing a correct (true) fact. When everything goes well, the rules created consistently regulate public relations and life goes on a regular flow, the legal fictions are not necessary. But as soon as something extraordinary happens, life falls out of rhythm, the desperate search for the new rules along with the old, well-established rules, appears, hoping they will work in a new, untypical situation. And often those new, additional rules are a true legal fictions, that live as parasites on the top of the old rules.

In approx. 1930 L. Fuller has formulated the definition of fiction in unusual, disjunctive form. According to him, fiction is: (1) the statement, presented for consideration, while understanding its full or partial false, or (2) the false statement, which is useful[49] and presented to coordinate a particular legal outcome with particular statement[50], and if to be more exact, to help the fiction overcome or avoid the legal outcomes of a law act[51].

The concept of fiction, presented by L. Fuller, is significant and interesting as L. Fuller has reflected two basic fiction features in it, i. e. (a) false and (b) usefulness. Oh yes, there is a third feature of a fiction, not reflected in L. Fuller's definition, but the one, that could be derived out of L. Fuller's fiction theory, i. e. (c) danger.

(a) False. Fiction – repugnant of truth and presented as truth at the same time[52]. Fiction is always false, it is a necessary feature of a fiction and this feature distinguishes it from the other formal measure of proving – presumption[53], and from the mistake as well.

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49 Fuller, L. L., *supra* note 13, p. 9.

50 *Ibid*., p. 51.

51 *Ibid*., p. 53.

52 Muradjan, Je. M., *supra* note 38 p. 239.

53 *Ibid.*, p. 239.

False – the feature of a fiction, not intended to trick anyone[54], but rather opposite, it is used to determine and to justify a fair outcome[55]. The importance of false in a fiction is not in presenting the facts, that do not exist as the true ones, existing for real, or distorting the content of a fact in a way that makes the fact seem misleading, but in the conclusion made on the base of the false fact, while trying to overcome one or another rule, the one impossible to deny with the help of legal measures.

(b) Usefulness. Fiction might become irreplaceable legal technical measure, when there are no other possibilities to overcome the formalism of the existing legal rules and their legal power. Legal fiction might be used to help this situation. Fiction is a special way of thinking, where thanks to idealization fictitious object is created, constructed and later on it is entered into legal reality and performs the functions of a legal fact in order to create, change and destroy legal relations with the help of fiction. Fiction helps coordinating a specific legal outcome with established legal rule[56] and in such way it satisfies the desire to improve the existing rules.

Here we can present an example of practical benefits of a fiction and how the court manages to "improve" the existing rule, considered impossible to overcome, with the help of fiction.

In accordance with rule of Article 20, section 4 of CPC, which governs admissibility of the evidence: "***only data, acquired in accordance with lawful methods could be considered as evidence**, which can be verified by the process actions determined in this Code*", The Supreme Court of Lithuania, while forming the unified judicial practice, has presented a recommended explanation and while explaining the legal rule, has introduced the fiction, i. e.:

*"The practice of The Supreme Court of Lithuania indicates, that the **infringement of a laid down procedure** **of data collection does not mean that such data can no longer be considered as evidence**. If was determined, the data collection procedure was breached while collecting the data, it is necessary to evaluate: 1) whether the infringement of a laid down procedure has influenced the reliability of data collected and 2) whether such infringement has limited the rights of a defendant, guaranteed by the law.* [...]"[57].

False, as the feature of fiction, in this case appears in the following way – the court is kind of announcing there is the category of "legal infringement" as well, although, as we know from the Theory of Law, the infringement is always "***against the law*** (i. e., **illegal**)[58], the activity of the person, causing the damage, is to blame[59].

This fiction has created an illusion, that the officers, while collecting the data, intended to be used as the evidence in separate, individual cases may not follow the requirements of a laid down procedure. Though, as we know, the officers in particular carry a burden of proving and therefore one of their requirements is to know the Process Law,

54 Fuller, L. L., *supra* note 13, p. 6.

55 Klerman, D., *supra* note 42.

56 Kerr, I. R. Pre-Natal Fictions And Post-Partum Actions. *Dalhousie Law Review*. 1997, 20: 240.

57 *Supra* note 56.

58 Vansevičius, S. V*alstybės ir teisės teorija* [Theory of State and Law]. Vilnius: Justitia, 2000, p. 220−222.

59 Vaišvila, A. *Teisės teorija* [Theory of Law]. Vilnius: Justitia, 2000, p. 343.

understand the content of its rules and apply it impeccably in practical actions. For this reason non compliance of the officers with requirement of the forms of the process or improper compliance means the infringement of a laid down procedure and procedural penalties should be applied. In this case the destructive (invalidity) penalties. They work when the actions, performed breaching the legal rule requirements with the legal power, are not approved, in other words the expression of such penalties – the annulment of the results, for example data, collected while breaching the laid down procedure.

On the other hand, thanks to fiction, introduced and approved by the Supreme Court of Lithuania, Lithuanian Courts may be more flexible while applying the existing legal rules and do not destroy the data, acquired while performing a formal, not essential breach of the criminal proceeding. i. e. such breach has not limited the rights of the defendant, guaranteed by law and/or they, in court's opinion, do not affect the full and impartial processing of the case.

This way, with the help of fiction, optimization of law practice is assured, i. e. the application of separate legal rules in practice is made easier. Furthermore, fiction helps eliminating legal assurance of the law[60], and in some cases fill the legal vacuum in it.

Fiction, as a certain legal technical instrument is useful and meaningful only when the creator and applier clearly understand the false of rule, that was created and applied and while understanding it he consciously and openly, clearly uses this rule, seeking a certain legal outcome. For example, while seeking to overcome or avoid the legal consequences that may arise if in particular case only the correct rule would be applied. In that particular situation the conscious lie may serve to come closer to the truth. Fiction becomes a legal measure, enforcing our knowledge about the reality. [61]

However, in cases when the person applying the law identifies himself with the creator of legal rules and does not understand that while seeking a certain outcome he uses fiction, but not the right legal rule, according to his false understanding, fiction becomes a dangerous instrument of law and loses its usefulness.

(c) Danger. The danger of fiction appears when one, applying the legal rules and identifying himself with the legislator, while applying in principal false rule to overcome the formalism of the existing law, does not understand that the rule he has chosen is not correct and it is only a legal measure to achieve the goal in certain, single cases.

Faith in own truth, false thinking that the one applying the law can effect or overcome any legal rule by certain way of explanation, compromises a legal system, distorts the essence of it, undermines the confidence of people not only in persons, applying the law (for example courts, office of the prosecutor, investigating institutions, etc.), but the State itself. The disclosure of lies causes frustration, anger at all times, and in some cases even burst of aggression.

On the other hand, the legislator may cause the same consequences when he introduces additional fictitious legal rules, which, according to him, are not fictitious, but correct and necessary. People are not able of knowing everything happening around

60 Kudrjashova, E. V. *Pravovye aspekty kosvennogo nalogooblozhenija: teorija i praktika* [Legal aspects of indirect taxation: theory and practice]. Moskva: Volters Kluver, 2006, p. 130.

61 Vermeer-Künzli, A., *supra* note 16, p. 45.

them, they are constantly creating the concepts of reality, in order to understand the reality[62], thus sometimes they make mistakes and sometimes they are forced to pretend that their imaginary reality is a true, absolute truth.

Finally, we have to go back to the question who is or who was right – J. Betham, the one assimilating legal fictions with fraud, or, however, R. Jhering, considering the legal fictions as the necessary measures? As indicated by our analysis both J. Betham and R. Jhering were right in a way.

The legal fiction, if perceived as such and consciously, carefully applied may become a useful, irreplaceable measure to determine the truth, i. e. by the way of paradox the lie will be used purposefully, to come closer to the truth. And on the contrary, if the false of fiction is not perceived correctly, the fictitious rules are introduced as the true, correct ones and later, when one becomes aware that the rules applied are, on a contrary from what was thought or declared, false, that might cause frustration, anger, etc.

Conclusions

1. Fiction – repugnant of truth and presented as truth at the same time. Fiction is a special way of thinking, where thanks to idealization fictitious object is created, constructed and later on it is entered into legal reality and performs the functions of a legal fact in order to create, change and destroy legal relations with the help of fiction.

2. Fiction helps coordinating a specific legal outcome with established legal rule and in such way it satisfies the desire to improve the existing rules. Fiction cannot be denied, therefore in the criminal proceeding and especially in the proving process it should be applied only in exceptional, single cases, when the target cannot be achieved by any other legal measures.

3. Fiction, as a certain legal technical instrument in law overall and in criminal proceedings separately, may be useful only if the one applying the law or the legislator clearly understand the false of applicable rule and while understanding it they use such rule consciously, openly and clearly while seeking particular legal outcome. Otherwise, the lie constructed in the content of a fiction serves as conscious misleading but not the way to determine the truth.

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62 Vermeer-Künzli, A., *supra* note 16, p. 45.

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TEISINĖ FIKCIJA BAUDŽIAMAJAME PROCESE – ISTORINIS ANACHRONIZMAS AR OBJEKTYVIAI SUPONUOTA BŪTINYBĖ?

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Santrauka. *Teisėje kartais vartojamas toks lotyniškas posakis: Fictioestcontraveritatem, sed pro veritatehabetur – nors fikcija yra priešinama tiesai, tačiau fikcija pripažįstama tiesa.*

Kalbant apie klasikinį (valstybinio kaltinimo) baudžiamąjį procesą, reikia pažymėti, jog čia jau veikia kitas principas – fictioceditveritati – fikcija užleidžia vietą teisei, arba kitais žodžiais tariant, fikcija netenka teisinės galios, kai jai priešinama tiesa. Taigi vos tik pradedama kalbėti apie tiesą ir fikciją, kaipmat iškyla melo, klaidingumo problema. Melas, klaidingumas yra tiesos antipodas. Teisinė fikcija irgi yra tam tikras melas, o tiksliau, melo išraiškos forma teisėje. Tai savotiškas teisinio samprotavimo arba mąstysenos rezultatas.

Neretai siekiant vienų ar kitų tikslų nesamas faktas (reiškinys) visuomenei ar atskiriems jos individams yra pateikiamas kaip tikras, iš tikrųjų egzistuojantis, nors realiame gyvenime jis (faktas, reiškinys) neegzistuoja. Dažnai tokiam reiškiniui apibūdinti pasitelkiamas fikcijos terminas. Nors fikcija ir laikoma neatskiriama socialinio gyvenimo palydove, kyla klausimas, kas yra tikroji (grynoji) fikcija ir ar jos taikymas baudžiamajame procese nereiškia teisės normų kūrėjo arba jų taikytojo sąmoningo sukčiavimo, apgaulės, kuri yra nukreipta į tų normų adresatą? J. Benthamas teisinę fikciją prilygino sukčiavimui prekyboje arba sifiliui, kuris tekėdamas kiekviena organizmo vena perneša puvimo procesą į visą organizmo sistemą. J. Benthamo nuomone, bet kokios teisinės fikcijos taikymas tik patvirtina moralinę niekšybę tų, kas ją sugalvojo ir pirmasis pritaikė. O gal vis dėlto teisinė fikcija yra objektyviai suponuota būtinybė, nes, pasak R. Jheringo (R. von Jhering (1818–1892), jurisprudencija nėra pakankamai ištobulinta, kad atsisakytų fikcijos, o be jos teisės funkcionavimas yra neįmanomas ir neįsivaizduojamas.

Straipsnyje nagrinėjant Konstitucinio Teismo, Lietuvos Aukščiausiojo Teismo bei kitų Lietuvos teismų jurisprudenciją siekiama išnagrinėti fikcijos sampratą, atskleisti jos pagrindinius požymius, parodyti, kokiomis formomis ji pasireiškia baudžiamajame procese ir kaip ji šiame procese taikoma.

Galima sakyti, jog fikcija – tai ypatingas mąstymo būdas, kurio metu idealizacijos principu sukuriamas, sukonstruojamas fiktyvus (melagingas) objektas, kuris vėliau perkeliamas į teisinę realybę ir atlieka teisinio fakto funkciją, kad pasitelkus fikciją galėtų būti sukuriami, keičiami ir naikinami teisiniai santykiai. Fikcija padeda suderinti konkretų teisinį rezultatą su nustatyta teisės norma ir taip ji patenkina egzistuojančių normų tobulinimo troškimą. Fikcijos neįmanoma paneigti, todėl baudžiamajame, ir ypač įrodinėjimo, procese ji turi būti taikoma tik išimtiniais, pavieniais atvejais, kai užsibrėžto tikslo neįmanoma pasiekti kitomis teisinėmis priemonėmis. Fikcija kaip tam tikras teisinis techninis instrumentas teisėje apskritai ir konkrečiai baudžiamajame procese gali būti naudingas tik tuomet, kai teisės taikytojas ar įstatymų leidėjas aiškiai suvokia taikomos taisyklės melagingumą ir tai suvokdamas jis sąmoningai, atvirai bei skaidriai panaudoja šią taisyklę siekdamas atitinkamo teisinio rezultato. Priešingu atveju fikcijos turinyje sukonstruotas melas ne padeda nustatyti tiesą, bet sąmoningai klaidina.

Reikšminiai žodžiai: *baudžiamasis procesas, fikcija, melas, tiesa.*

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