

**Philosophical and linguistic backgrounds of legal fictions**

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What is legal fiction? Legal fictions are necessary in reaching solutions of some problems put by the legal system, however the very concept of 'legal fictions' has not been investigated and defined in Law theory, moreover, it has not got a single accurate definition so far. The basic problem is that according to most of the definitions given by different authors the fiction is basically a lie, a misconception. Legal fiction is a lie too, but a lie for the sake of justice. Frederick Schauer who studied legal fictions and wrote about them considered legal fiction as the assumption, as the offer and as a deviation from the norm [4].

The Black's Law Dictionary gives such a definition of legal fiction: "A legal fiction is an assumption or supposition of law that something which is or may be false is true, or that a state of facts exists which has never really taken place. An assumption, for purposes of justice, of a fact that does not or may not exist. A rule of law which assumes as true, and will not allow to be disproved, something which is false, but not impossible." [1]

As a philosophical foundation for legal fiction theory Hans Vaihinger's philosophy of "as if" has been adopted [2]. The German philosopher, Hans Vaihinger offered the perspective of "as if", the basic idea of which had both logical and psychological dimensions. Any argument can typically be presented in hypothetical form, when we assume something for the sake of this argument or presuppose the truth of one proposition in order to make sense of some other proposition. Vaihinger's philosophy had great influence on both Hans Kelsen and Lon Fuller and their concept of legal fiction.

In Fredrick Schauer's article "Legal fictions revisited" the etymology of legal fiction is given: "Legal fictions exist by virtue of legal terms having non legal meanings,... a non standard application of that meaning is false regardless of the justifications for the falsity. And of course, if law is to serve its function of guiding ordinary folk, the meaning of some or most of its terms must be in the language that those ordinary folk use and understand". [4] Fiction is false and a legal fiction is a legal falsehood, both are considered as some kind of a metaphor by F. Schauer. He asserts that according to etymology, on the one hand, the fiction is a lie, a deliberate lie, but on the other hand, a legal fiction is interconnected with the rule of law which is a system of true statements. Therefore, what we deal with is a logic contradiction - a legal fiction is simultaneously a true and a false statement. Thereupon F. Schauer suggests to consider the term «legal fiction» as a special type of metaphor - "as though" ('as if' in Vaihinger's philosophy). A legal fiction as a metaphor is false under the logic form, the statement which also can not correspond to actual truth, but thus to represent itself as legal norm. According to F. Schauer, «it is sometimes important to operate and speak, as though something was the truth» [4]. Usually we understand fiction as close to lie, as a deliberate statement of an inaccuracy, however fiction is deprived of a component of actual lie.

Lon L. Fuller was more critical about legal fictions than F. Schauer. In his book “Legal fiction” he writes: “Probably no lawyer would deny that judges and writers on legal topics frequently make statements they know to be false. These statements are called “fictions”... and caused the legal profession much embarrassment” [3]. In his book he distinguished a fiction from a lie, from an erroneous conclusion, from the truth and from a linguistic phenomenon.

As an example of a legal fiction, let us consider the classic common law case of paternity – the presumption that the husband of the mother is the father of any child born during the marriage. Assuming for the moment that fatherhood requires some biological connection between the father and the child and also demands that the father should have had sexual relations (or a modern scientific or technological equivalent of them) with the mother in order to produce the child, then a number of people presumed by the law to be fathers will not in fact be fathers. It is quite possible to be the biological father of a married woman’s child without being the person to whom the mother was married at the time of conception or the time of child birth. But the law, partly because it reflected a traditional social aversion to illegitimacy, and partly to create and enforce obligations of support, presumed that all men married to women at the time the women gave birth were the fathers of the children so born, even though, in fact, only some of them were real fathers (adapted from [4]).

In F. Schauer’s work legal fiction is analyzed as a version of legal assumptions leads to false analysis of the concept structure. There is another example of legal fiction, the statement «All Volvo cars are reliable» can be considered fiction as the number or a class of characterized subjects is uncertain. In other words, if the given statement were authentically true, 100 percent of Volvo cars should be recognized as reliable. In reality, the truth is that some percent of Volvo cars can be unreliable. What does it imply? The statement «All Volvo cars are reliable» is a fiction; that is, a true assumption.

Analyzing various examples from everyday life, F. Schauer came to a conclusion that any statement received as a result of generalization is fiction. Therefore, legal norm being a rule limiting the general maintenance is fiction as doesn’t contain direct instructions to action, behavior of the actual subject in a certain situation.

Besides, attempts of classification of each particular case or legal event according to this or that legal norm can be also considered as fiction. Underestimation of the logic contradiction of the nature of fictions and discrepancy between a special case and the general norm can, according to F. Schauer, lead to injustice and should be considered with special caution.

### **Литература**

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