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FICTIONS ON THE STATEMENT OF THE APPEAL IN THE LEGAL PROCEDURE

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Abstract. *Analyzed in this paper are the law fictions as a means of the law technique, which is used in different branches of the modern law as well as in the field of civil procedure. The author points to certain fictions in the domain of the procedural law concerning the dispositional legal operations such as fictions on bringing compalints and fictions on withdrawing complaints no matter if they were directly or indirectly formulated in the legal text and points to a special law phenomenon - to fictions on the statement of the appeal .*

Fictions on the statement of the appeal are encountered in the court of appeal procedure concerning the appeal to the decision by means of which a decision has been made on a possibly joined demands. They have resulted as a consequence of the legal gap which should have been filled by interpretation. The court practice has in this situation resorted to creating fictions on the statement of an appeal, thus practically contributing the court to participate in the law order elaboration.

Fictions on the statement of the appeal, as a legal phenomenon occuring in the court practice due to the failures of the lawmaker to norm a procedural situation, represent a phenomenon to be studied and analysed in details. This law phenomenon, which has not attracted attention of processualists deserves not only to be the subject of a special analysis due to the basic concrete dilemmas it causes, pointed to by the author, but to be legally normed as well.

Key words: *fiction, legal remedy, complaint, possible cumulation of complaints, legal procedure, appeallation proceedings.*

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I

1. Fictions in the law[1] (fictio juris) are a special means of the law technique[2] by means of which declared as true is that what is untrue and for what one knows that is untrue, that is, that something is not true although one knows that it is true. Fictions are fabricated law facts which the law order takes to be true, that is, untrue regardless of their imaginary contents.

The law fiction consists of a conscious and deliberate equalizing something which is known to be unequal and in equalizing something which is known to be similar. Fictions are used in the law to consciously distort reality and deviate from it[3] and that is why these law facts are characteristic and differ from other law facts. Certain facts in the law fictions are deliberately falsely represented and the real life facts are deliberately distorted. This is dictated by the practical needs of the life and the social and human reasons taken into account by the law.

Resorting to the fictions in the law occurs when the usual law technique instruments and the known and recognized law categories cannot provide an acceptable solution of a law problem to be resolved, regadless of the fact if it was generated in the procedure of legislative norming certain law relations or during the interpretation of a law norm in its practical application. As an instrument of the law technique, the law fiction can be a part of the law and a part of the law reality.

Fabrication of facts is a means used in the law only in exceptional cases in order to achieve some, for the law important goal or to accomplish certain law values in the social relations such as, for example, order, peace, freedom, justice, human dignity, equality, confidence relations, protection of interests of certain categories of persons, etc.

2. Fictions in the law are, as well as the law presumptions[4], a special kind of law facts.

Facts are, as one knows, elements of a factual state of the law norm the existence of which should be established by the organ which applies the law and without which, as a rule, stipulated law consequences cannot result. Sometimes, the law norm maker is neither sure nor can be sure if a ceratin fact he stipulates as a condition for occurence of a certain law consequence exists in reality. Since the law norm maker tries his norming of a ceratin social relation to be effective and practical, he uses special methods of the law technique in creating law facts which should create a factual state of the law norm. Making every efforts to accomplish a certain goal, the law norm maker sometimes assumes certain facts the existence of which need not be proved and in certain cases he goes further because he imagines or fabricates certain facts.

The law fictions differ from the law presumptions although they belong to the same

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[1] The Latin word "fictio" means fabrication; the noun has been derived from the verb "fingere" which means to fabricate.

[2] See: Perelman, H. – Pravo, moral i filozofija (The Law, Morals and Philosophy), Nolit, Beograd, 1983, p 160.

[3] Therefore, fictions are differentiated from mistakes. A fiction is a fact created by that subject which creates a legal norm, while a mistake is a wrong idea about the reality or some of its actions, which results from ignorance or incapability to recognize the truth.

[4] The Latin word "presumptio" means premonition.

group of the law technique means. Both with one and the other "there is a certain part of artificialness"[5].

A fiction is a law-technical means by means of which that which is positively untrue and which is known to be untrue is proclaimed true. Its is quite obvious with fictions that the law sanctions an imaginary, untrue state. Each fiction, as a fabricated law fact, has a certain really existing, that is, indisputable law fact as its grounds.

Presumptions occur when the lawmaker (or a judge) cannot be sure if a certain fact exists. In that case, it is supposed to exists and is established as if it existed. Presumptions are a means of the law technique by means of which the maker or the interpreter of the law norm is satisfied with the premonition and probability and based upon that takes as true only that probable[6].

There occurs uncertainty with the presumptions if anything exists, while with fictions there occurs certainty that something does not exist, but anyway is considered to exist. Fictions are contradictory to the truth, correctness, while the presumptions are the result of understanding and that which is supposed is true[7]. In case of ficitions, it is obvious that the law sanctions an imaginary state, while in case of presumptions, for practical reasons, a certain fact is presumed due to a high degree of probability, thus unburdening law subjects from excess labour and efforts in achieving and protecting their rights.

In contrast to certain law presumptions, however, fictions cannot be refuted, that is, something contrary to that which is considered to exist or does not exist cannot be proved.

3. The juridical fictions have different functions. In view of that, fictions in law can be: a means of the law normative technique, a means in interpreting a law norm, a means in explaining a verdict and a means used in science.

The purpose of the legal fictions is to use a certain law rule stipulated for a certain factual state for some other factual state. It is clear with the legal fictions that a special manner of referring to the consequence stipulated for some other law situation from the very language formulation used by the lawmaker ("considered as") is in question.

Different reasons force the lawmaker to make use of law fictions in the norming procedure. The lawmaker sometimes makes use of a fiction because it is more suitable than a definition. The fiction is sometimes, due to the short-form expression, that is, formulation of a certain rule, a suitable technical means of reference to the similar situation or to the same law consequence.

Although fictions are considered to be a means of the law technique by means of which certain permissible goals are most easily accomplished when legal norming is done, there are also authors who think that they are often unnecessary in legal texts and that by means of careful revision and precise legal formulations they can be completely

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[5] Spasojević, Ž. – Analogija i tumačenje, Prilog proučavanju metoda u privatnom pravu (Analogy and Interpretation, A Controbution to a Study of Methods in Private Law), Beograd, 1966, p. 124 (translation of the doctoral dissertation of 1911).

[6] Thus: Lukić, R. – Metodologija prava (Methodology of Law), SANU, Beograd, 1977, p. 233.

[7] On that: Lukić, R. – Teorija države i prava (The Theory of State and Law), Savremena administracija, Beograd, 1964, p. 188.

eliminated[8].

In the process of interpretation, fictions are intended to enable a fact from the established state of things to be subsumed under the factual state of a law norm under which it otherwise could not be subsumed. To achieve this aim, fabricated law facts are deliberately created so that something is added to or subtracted from the fictions or something is represented in a different way or as a similar thing. As a law and technical instrument, fictions enable essentially different law situation to be treated in an equal way and subsumed under the same law regime[9].

In the court practice, fictions are sometimes used as a means in giving reasons and motives for the verdict. Fictions in giving reasons and motives are most frequently the consequence of failures or nonchalance of the judge who has not worthily done his assignment. Giving reasons and motives has the character of an account on the established state of things and should be, as an adequate realization, correct and true. A fiction in giving reasons and motives for the verdict means that the judge takes something to exist although he knows that it is not true. That practically means that the judge consciously wraps the nontruth with the veil of truth, that is, that he obscures the facts. In that case, a verdict has illusory reasons and motives – has only seeming reasons and motives.

The law science, as well as any other science, should scientifically work out the contents of the law. To conceptually work out the law, the law science also utilizes categories which have a fictive character in the sense that they have not their immediate substrate in the factual life relations. When scientific, doctrinaire working out in studying law is in question, in addition to other, described also are the law norms as valid (or as historical) law and the contents of the normative ideas are presented. In addition, when reporting the contents of the law in the law system, the science discovers fictions in the law norms, analyses them, finds out the reasons of their existence and provides scientific explanations because of which the law resorts to fictions.

When fictions are in question, our general theory of law has not demonstrated a somewhat stronger interest in this law phenomenon[10].

4. In the law literature, it is mainly considered that only the lawmaker have the right to use fictions in the law as a means of the law technique and to explicitly or indirectly stipulate them under the law. Certain law writers point to the fact that fictions are dangerous means of the law technique ("the most unnatural technical means in the law")[11] and that it is unreasonable the fictions to be created by the lawmaker, who can

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[8] "A fiction in the law resembles of auxiliary hypotheses to be made up when physical theories do not sufficiently take reality into account, which can be dispensed with when they are replaced by theories better suited to the practice. Also, when the theory is changed, when the law reality turns different, resorting to a fiction becomes needless". – Perleman, H. – op. cit. p. 161.

[9] On that: Leksikon građanskog prava (The Lexicon of Civil Law), Nomos, Beograd, 1996, p. 808; Tasić, Đ. – Uvod u pravne nauke, Enciklopedija prava, edicija Klasici jugoslovenskog prava (Instroduction to the Law Sciences, Encyclopaedia of Law, edition Classical Authors of the Yugoslav Law), Službeni list SRJ, Beograd, 1995, p. 432; Lukić, R.- The Theory of State and Law, Savremena administracija, Beograd, 1964, p.188; Lukić, R. – The Methodology of Law, SANU, Beograd, 1977, p. 233.

[10] In that sense also: Martinović, S. – O fikcijama u pravu (On Fictions in Law), Pravni život, 12/98, p. 1061.

[11] Thus: Lukić, R. – The Theory of State and Law, Savremena adminsitracija, Beograd, 1964, p. 189.

always enact new regulations by means of which a certain relation or a certain right shall be regulated without fictions or shall, by a careful revision of the legal text, if possible, directly avoid the use of fictions.

In the court practice, fictions are generally used to accommodate the obsolete law to the newly generated changes. Since a court itself cannot change a law, it uses fictions in interpretations[12] and thus, adapting the law rules by means of fictions, makes new law rules.

When application of the law in the court activities is in question, the usage of fictions is considered to be a method of distorting and evading legal regulations. The usage of fictions in the court practice is conditioned by the historical and cultural circumstances and is a product of times when symbols and forms featured thinking. In addition, it is a consequence of the human spirit inclination to use personifications[13]. If, according to the valid law and in line with the separation of power principle, the judge applies the law, but does not create it, it is not necessary in the interpreting process to resort to fictions, particularly because new methods are available to a modern lawyer and because interpreting the law is much more free.

5. Fictions are a means of the law technique which has played a significant role in the Roman law. Examples of numerous fictions are encountered in the Roman law. The Romans used to resort to fictions which made a Roman citizen equal to a foreigner that they could apply ius civile to him. Or, that a person could designate an authorized person, he had to seemingly transfer his property to that other person. Also, fictions were used when a slave was treated as a thing, when fabrications were made to continue de cujus persons in his heirs, when seeming law jobs were explained.

Fictions in the Roman law were a means frequently used by praetors that they could overcome sternness of the positive law which did not meet new needs occurring in the law life during the development of social relations. However, that is why fictions in the Roman law have found the best use in the court proceedings[14].

The English law, like the Roman law, was in the similar position when fictions were in question. Thus, for example, the English law featured fabrications that the owner himself was his own sharecropper that he could do those authorizations recognized to lessees.

In the theory of law, the examples of the Roman and English laws are considered to demonstrate that fictions were a means of the law technique usually used in those law systems which were conservative, which were not easy to change and which were too strict and stern[15].

6. Fictions, as a law phenomenon, are also encountered nowadays in different branches of the modern law: constitutional, criminal, civil (real, obligation[16], hereditary),

[12] See also: Kelsen. H. – Opšta teorija prava i države (General Theory of Law and State), Beograd, 1998, p. 205.
[13] Tasić, Đ. – op. cit. p. 434
[14] Detailed on that, for example: Gaj – Institucije (Institutions), Nolit, Beograd, 1982, p.261.
[15] See: Tasić, Đ. – Uvod u prave nauke (Introduction to Law Sciencies), Beograd, 1995, p. 433.
[16] Thus, for example, provision of Art. 74, Paragraph 4 of the Law on Obligations, reads: "The condition is deemed to be met if its fulfillment, contrary to the principle of good faith, is prevented by the party to the

administrative, international[17], etc.

Typical and a generally known law fiction is contained in the rule according to which anybody who violates any law norm is deemed to know its contents[18]. In addition to that, fictions are also encountered in the rules which, for example, stipulate that people perform legislative power although deputies, as their representatives, pass laws in the assemblies, that the conceived but unborn child is already born at the moment of delation, that ships represents a part of a state's territory, that an instigator and accomplice in a criminal act are treated like the criminal act performer himself and are punished as if they have committed the crime, etc.

Fictions, as a means of the law technique, are also encountered in the civil procedure both in the field of the procedural statics and in the field of the procedural dynamics. A great number of procedural norms with its stylization of the law norm factual state, its linguistic expression and linguistic form clearly expresses a fictive nature of certain facts being the component parts of the disposition ("it is considered", "as if it is" and the like).

In the field of civil procedure, the lawmaker has, for example, provided that all persons having the role of unique colitigants are considered one person (Art. 201 of the Statute on Litigation Procedure, that in the case of the colitiguous intervention the party and the interferer who joined it are considered one person (Art. 209 of the Statute on Litigation Procedure), that in certain situations it is considered that summon has been done (Art. 144 of the Statute on Litigation Procedure), etc.

In view of the nature of the lawsuit actions themselves and in view of the circumstance that they are the most important procedural and law facts which represent the basic element of the legal procedure and which produce their effects in the lawsuit, fictions, as a means of the law technique, are considerably rarely used in the field of the procedural dynamics.

In the process of normative creation of the functional procedural rules, when lawsuit actions are in question, considerably limited is the space to the lawmaker for their conscientious fabrications. It is, surely, the consequence of their law nature because they are, in their essence, active bodily behaviour, but is also the consequence of the disposition principle, as the fundamental procedural principle and the basic methodical principle dominating the civil procedure. In addition to that, in legal texts, fictions relative to certain dispositional lawsuit actions, first of those having initiating character, are also encountered.

The lawmaker, motivated by different law and political or law and technical reasons, has explicitly or indirectly stipulated fictions on bringing[19] or withdrawing the complaint.

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burden of which it has been defined, but is deemed not to be met if its fulfillment, contrary to the principle of good faith, is caused by the party to the benefit of which it has been defined."

[17] Popvić, Đ. – Pojam pravnih fikcija i njihova primena u međunarodnom pravu (The Concept of Law Fictions and Their Use in the International Law), Beograd, 1931.

[18] Also Kelsen, H. – General Theory of Law and State, Beograd, 1998, p. 97.

[19] In a series of events, the law explicitly or indirectly stipulates fictions on institution of proceedings. For example: 1) When the voluntary jurisdiction court, until the decision has been made in that voluntary jurisdiction matter, establishes that the proceedings should be carried out according to the rules of the litigious procedure, because a lawsuit matter is in question, it will decide to suspend the voluntary jurisdiction proceedings and to cede the legal matter to the lawsuit court. According to the effectiveness of this decision, the proceedings will be continued with the lawsuit court, competent for that legal matter, and be carried out

Fictions on institution of proceedings[20] are a relatively new law phenomenon in our procedural law, which causes a series of basic and concrete law dilemmas, but a series of law consequences as well, which have not been sufficiently registered so far by the court practice or on which an attitude has only to be assumed[21].

Fictions on withdrawing the complaint[22] are a means of the law technique frequently used by the lawmaker for different law and political reasons. Legal texts, by a series of provisions, stipulate situations in which the complaint is deemed to have been withdrawn although it is certain that the plaintiff, like dominus litis, have not made such a statement.

When an appeal[23], as a regular law means, is in question, which, by the course of its law nature, is a dispositional party lawsuit action by means of which a court of appeal procedure is regularly instituted, the lawmaker has not explicitly stipulated fictions on its statement. However, in a specific procedural situation, although the party has neither stated the appeal nor has through it instituted the secondary procedure, the appeal is deemed to have been stated because there exists a fiction on the statement of the appeal. This fiction is encountered in the legal procedure, during the appellation proceedings in a specific situation arising due to a possible cumulation.

II

7. Possible cumulation of complaints is a form of an objective cumulation of the complaints cumulated so that the plaintiff points out two or more demands being mutually connected and proposes the court to adopt the next of those demands in the case it finds out that the previously pointed out demand is groundless (Art. 188 of the Statute on Litigation Procedure).

Possible cumulation differs from the common cumulation in that the plaintiff does not require the court to adopt all cumulated demands against the same defendant, but only

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according to the rules of the legal proceedings before that competent court although the legal proceedings in that legal matter was neither instituted by the complaint nor it was brought. 2) When the plaintiff alters the complaint, the altered complaint shall be deemed to have been brought at the moment the former has been brought. 3) When one of the petitioners gives up the common proposal for divorce, and the other sticks to the request their marriage to be divorced, the divorce procedure shall be deemed to have been instituted. 4) When, during the divorce procedure, the petitioner dies, the marriage shall cease in a natural way. Since it is possible that the heirs of the plaintiff have a legal interest the outlived accused spouse/wife to be established to have lost the right to the heritage, the procedure shall be deemed to have been instituted to establish that the outlived spouse/wife have lost the right to the heritage because the divorce complaint has been legally instituted if the heirs only declare to "go on with the procedure" although they have not instituted the constitutive complaint. The lawmaker has, in some other cases, indirectly stipulated fictions on institution of proceedings. In practice, a fiction on institution of proceedings in a particular situation is deemed to exist. If the plaintiff at the same appearance in court, when he made a statement on withdrawing the complaint, and then declares to give up the withdrawal of the complaint, he is considered to have brought a new complaint of the same contents.

[20] Detailed on this: Stanković, G. – Fikcije o podizanju tužbe (Fictions on Institution of Proceedings), Zbornik radova Pravnog fakulteta u Nišu, Niš, 1985, p. 93; Stanković, G. – Građansko procesno pravo (Civil Processing Law), Niš, 1998, p. 317.

[21] Detailed: Stanković, G. – Fictions on Institution of Proceedings, Zbornik radova Pravnog fakulteta u Nišu, Niš, 1985, p. 100.

[22] Stanković, G. – Građansko procesno pravo (Civil Procedural Law), Niš, 1998, p.326.

[23] Detailed on that: Janevski, A. – Žalba protiv presuda vo parničnata postapka (Appeal Against the Verdict in the Litigation Procedure), doctoral dissertation, Skopje, 1991.

one of more cumulated demands. The plaintiff had the possibility of pointing out each of the possibly cumulated demands in a particular proceedings. Since it is not possible the court to adopt all the demands pointed out because they are, in view of the material law rules, mutually excluded, the plaintiff points them out simultaneously and requires the court to adopt one of the demands pointed out – that one which proves to have grounds. For example, if the plaintiff requires the court to give orders to the defendant to meet the contractual obligations, and if, during the proceedings, the contract is found out null and void, he requires the court to sentence the defendant to bring back the selling price.

8. Possible cumulation is a form of the objective cumulation of the demands representing a certain advantage for the plaintiff. The plaintiff who, at the moment of bringing the complaint, is not certain of the grounds of his pretensions against the same defendant, can require the law protection by simultaneously pointing out all of his pretensions, not running an obvious risk to fail with any of the demands if pointing them out successively in different lawsuits. The dilemmas with the plaintiff at the time of his decision to require the law protection may also be caused by the circumstance that at the moment he needs the law protection he is not fully acquainted with the state of things, that he is not sure of his own law grounds, that he cannot predict what the defendant's behaviour will be as well as that he cannot prognosticate the law understanding and the court decision and his possible prospects for success in each of the lawsuits he would have to institute.

9. Possible cumulation is a procedural institution by means of which, in addition to economy, efficacy and concentration principle, the law safety principle is also accomplished. Simultaneously pointing out more demands, in a sequence determined by the plaintiff, the possibility that the court, in two different lawsuits, will reject both demands due to differences in the law estimation and law understanding is prevented in advance.

10. Differentiated with a possible cumlation are: basic demand and possible demand. The earliest pointed out demand is a *basic demand*, while the others, subsequent demands are *auxiliary* or *possible* demands.

The sequence of decision-making on the cumulated demands is determined in the complaint by the plaintiff himself.

11. Possible cumulation may be simultaneous (or initial), when the demands were cumulated way back in the complaint and subsequent (or successive), when the possible demand is pointed out during the lawsuit (altered complaint).

In case of the initial possible cumulation, the litispendence and all its effects occur simultaneously for all simultaneously cumulated demands; the lawsuit on all cumulated demands is simultaneously instituted as well.

If possible cumulation occurs additionally, during the proceedings, the litispendence on each additionally pointed out demand begins from the moment when the defendant is advised on its pointing out.

The effect of the litispendence is demonstrated in that bringing of the new complaint is not permitted with the demand identical to any of the possibly cumulated demands,

either the principal or the possible.

12. Possible cumulation is permitted under certain conditions. First of all, there should be mutual connection between the cumulated demands (that principal and possible). Connection between the principal and possible demands may be real and legal. Mutual connection is demonstrated either in that the demands have the same factual and law grounds or in that they are directed to the accomplishment of the identical law or economic goal.

Possibly cumulated demands are most frequently mutually excluded and because of that only one of them can possibly be adopted.

Possible cumulation is also permitted when the same court is really and locally competent for the cumulated demands. In addition, possible cumulation is also permitted when the same kind of proceedings is prescribed for all cumulated demands because decision-making on demands for which the same law method is stipulated is in question.

13. The Statute on Litigation Procedure of the Federal Republic of Yugoslavia of 1977 does not include particular rules according to which the court should proceed in investigating and making decisions when included in the complaint are possibly cumulated demands although there is a need that this procedural phenomenon as well shall explicitly be regulated in view of the different law understandings generated both in literature and in practice.

When investigating the state of things in a lawsuit in which the demands are possibly cumulated, the court shall not be bound to the order of the states of things by means of which the plaintiff explains his demands. The court shall establish the facts in the order it deems the most suitable to it.

14. The specifics of the decision making-procedure on the possibly cumulated demands are in that the procedure on one of the possibly cumulated demands cannot be separated from the other because there is a danger two contradictory decisions to be made.

The decision-making order on the cumulated demands shall be determined by the plaintiff himself in a way that he shall point out one demand as the principal and the other, subsequent, as the possible. Because of that the court too shall investigate the groundedness of that demand which was given priority. Decision-making on the possible demand is possible and permitted only when the court finds out that the principal demand is groundless.

Possible cumulation of the demands may result in a situation where the principal demand has grounds or not. In that case two different situations are possible.

When the court concludes that the principal demand has grounds to be pointed out, it then pronounces a verdict by means of which the demand is adopted. Having adopted the principal demand the court has thus provided the plaintiff with the law protection, but the lawful condition to make decisions on the groundedness of the possibly pointed out demands has not been met. When the court adopts the principal demand, decision-

making on the possibly cumulated demands has become unnecessary[24]. All the demands cumulated in the case of possible cumulation mutually exclude each other and, adopting one of them, the plaintiff has achieved the desired goal and has obtained the required law protection. The court should include a conclusion into the verdict reasons and motives that it is unnecessary to make a decision on the possibly pointed out demand.

There are different opinions in literature on how the court should proceed.

According to one opinion[25], the court of first instance should, in addition to the verdict, make a decision by means of which it will establish that the lawsuit on the possibly pointed out demand shall be discontinued when the verdict, by means of which the principal demand has been adopted, becomes effective.

According to another, contrary opinion[26], it is deemed that by making a decision the lawsuit shall be discontinued regarding the possibly pointed out demands and that presumption should be made that the plaintiff has at that moment withdrawn the charges on the possibly pointed out demands.

This second opinion can seriously be objected to, being a specific law construction. First of all, in the hereinbefore mentioned case there would be no presumption in question but a fiction on the complaint withdrawal. On the other hand, the fiction on withdrawing the complaint regarding the possibly pointed out demand would be contrary to the clearly expressed procedural will of the plaintiff and his interests. In addition to that, this would bring the plaintiff into an exceptionally unfavourable situation in case that the court of appeal would repeal the verdict of first instance and bring back the case for retrial or adopt the appeal and reject the demand. In that case, the plaintiff would be forced to additionally alter the appeal by the repeated pointing out the possible demand, which the defendant can object to, or again to institute the new lawsuit, which would, in addition to other, incur certain costs on him.

15. When the court establishes that the principal demand is groundless, legal conditions are met a decision on the pointed out possible demand to be made. However, the court does not make an outright decision on the principal demand groundlessness, but investigates groundedness of the possibly pointed out demand. The court can make a decision only when it concludes that the possible demand has been groundedly pointed out (that is, one of more possibly pointed out demands) or when it concludes that all possibly joined demands (both the principal and the possible) and groundless. In that case the court, by the same verdict, makes a decision on the groundedness or ungroundedness of all cumulated demands. Accordingly, should the principal demand be rejected, the court must, by the same decision, make a decision on the possible demand as well.

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[24] See: Stanković, G. – Civil Procedural Law, Niš, 1998, p. 306; Starović - Keča – Građansko procesno pravo (Civil Procedural Law), Novi Sad, 1998, p. 222.

[25] In that sense also: Poznić, B. – Građansko procesno pravo (Civil Procedural Law), Beograd, 1993, p. 289; Poznić, B. – Da li je potrebna reforma jugoslovenskog parničnog zakonodavstva? (Is the Reform of the Yugoslav Procedure Legislation Needed?), Zbornik "Aktuelna pitanja jugoslovenskog procesnog zakonodavstva", Beograd, p. 14

[26] See: Triva – Belajec – Dika – Građansko parnično procesno pravo (Civil Legal Processing Law), Zagreb, 1986, p.339.

If the court has decided that the principal demand is groundless, it must reject it explicitly as groundless because it is a lawful condition to make decisions on the possibly pointed out demand. With the same decision, by means of which it rejects the principal demand as ungrounded, the court makes a decision on the groundedness or ungroundedness of the possible demand to follow. The court must simultaneously make a decision both on the principal and on the possible demand because separate decision-making on the cumulated demands shall not be allowed. Since demands which exclude each other are in question, partial verdict shall not be allowed because in that case it could result in contradictory decisions. Besides, the plaintiff has only required the court to adopt only one of more cumulated demands.

III

16. Possible cumulation causes a specific situation in the instance procedure if the appeal would be possibly stated.

In the procedure relative to the legal remedy regarding the decision on the possibly joined demands, questions are being raised concerning authorizations for stating the appeal, the scope of refuting and the limits of the court decision-making. Under the provisions of the Statute on Litigation Procedure, the lawmaker has not stipulated particular rules on investigating the complaint and on the decision-making of the court of appeal if there occurs a law situation which hereinafter will be dealt with.

The specifics of the appellation proceedings concerning the complaint to the decision by means of which a decision has been made on the possibly joined demands is in that the lawmaker has failed to regulate certain specifics characteristic of the procedure. Because of that the court has been brought into the position to create fictions on the statement of the appeal.

17. If, during the decision-making procedure concerning the possibly cumulated demands, the court has adopted the principal demand of the plaintiff, he has no rights to an appeal because he has succeeded in the lawsuit – the court has adopted his demand. However, if the court has rejected the principal demand adopting the possible one, there is opinion that the plaintiff has legal interest[27] to refute such verdict[28].

It goes without saying that the plaintiff has the right to file a complaint if the court has rejected all possibly joined demands (both the principal and the possible) as groundless.

18. If the court has adopted the demand of the plaintiff (the principal or the possible), the defendant has the right to the legal remedy.

If, however, the defendant has stated an appeal, there occurs a specific situation in the appellation proceedings, depending on that if the court has adopted the principal or the possible demand.

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[27] On that in details: Janevski, A. – op. cit. p. 37.

[28] In that sense: Poznić – Rakić-Vodinelić – Građansko procesno pravo (Civil Procedure Law), Beograd, 1999, p. 341.

19. If the court has adopted the principal demand and has concluded that decision-making on the possibly pointed out demands is unnecessary, the defendant has only the right to file an appeal against that verdict because it represents a meritorious decision on the demand. The defendant may require the decision of first instance to be repealed or altered.

If the court has rejected the principal and adopted the possible demand, defendant has the right to state an appeal against the decision on adopting the possible demand because he has a law interest.

If the defendant has stated an appeal against the decision by means of which the principal demand has been rejected and the possible one adopted, a decision on the principal demand against which no appeal has been stated cannot become effective because joined demands are in question.

20. In the appeal procedure against the verdict by means of which the principle demand has been adopted, the court of appeal is authorized to repeal or to alter the refuted decision.

If the court of appeal repeals the verdict of first instance, it is possible to simultaneously repeal the decision made regarding the possibly pointed out demand as well. In that case, it has the possibility of making a decision on the possible demand too, if it is mature for decision- making and thus to alter the decision of first instance by adopting the possibly pointed out demand.

There are, however, opinions that a higher court cannot at all make a decision on the auxiliary demand because a meritorious decision has not been made on it in the procedure of first instance.

21. A specific situation in the appellation proceedings occurs if the court of first instance has rejected the principal but adopted the possible demand.

As we have already said, the plaintiff has no right to state a legal remedy because he has no legal interest in that since the requested legal protection has been provided to him by adopting one of his demands. The right to file an appeal is that of the defendant only, upon the disposition of which it depends if he would use the law means and institute the proceedings to control the legality of the decision of first instance.

If the defendant states an appeal against the verdict by means of which the possibly pointed out demand is adopted, there occurs a specific situation in which a fiction on the statement of an appeal is encountered. This specific situation may be interpreted in two ways.

In the first case, the court has rejected the principal demand as groundless adopting the possible one. The defendant has no law interest to state an appeal against the verdict by means of which the court has rejected the principal demand as groundless because in that part of the verdict he has succeeded in his demand for verdict because the court has rejected the principal demand. The defendant, however, can file an appeal against the verdict of the court on adopting the possibly pointed out demand. If the defendant states an appeal, and should an extensive interpretation be applied, the defendant may be deemed to have stated an appeal against the complete verdict. In that case, there exists a fiction that the defendant has filed an appeal against the verdict as well on which he could not state this law means.

When the defendant has stated an appeal against the verdict by means of which the possible demand has been adopted, in that case there may exist one fiction more on the statement of the appeal. Namely, the plaintiff may also be deemed to have stated an appeal against the refuted verdict in that part in which the court has rejected his principal demand as groundless. Although it is evident that there are no appeal actions of the defendant, it is considered in the court practice as if the appeal has been stated.

Although the appeal has not been stated in the hereinabove cases because the appeal proceedings action has not been undertaken by means of which a certain court decision is being attacked, it is deemed in practice, by the natural course of things, that the appeal has been stated.

22. A fiction on the statement of an appeal causes certain basic and practical implications.

An appeal is, as it is well-known, a proceedings action which, according to the law, has a certain stipulated form and contents. As for the appeal, a written form is explicitly stipulated under the law.

A written form which contains an appeal legal proceedings action should have definite contents. When a fiction on the statement of the appeal is in question, not only that there is no an action, but there is neither a motion which should contain definite formal elements. It is evident, and that need not be particularly stressed, that a fabricated appeal contains neither the reason nor the volume of refutation.

Although the fabricated appeal in this specific situation does not contain either the reason or the volume of refutation, that will not prevent the court to proceed with the fabricated appeal in view of the procedural rules existing relative to the appellation proceedings.

When the appeal does not contain the reasons of refutation, the court, based on the explicit legal provision and in official duty, takes care only of the material and law violations and of certain procedural violations, those which are, according to the law itself, of essential importance. Should any doubt be raised relative to the correctness of the state of things found out, it may repeal the decision being refuted by the fictive appeal.

On the other hand, the law stipulates that the verdict being refuted, if the volume of refutation cannot be seen from the appeal, is deemed refuted in the part in which the party has not succeed in the proceedings.

23. In the appeal procedure against the verdict reached after the complaint which contained the possibly joined demands, the court of appeal has a special assignment and different authorizations as regards the limits of investigation of the decision being refuted.

If the court of appeal in the procedure of second instance repeals the verdict of the court of first instance by means of which it has made a decision on the principal demand, it will decide to bring the law matter back to the court of first instance for repeated decision-making.

If the defendant has stated an appeal against the verdict by means of which the possible demand has been adopted, the court of appeal must, on the whole, investigate the decision of first instance being refuted, which means to investigate it in the part in

which the principal demand has been rejected, but not only in the part in which the possible demand has been adopted and to which the appeal has been stated.

The court of appeal can, depending on the proceedings results, adopt the appeal and make a decision on rejecting the possible demand or to repeal the verdict of first instance on the whole and bring back the law matter to repeated trial.

IV

24. In the appellation proceedings regarding the appeal against the decision by means of which a decision has been made on the possibly joined demands, encountered are fictions on the statement of the appeal resulting as a consequence of the legal gap which should have been filled with the interpretation. The court practice has in that situation resorted to creating fictions on the statement of the appeal, thus practically contributing to the court to participate in the law order elaboration.

Fictions on the statement of an appeal, as a law phenomenon which has appeared in the court practice due to the failures of the lawmaker to norm a procedural situation, represents a phenomenon which should be investigated and analysed in details. This law phenomenon, which has not attracted the processualists' attention, deserves not only to be the subject of a particular analysis, due to basic and concrete law dilemmas it causes, but to be lawfully normed as well.

FIKCIJE O IZJAVLJIVANJU ŽALBE U PARNIČNOM POSTUPKU

Gordana Stanković

U ovom radu autor analizira pravne fikcije kao sredstvo pravne tehnike koje se koristi u raznim granama savremenog prava, pa i u oblasti civilne procedure. Autor ukazuje na pojedine fikcije u domenu procesnog prava koje se tiču dispozitivnih parničnih radnji, kao što su fikcije o podizanju tužbe i fikcije o povlačenju tužbe, bez obzira da li su direktno ili indirektno formulisane u zakonskom tekstu i ukazuje na jedan poseban pravni fenomen – na fikcije o izjavljivanju žalbe.

Fikcije o izjavljivanju žalbe sreću se u instancionom postupku povodom žalbe na odluku kojom je odlučeno o eventualno spojenim tužbenim zahtevima. One su nastale kao posledica pravne praznine koju je interpretacijom valjalo popuniti. Sudska praksa je u toj situaciji pribegla kreiranju fikcija o izjavljivanju žalbe i tako doprinela praktično da sud učestvuje u elaboraciji pravnog poretka.

Fikcije o izjavljivanju žalbe, kao pravni fenomen koji se javio u sudskoj praksi zbog propusta zakonodavca da normira jednu procesnu situaciju, predstavljaju pojavu koju treba detaljno istražiti i analizirati. Ova pravna pojava, koja nije privukla pažnju procesualista, zaslužuje ne samo da bude predmet posebne analize, zbog naćelnih i konkretnih dilema koje izaziva, na koje autor u radu ukazuje, već i da bude pravno normirana.

Ključne reči: *fikcija, pravni lek, tužbeni zahtev, eventualna kumulacija tužbenih zahteva, parnični postupak, postupak po žalbi.*