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ASPIRATION OF THE CRIMINAL PROCEDURE – THE TRUTH

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Abstract. *The article investigates the problem of the truth as the purpose of the criminal procedure, the problem of its cognition. Individuals carrying out criminal procedure activities (including the court) are servants of the procedural form and, at the same time, its hostages, therefore they are unable to approach the objective, absolute truth and should be content with the formal (legal) truth. This position falls under criticism. Attempts to artificial segmentation of the truth to its separate categories or forms are nothing, but justification of the procedural erosion of a certain form. The article offers the opinion that the classical criminal procedure shall establish absolute, not formal (legal) truth. The truth is not only an aspiration of the criminal procedure, but, at the same time, a derivative, regulatory principle, the idea that works only in classical criminal procedure. This principle does not work*

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in quasi-processes, i. e. in those criminal procedure forms that are organically separated from the classical procedure form.

Keywords: *criminal procedure, truth.*

Introduction

The opinion that pursuing of the truth in the criminal procedure in Lithuania and its establishment is some kind of illusion that should neither be established, nor pursued, and it is enough to be satisfied with the formal (legal) truth becomes more and more frequent in Lithuania. Comprehension of the truth is referred to as the ability of subjective, not practical cognition[1]. This means that absolute truth cannot be perceived as a material object and it is only an indication of certain circumstances, a quality of cognition. Individuals carrying out criminal procedure activities (including the court) are servants of the procedural form and, at the same time, its hostages, therefore they are unable to approach the objective, absolute truth and should be content with the formal (legal) truth. The formal (legal) truth is a construction arising from the formal origin, due to which the justice is consolidated into a certain form, accordingly the justice is nothing than a certain formality[2], as it contents itself not with a thorough investigation of criminal acts that have been conducted in the past and circumstances of their conduct, but with superficial investigation of circumstances of criminal acts or their examination at the best. The formal truth in the criminal procedure is viewed as the knowledge, conclusions about circumstances of the criminal act, which, although correspond to the circumstances of the cognition of the conducted criminal act, however, the level of the cognition of those circumstances does not correspond to criterion of full, comprehensive cognition of those circumstances. In case of the formal truth, the level of cognition of the circumstances of conducted criminal act is more presumable than real.

The aim of "[...] the fast, comprehensive disclosure of criminal acts and proper employment of the law for proper punishment of an individual who has conducted a criminal act so that no one, who is not guilty, shall be punished" consolidated in the Clause 1 of the Criminal Procedure Code of the Republic of Lithuania theoretically allows consolidation of such procedural rules, which by any "legal" means shall be orientated to disclosure and punishment of an individual, who has conducted criminal act, without looking for the optimal, ideal form of the criminal procedure and forgetting about certain values, often even human rights or international obligations. Only a guilty person can be convicted and punished simultaneously. Such requirement of the law does not

1 Arlauskaitė–Rinkevičienė, U. Pažinimo proceso ir tiesos nustatymo baudžiamajame procese probleminiai aspektai [The Problematical Aspects of Cognition Process and the Truth, as this Procedure Purpose in Criminal Procedure]. *Jurisprudencija.* 2006, 11(89): 74.

2 Muradjan, Je. M. *Istina kak problema sudebnogo prava* [Truth as a Problem of Judicial Law]. Moskva: Jurist, 2004, p. 89.

allow seeking for justice at any price and using any legal means (procedural form including). The formal justice is defective. Act of justice, conviction, which is inadequate to the actual circumstances of the criminal act and which is not proved by evidentiary material is doubtful[3]. Desire to perceive, to know is characteristic to each human being, while public relations shall be grounded by the honesty and the truth[4]. Any attempt to distort public and, at the same time, legal relations so that they become insincere, faked instead of being true is reprehensible. Although each person has a certain choice or possibility to aspire for the cognition of the truth or to refuse from pursuing of it, public participants of the criminal procedure, i. e. those, who are empowered to execute criminal procedure activities on behalf of the State have no such choice; they must seek that criminal acts they investigate or hear in court are investigated justly at the maximum. The truth and aspiration for it has been and is a priority of the criminal procedure, as personal belief in a legal system as such and in the State itself relies on thorough investigation and description of criminal acts conducted in the past and circumstances of their conduct laid out in the act of justice, the court judgment. And this is evident, as the criminal procedure is a certain cognitive activity involving a concrete person, usually not at his own will or wish, and namely this concrete person experiences those legal consequences that, according to him are caused by the "wrong" court judgment. Each person has an inner feeling of justice and a conflict arising between the truth stated in the concrete court judgment and inner conception of the truth of the person makes him feel dissatisfaction, inner confusion that influences his legal consciousness[5] and, at the same time, forms his attitude not only to the court that has passed the judgment, but also to the State, on behalf of which the court passing that judgment has been acting.

This article using methods of induction, deduction and data analysis tries to clear out, what truth – formal, material, absolute, relative, objective, subjective and etc, should be established during the criminal procedure of Lithuania. It also attempts to check hypothesis that segmentation of truth into its separate categories or forms is nothing more than an attempt to justify a certain form of procedural erosion.

1. Pursuing the Truth in the Criminal Procedure

The criminal procedure is an activity of investigation and litigation of criminal acts carried out in a specific legal form and this activity shall not be carried out not haphazardly, but in such a manner that persons implementing this activity would seek for and establish the truth[6] (Latin, *veritas).*

The Latin word *veritas* – the truth[7] is considered to be a ritual word, which, as it was thought, was brought to people by Gods by an intermediary to teach them to stick

3 Muradjan, Je. M., *supra* note 2, p. 89.

4 Arlauskaitė–Rinkevičienė, U., *supra* note 1, p. 74.

5 *Ibid*.

6 Moore, M. S. The Plain Truth About Legal Truth. *Harvard Journal of Law &Public Policy.* 2003, 26(1): 24.

7 Kuzavinis, K. *Lotynų–lietuvių kalbų žodynas = Dictionarium Latino – Lituanicum* [Latin-Lithuanian Dictionary]. Vilnius: Mokslo ir enciklopedijų l-kla, 1996, p. 913.

to the orders of God, therefore *"veritas"* is considered to be that what *convenientia* (corresponds) the will and the wish of the Creator of the world[8]. Such interpretation of the word *"veritas"* is nothing but the theological attempt to explain the essence of the *"veritas*" (the truth). Researchers of the Latin language notice that in the late Latin the word *"veritas"* and its derivatives (*verdicus* – the one that says the truth, truthful; *verax* – straightforward, telling the truth; *veratrix* – witch, sorceress) have become purely legal terms with the help of which the truth is brought nearer to the law, thus, the meaning and the content of the word *"veritas"* itself has changed and acquired a shape of idea of universal order, which is pursued using the right laws[9].

Lithuanian lawmaker demonstrates aspiration to created a "perfect" legal instrument (the law), with the help of which it would be possible to implement the idea of "universal order" or, to be more precise, which could be effectively used in investigation and litigation of criminal acts. For example, designing criminal procedure the lawmaker already in the first clause of the Criminal Procedure Code of the Republic of Lithuania[10] determines the purpose of this process stating that the goal of the criminal procedure is "[…] the fast, comprehensive disclosure of criminal acts […]". The terms "fast" and "comprehensive" used in the Criminal Procedure Code demonstrate real intentions of the lawmaker, aspiration that state institutions and officials implementing criminal procedure in practice shall put their effort not only into fast disclosure of criminal acts, but also combine the rapidity of disclosure with its comprehensiveness, i. e. comply with the requirement of finding the truth – the absolute, objective truth, not just any. To tell the truth, this requirement flows from the principles of the legal state and justice consolidated in the Constitution of the Republic of Lithuania and is explicated in constitutional doctrine of Lithuania, therefore, the lawmaker designing the content of the Criminal Procedure Code had no other choice than to echo the idea of pursuing of the truth.

The idea of pursuing of the truth in the criminal procedure is encoded in the Constitution of the Republic of Lithuania. The Constitutional Court of the Republic of Lithuania explicating constitutional doctrine has expressed its opinion concerning the idea of pursuing of the truth in the criminal procedure in the number of its rulings. For example, "[…] The duty of the court is to use all possible means to establish the truth in the criminal case […]"[11], "[...] The court while hearing the criminal case shall act in such a way

8 Hajdegger, M. O suwnosti istiny [On the essence of truth] [interactive]. [accessed 04-05-2011]. <http://www.philosophy.ru/library/heideg/verit.html>.

9 *Ibid*.

10 Further – CCP.

11 The Constitutional Court of the Republic of Lithuania 5 February 1999 ruling On the compliance of Parts 4 and 5 of Article 255, Part 4 of Article 256, Part 4 of Article 260 and Parts 1, 2 and 6 of Article 280 of the Republic of Lithuania Code of Criminal Procedure with the Constitution of the Republic of Lithuania. *Official Gazette.* 1999, No. 15-402.

that the objective truth is established in the criminal case and the issue of the guilt of the accused person in conducting the criminal as is solved in the right way […]"[12].

On the other hand, despite the fact that the lawmaker and the official constitutional doctrine consider establishment of the objective truth in the criminal procedure to be one of the key objectives of this procedure and a duty arising from this objective, the truth is a philosophical category and, for this reason, it is only an aspiration in the classical criminal procedure, which could be only approximated[13], while investigating and litigating criminal acts, but not disclosed or established[14]. As, according to S. Kierkegaard (1913–1855) a human being cannot find the objective truth and the maximum, what he could achieved, is only a subjective sense of it[15]. Could the truth be approached in the criminal procedure or will it stay an aspiration, a certain subjective sequel of imagination, it depends only on wishes, knowledge, will and efforts of a human being (lawmakers, persons executing or involved in the procedural activity), as, according to I. Kant (1724–1804) and J. G. Frichte (1762–1814), a human being (subject) and not anyone else is creating or, at least, determining the truth[16]. The truth is a sense, which could be felt by a human being, who touched it or approached to it, as it cannot be contacted physically or does not materialize in any other way. No methods exist in the contemporary world, employment of which would allow us to claim that we have reached absolute, objective truth or even come to it closer than we have been earlier[17].

Thus, absolute, objective truth in the criminal procedure is only an aspiration, we are searching for such truth with the help of this process, but we could not realize, when we find it, as the common criterion of the establishment of the truth is non existent here. Even the common criterion of establishment of the truth does not exist in the criminal

12 The Constitutional Court of the Republic of Lithuania 16 January 2006 ruling On the Compliance of Paragraph 4 (Wording of 11 September 2001) of Article 131 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania, on the Compliance of Paragraph 5 (Wordings of 10 April 2003 and 6 September 2003) of Article 234, Paragraph 2 (Wordings of 10 April 2003 and 16 September 2003) of Article 244, Article 407 (Wording of 19 June 2003), Paragraph 1 (Wording of 14 March 2002) of Article 408, Paragraphs 2 and 3 (Wording of 14 March 2002) of Article 412, Paragraph 5 (Wording of 14 March 2002) of Article 413 and Paragraph 2 (Wording of 14 March 2002) of Article 414 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania and on the Petitions of the iauliai District Local Court, the Petitioner, Requesting to Investigate whether Article 410 (Wording of 14 March 2002) of the Code of Criminal Procedure of the Republic of Lithuania Is not in Conflict with the Constitution of the Republic of Lithuania. *Official Gazette.* 2006, No. 7-254.

13 Merkevičius, R. Baudžiamojo proceso kodeksas: ar teisminio nagrinėjimo struktūra garantuoja teisingą teismą? In Ancelis, P.; Ažubalytė, R.; Gušauskienė, M., *et al. Sąžiningas baudžiamasis procesas: probleminiai aspektai* [Fair Criminal Procedure: Problematical Issues]. Vilnius: Industrus, 2009, p. 154.

14 Panomariovas, A.; Ramanauskas, R. Slaptumas – tiesos baudžiamajame procese nustatymo priemonė [Secrecy – Remety to Ascertain the Truth in Criminal Procedure]. *Jurisprudencija.* 2005, 75(67): 51.

15 Tatarkiewicz, W. *Filosofijos istorija. T.3: XIX ir XX amžių filosofija* [The History of Philosophy. T.3: Philosophy of XIX and XX Century]. Vilnius: Alma littera, 2003, p. 78−79.

16 *Ibid*.

17 Rorty, R. Pragmatism, Relativism, and Rationalism. *Proceedings and Addresses of the American Philosophical Association.* 1980, 53(6): 726.

procedure, however, there is something similar to the criterion of movement towards approaching of the truth[18], which brings or, at least, shall bring us the sense of truth.

The status of the truth in its objective sense in the criminal procedure, search of it can be compared to the peak of a mountain, which is constantly or almost always hidden in the clouds. A mountaineer not only finds hard to reach it, but he could even not be sure, when he reaches it, because he might mistake any other crest of the mountain for the main peak due to the clouds. However, objective existence of the mountain peak does not depend on it[19]. The similar situation is in the criminal procedure, when very often it is not possible to state that the objective, absolute truth is or has been found. On the contrary, rather often it is not difficult to understand that the truth has not been found or even neared in the criminal procedure.

For example, the truth should reflect in the final court document – court judgment, i. e. conviction, acquittal or none suit[20]. It is evident that the conviction cannot be based on presumptions. Conclusions stated in the conviction shall be based on evidences that should prove the guilt of the accused person in conducting the criminal act indisputably and other important circumstances of the case[21]. Such court judgment shall be passed when the guilt of the accused is proved fully and undoubtedly by the data collected during investigation of the case. Then, at least formally, it could state that the truth of one or another kind has been established. And vice versa, the acquittal court judgment shall be passed, when the guilt of the accused is not proved, if the court using all possibilities fails to eliminate or dispel doubts over the guilt of the accused person, which in accordance with the content of the principle of the presumption of innocence shall be interpreted in favor of the accused, the court shall pass the acquittal judgment. However, such judgment could hardly be treated as a document establishing the truth. In this case we could firmly state that the truth has not been established in this process. The situation with conviction and acquittal court judgment is very similar to the one of the mountaineer, who is trying to reach the peak. Although the mountaineer sometimes feels difficult to be sure of the fact that he has reached the peak (allusion to the conviction), he usually experiences no difficulty in understanding that he has not (or still has not) reached it, if, for example, he has been forced to return back because of the rock hanging above[22] (allusion to the given example of acquittal judgment).

One of the criteria of moving towards the truth in the criminal procedure is a procedural form and, later on, the procedural activity carried out on the basis of it, which should be orientated to establishment namely of the absolute, objective truth, not of any other kind. In this case, a presumption can be made that dividing of criminal procedure into separate formally independent stages or phases, no one out of which can exist and

18 Popper, K. R. *Rinktinė* [Selected Works]. Sudarytojas D. Miller. Vilnius: Pradai, 2001, p. 243.

19 *Ibid.*

20 See, CPC 29 straipsnį ir 303 straipsnio 1 dalį.

21 The Supreme Court of Lithuania Senate decision 20 June 2003 No. 40 On the Practice of the Courts applying Rules of the Code of Criminal Procedure regulating the Writing of the Sentence. *Teismų praktika.* 2003, No. 19.

22 *Ibid.*

does not exist independently, isolated and, in other words, organically separated from each other, is not only a legal abstraction that makes cognition of the criminal procedure and its practical implementation easier, but also a necessity dictated by objective circumstances. Separate stages (phases) of this process also shall not be even investigated abstractly unrelated to each other, as they are united by one unique purpose – to disclose a criminal act and do it in such a way that the disclosure of the criminal act would bring maximum approximation to the truth. Although the truth in the criminal procedure is established in court, the whole criminal procedure and its separates stages (phases) shall be directed towards achievement of the uniform goal.

The truth is not only an aspiration of the criminal procedure, but also a derivative, regulatory principle[23], an idea, which, as it has been mentioned above, functions only in the classical criminal procedure. This principle does not function in quasi – processes, i. e. in those forms of criminal procedure, which are organically separated from the classical criminal procedure form, for example, where separate criminal procedure stages (phases) are curtailed or refused at all (processes of the criminal court order, cases of private prosecution and etc.)[24]. The truth is beyond the boundaries of cognition and aspiration of these processes. The idea of such processes cannot be coordinated with the idea of search for truth in the criminal procedure.

In cases of private prosecution, criminal court order in the absence of the accused and similar procedural forms nobody attempts to establish and prove absolute, objective truth and most often criminal cases of such form satisfy only with the establishment of relative (formal) truth. For example, an individual bringing charges against another person in the cases of private prosecution and accusing the latter of conducting a certain criminal act against him most often attempts to protect his own "ego", to prove oneself to be right in front of other members of the society and to demonstrate, how bad is the person, who has conducted an inappropriate, i. e. criminal act against him. And it is evident, because private prosecution cases most often are nothing but certain torts, which are defended using criminal, not civil procedure, i. e. tort civil responsibility is transferred to the framework of criminal relations. For example, speaking about such legal goods as honor and dignity that belong to a concrete person and that have been violated, although they could be successfully protected in the civil process, often for their protection not a civil, but criminal law is employed.

Usually it is considered that the judgment passed during the private prosecution or criminal court order is formally correct, when both parties of the process are satisfied with it and for reaching of this kind of satisfaction of the parties it is not necessary to search for or to establish a certain absolute, objective truth, it is enough to establish relative (formal) legal truth and to take corresponding decision. In such forms of the criminal procedure the principle of substantiation of complaint shall be employed instead of the requirement to establish the facts such as they are. If we analyze deeper the process of criminal court order and private prosecution, we will notice that this process

23 Muradjan, Je. M., *supra* note 2, p. 99.

24 Panomariovas, A.; Ramanauskas, R., *supra* note 14, p. 54.

is constructed in such a way that there always is a place for different means of formal arguing (for example, various presumptions, agreements, different stipulations and etc.). Therefore, parties shall be satisfied with relative, but not absolute truth in such forms of the criminal procedure.

Publicity of the administration of justice, which is understood as openness of the process, shall be based not on the establishment of the formal legal truth, but on the absolute, objective truth. Precise establishment of the facts, actual, not ostensible, their recognition allows proper regulation of public relations avoiding unnecessary expenditures and compromise of a legal system as such.

Another issue arises of what is the truth and what is not? As it has been mentioned above, the truth, first of all, is a philosophical category or a problem[25], research of which has won a special attention already from the antique philosophers starting with Plato (428 (427) BC – 348 (347) BC) and Aristotle (348 (383) BC – 322 BC), and which, alas, remains unsolved yet nowadays. The problem of truth, its criterion is similar to the sophistic problem of the "need to know"; the simpleton does not want to know, because he thinks that he knows, while a scientist does not want to know, because he already knows[26]. Besides, the truth as philosophical category first of all is linked not to the objective truth, towards which all classical criminal procedure shall be orientated following the official constitutional doctrine, but to the absolute truth. The "objectiveness" shall be valued as a quality of the truth, which is independent from a human being, his wishes or will, but not as a separate variety of the truth. Only absolute truth can lead to full, universal knowledge about one or another thing (object). Relative truth, differently from the absolute one, does not provide full, universal knowledge about the thing or object in question. The truth, whatever it is speaking about its content shall always be objective; otherwise we should talk not about the truth, but about "erroneousness", "falsity" and "untruth". Hence, speaking about the form, the truth can be "absolute" or "relative", while terms "absolute" and "relative" themselves, speaking about the truth, just show different level of cognition of the phenomenon, i. e. the truth under research. Although legal literature often mentions other forms of truth as well (for example, "material", "formal" or "subjective" and etc.), however, they all are nothing else but expressions of "absolute" or "relative" truth.

The classical criminal procedure shall be orientated to the establishment of the absolute truth instead of its separate characteristics forming its content – objectiveness.

The science of philosophy knows several main theories of the concept of truth (i. e. correspondent (or classical), obvious, coherent (or logical consistency), pragmatic truth, agreement (or consensus)), representatives of which try to solve in one or another way the problem of cognition of the truth and its conception. Although these theories give one or another explanation of the conception of the truth, disclose its content, however, all these theories shall be viewed not isolated but in complex, as they do not

25 Haack, S. Truth, Truths, „Truth" and „Truths" in the Law. *Harvard Journal of Law &Public Policy.* 2003, 26(1): 17.

26 Caratini, R. *Filosofijos įvadas* [Introduction of Philosophy]. Vilnius: Kronta, 2007, p. 110.

deny each other in principle, but, on the contrary, supplement each other. Through these theories gnoseological, semantic, epistemological and social – cultural aspects of the attitude to and the same issue, i. e. the truth, are highlighted[27]. Thus, while solving or investigating different truth-related aspects in a concrete field, in this case, in the criminal procedure, essentially, the complex conception of the truth could be followed. Sticking to this point of view, in the complex sense, the criminal procedure should consider as the true the knowledge, which:

a) meet correspondent feature of the truth. In the classical attitude the truth is "the compliance of an object and a thought"[28] (Lat. *Veritas est adaequation rei et intellectus*)[29] or speaking from the position of the criminal procedure the truth is compliance of circumstances of the conducted criminal act established in the process of investigation and litigation to facts or reality;

b) show their coherence (Lat. *Cohaerentia* – relationship, connection). It is considered in the criminal procedure that knowledge, statements, facts are true, if they are consistent with other knowledge, statements, facts or their system, which is presented for the purpose to acknowledge the truth[30]. The court judgment, i. e. the final court document that shall reflect the truth, shall state whether the gathered facts are enough or do they lead to precise establishment of all circumstances of the matter that is argued. Evidence examined during the judicial trial shall be set forth consecutively in such a way that it would allow to disclose their interrelation and that their analysis would lead logically to the conclusions proving the guilt of the accused or other important circumstances[31]. The court describing circumstances involved into the matter that shall be proved must draw an unambiguous conclusion about presence or absence of these circumstances;

c) are useful in the practical aspect and are proved by the practice (Greek *pragma* – action, practice). The criminal procedure theory considers that practice is the only objective category of establishment of the truth[32], which is understood not in a narrow, but a broad sense of meaning. In the criminal procedure, while investigating and litigation different criminal acts, conclusions, except for single cases, are not verified in practice really, thus, practice as a category of establishment of the truth is understood in the broader sense, i. e. not as concrete practical actions verifying one or another result or conclusion, but as the general historical practice[33] (historical experience). The practice as a category of the establishment of the truth in the criminal procedure most often is applied in the indirect form, when results received from the arguing process are "compared" to

27 Alekseev, P. V.; Panin, A. V. *Filosofija* [Philosophy]. Moskva: Prospekt, 2008, p. 214.

28 *Ibid.*, p. 199−200.

29 Nekrašas, E. *Filosofijos įvadas* [Introduction of Philosophy]. Vilnius: Mokslo ir enciklopedijų leidybos institutas, 2006, p. 121.

30 Motore, B. N.; Bruder, K. *Philosophy: the power of ideas*. US/Mountain View: Mayfield Publishing Company, 1999, p. 564.

31 The Supreme Court of Lithuania Senate decision, *supra* note 21.

32 Grigorev, V. N.; Pobedkin A. V.; Jashin, V. N. *Ugolovnyj process* [Criminal procedure]. Moskva: Jeksmo, 2006, p.162.

33 *Ibid*.

the other data (information), which has already been verified in the earlier activities of a person. Thus, practice covers general professional and vital experience of a person empowered by the State to carry out procedural activity.

Thus, if we understand the truth as compliance of the knowledge we have to the actual reality (classical conception of the truth), we could decide upon this compliance in the criminal procedure only owing to the inner self-conviction. Here, the attention should be drawn to the fact that actual truthfulness does not exist; it is only the expression of confidence of a concrete person based on certain data and knowledge, Grounded, motivated confidence in own truth makes this truth real rather than apparent. Antagonists might argue that inner confidence of a concrete individual and, as well, of the one, who is empowered to implement or who is involved in the criminal procedure activity allows him to draw a conclusion about presence or absence of a certain subjective truth. However, as we have mentioned above, the truth according to its form can only be absolute or relative. Subjective truth, if such even exists, will always carry a relative character. The other question is, whether a grounded, motivated confidence of one individual, person allows us to talk about absolute truth? Hardly, as absolute truth consists of relative truths, their aggregate, not anything else[34].

That what shapes inner conviction of a human being forms his personal ability to differentiate between the truth and untruth at the same time. Vital experience, his practical activities can be attributed to factors forming conviction of a human being. As vital experience and practical activities are different, the vital situation often arises that, what is true and evident to one person, raise substantial doubt to the other. Thus, in the criminal procedure experience not of a separate individual is important, but public experience manifesting itself in the fact that the procedure is executed by different individuals having different personal experience, who, at different stages of the process familiarize with certain data, facts, evaluate those facts and data and, in the end, namely their personal experience looking from the point of view of the criminal procedure transforms into general (public) experience, which allows to approach a certain truth. The higher is the level of cognition, the nearer is the absolute truth and, vice versa, the lower is the level of the cognition, the more distant is the absolute truth and it remains to be satisfied with its relativity.

All this allows explaining practical meaning of criminal procedure stages. Thus, returning to the stages of the criminal procedure we could firmly state that division of criminal procedure into stages is not only a theoretical abstraction facilitating cognition of the criminal procedure, but an objectively conditioned necessity to recognize the truth, only executing the process in stages it is possible to approach the absolute truth. Dividing criminal procedure into stages is necessary element of the procedural form that shall stipulate practical implementation of the search for truth.

On the other hand, dividing of the criminal procedure into stages is only one of the examples, of how the procedural form can influence or influences search for the truth in this procedure, Procedural form is only one of the conditions that determine successful

34 Alekseev, P. V.; Panin, A. V., *supra* note 27, p. 211.

search of the truth in the criminal procedure, along with it there exist other conditions, on which depends search for the truth in this process, such as:

1) a subject, who is able to state that the truth has been established; The court is acknowledge as such a subject in the criminal procedure;

2) search for the truth shall be executed only in a concrete case investigating and litigation on a concrete, clearly defined criminal act. As investigating and litigation a concrete criminal act, the "world" related to it is simplified, i. e. data, events, facts are "drawn" out of ordinary environments or, in other words, from the whole of the surrounding "world" and operated in such a way that the truth we search for nears to us. The more events and facts, the more difficult is to approach the absolute truth in the criminal procedure. Here is like in mathematics, the more features or the bigger is the number of samples, the further the cognition is. The joy of the cognition may also fail to come, when data, facts or other indications are too scarce, as the less are the features or the smaller is the number of samples, the bigger is the possibility of the mistake. There should be not too much or too little facts or data characterizing or related to the criminal act for investigation and litigation of it. The theory of the criminal procedure uses the term of the "threshold of proof"[35] not without reasons;

3) search for the truth, the "road" of this search shall reflect in a procedural act of a certain form and content, which, by the way, shall acquire a power of *res judicata*. A final judicial verdict is considered to be such a procedural act in the criminal procedure[36].

Although classical criminal procedure, where complaint is supported, first of all, by the public procurator – prosecutor, the truth should become a guide for the criminal procedure, however, in real life absolute truth becomes an unachievable aspiration not only in quasi – procedure forms, but in classical criminal procedure as well. When a lawmaker forgets about the true goal of the criminal procedure – establishment of the truth, fails to coordinate comprehensiveness and quickness, and, on the contrary, orientates only to effectiveness of the criminal procedure and, by all possible legal technical measures, tries to put into life new norms, which, according to him, should speed up the criminal procedure, the opposite effect is reached – there is no neither the truth, nor effectiveness. As the effectiveness in the criminal procedure is often reached at the expense of restriction, curtailing of human rights.

This way, for example, for the sake of effectiveness of the criminal procedure the lawmaker sets himself a goal to amend Clause 9 of the Criminal Procedure Code in such a way that pre-trial hearings examining issues of the pre-trial supervision or other preventive measures or dealing with the complaints of the parties shall be closed for the public except for the cases, when the court decides otherwise[37]. However the Constitution of the Republic of Lithuania states otherwise. The Constitution of the Republic of Lithuania does not distinguish between trial phases consolidating the principle regulation in the Part 1 of the Article 117

35 See, Goda, G.; Kazlauskas, M.; Kuconis, P. *Baudžiamojo proceso teisė* [Criminal Procedure Law]. Vilnius: Teisinės informacijos centras, 2005, p. 186.

36 See, Panomariovas, A.; Ramanauskas, R., *supra* note 14, p. 51.

37 The Project of the Law on the Amendment and Appendix of the Articles 3, 9, 40, 63, 64, 152, 154, 155, 158, 159, 160, 161, 162, 163, 170, 172, 178, 179, 181, 183, 214, 217, 218, 220, 237, 254, 276, 372, 373, 374(1), 374(2), 418, 419, 421, 426, 429 of the Criminal Procedure Code and the Appendix of the Code with Articles 3(2), 160(1), 2011, No. XIP–3121 [interactive]. [accessed 04-05-2011]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=396814&p_query=&p_tr2=>.

that "[…] in all courts cases are heard in public". Thus, the provision of the Constitution of the Republic of Lithuania is contrary to the one proposed by the lawmaker.

Thanks to such innovations, search for the absolute truth in the criminal procedure is often transformed into a kind of imitational action, when declared aspiration to establish the truth becomes an action of "public relations" aimed to create an illusion that despite any norms forming the content of the criminal procedure – all they have to assist individuals, who implement procedural activity, to act so that maximum truth should be reached, no matter what kind of it. Thus, if certain innovations of the criminal procedure fail to reach the absolute truth in practice, it can always be explained that here relative or formal truth is to be satisfied with instead of the absolute one.

The society, individuals, who in one or another way are involved in the mechanism of the criminal procedure, expect justice and think that the court considering the particular case with the help of the officials (officers of pre-trial investigation, prosecutors) will be able to reach the absolute truth in all cases and that it must do it. However, as it has been mentioned above, some objective reasons, i. e. various consolidated procedural safeguards, prohibitions (for example, prohibition to question a person as a witness, if the latter does not agree to testify about his own possible criminal offense; commission to investigate the offence to the prosecutor, who accidentally became a witness of interpersonal criminal behavior[38]; to use the data, the source of which is not known and etc.) burden the search for the absolute truth in the criminal procedure or, in separate cases, make it impossible, inconceivable goal[39], although all necessary procedural measures have been employed to establish it.

Often flawed procedural form saturated with the variety of formal proof prevents officials investigating specific criminal act, and, later, the trial court from approaching the absolute truth. And, in this case, the guilt for the failed expectations of individual members of the society and the society itself for the prostrate fairness, first of all, falls not on the court officials or officials implementing procedural activities, but on the flawed procedural form, which for the sake of the economy of the process allowed to sacrifice the truth on the altar of justice.

Conclusions

1. Although official constitutional doctrine considers establishment of the truth in the criminal procedure one of the key goals of this procedure and a duty arising from this goal, the truth is only an aspiration, which in the classical criminal procedure in investigation and, later, litigation of criminal acts might only be approached, but not reached or established, However, often flawed procedural form saturated with the variety of formal proof prevents officials investigating specific criminal act, and, later, the trial court from approaching the absolute truth.

38 Merkevičius, R., *supra* note 13, p. 154.

39 Goldman, R. M.; Goldman, A. I. Review of Truth, Error, and Climinal Law: An Essay in Legal Epistemology, by Larry Laudan. *Legal Theory*. 2009, 15: 56.

2. In form the truth can be "absolute" or "relative", while the terms "absolute" and "relative" only show different cognition level of the investigated phenomenon, i. e. the truth. other forms of the truth such as "material", "formal", "subjective" and similar are nothing else than expressions of "absolute or "relative" truth. Objectiveness is not a separate form of the truth, but its feature, which does not depend on wishes or will of a human being. Attempts of artificially divide the truth into "material", "formal" or subjective are nothing but peculiar form of justification for procedural erosion.

3. The criminal procedure forms, which are organically separated from the classical procedure form (processes of criminal court order, private prosecution cases and etc), the absolute truth is unreachable and, in the best case, leaves one to be satisfied with the cognition of the relative truth.

4. In the criminal procedure public experience, not an experience of a single individual, a person is of importance. In the complex meaning the knowledge, which (a) conform to the correspondent feature of the truth; (b) show their coherent ness; are useful in the practical aspect, i. e. proved in practice, should be treated as correct in the criminal procedure.

References

Alekseev, P. V.; Panin, A. V. *Filosofija* [Philosophy]. Moskva: Prospekt, 2008.

Arlauskaitė–Rinkevičienė, U. Pažinimo proceso ir tiesos nustatymo baudžiamajame procese probleminiai aspektai [The Problematical Aspects of Cognition Process and the Truth, as this Procedure Purpose in Criminal Procedure]. *Jurisprudencija.* 2006, 11(89).

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

Goda, G.; Kazlauskas, M.; Kuconis, P. *Baudžiamojo proceso teisė* [Criminal Procedure Lawa]. Vilnius: Teisinės informacijos centras, 2005.

Goldman, R. M.; Goldman, A. I. Review of Truth, Error, and Climinal Law: An Essay in Legal Epistemology, by Larry Laudan. *Legal Theory.* 2009, 15.

Grigorev, V. N.; Pobedkin, A. V.; Jashin, V. N. *Ugolovnyj process* [Criminal procedure]. Moskva: Jeksmo, 2006.

Haack, S. Truth, Truths, "Truth" and "Truths" in the Law. *Harvard Journal of Law &Public Policy.* 2003, 26(1).

Hajdegger, M. O suwnosti istiny [On the essence of truth] [interactive]. [accessed 04-05-2011]. <http://www.philosophy.ru/library/heideg/verit.html>.

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

Merkevičius, R. Baudžiamojo proceso kodeksas: ar teisminio nagrinėjimo struktūra garantuoja teisingą teismą? In Ancelis, P.; Ažubalytė, R.; Gušauskienė, M., *et al. Sąžiningas baudžiamasis procesas: probleminiai aspektai* [Fair Criminal Procedure: Problematical Issues]. Vilnius: Industrus, 2009.

Moore, M. S. The Plain Truth about Legal Truth. *Harvard Journal of Law &Public Policy.* 2003, 26(1).

Motore, B. N.; Bruder, K. *Philosophy: the power of ideas*. US/Mountain View: Mayfield Publishing Company, 1999.

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

Nekra as, E. *Filosofijos įvadas* [Introduction of Philosophy]. Vilnius: Mokslo ir enciklopedijų leidybos institutas, 2006.

Panomariovas, A.; Ramanauskas, R. Slaptumas – tiesos baudžiamajame procese nustatymo priemonė [Secrecy – Remety to Ascertain the Truth in Criminal Procedure]. *Jurisprudencija.* 2005, 75(67).

Popper, K. R. *Rinktinė* [Selected Works]. Sudarytojas D. Miller. Vilnius: Pradai, 2001.

Rorty, R. Pragmatism, Relativism, and Rationalism. *Proceedings and Addresses of the American Philosophical Association.* 1980, 53(6).

Tatarkiewicz, W. *Filosofijos istorija. T.3: XIX ir XX amžių filosofija* [The History of Philosophy. T.3: Philosophy of XIX and XX Century]. Vilnius: Alma littera, 2003.

The Constitutional Court of the Republic of Lithuania 16 January 2006 ruling On the Compliance of Paragraph 4 (Wording of 11 September 2001) of Article 131 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania, on the Compliance of Paragraph 5 (Wordings of 10 April 2003 and 6 September 2003) of Article 234, Paragraph 2 (Wordings of 10 April 2003 and 16 September 2003) of Article 244, Article 407 (Wording of 19 June 2003), Paragraph 1 (Wording of 14 March 2002) of Article 408, Paragraphs 2 and 3 (Wording of 14 March 2002) of Article 412, Paragraph 5 (Wording of 14 March 2002) of Article 413 and Paragraph 2 (Wording of 14 March 2002) of Article 414 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania and on the Petitions of the iauliai District Local Court, the Petitioner, Requesting to Investigate whether Article 410 (Wording of 14 March 2002) of the Code of Criminal Procedure of the Republic of Lithuania Is not in Conflict with the Constitution of the Republic of Lithuania. *Official Gazette.* 2006, No. 7-254.

The Constitutional Court of the Republic of Lithuania 5 February 1999 ruling On the compliance of Parts 4 and 5 of Article 255, Part 4 of Article 256, Part 4 of Article 260 and Parts 1, 2 and 6 of Article 280 of the Republic of Lithuania Code of Criminal Procedure with the Constitution of the Republic of Lithuania. *Official Gazette.* 1999, No. 15-402.

The Project of the Law on the Amendment and Appendix of the Articles 3, 9, 40, 63, 64, 152, 154, 155, 158, 159, 160, 161, 162, 163, 170, 172, 178, 179, 181, 183, 214, 217, 218, 220, 237, 254, 276, 372, 373, 374(1), 374(2), 418, 419, 421, 426, 429 of the Criminal Procedure Code and the Appendix of the Code with Articles 3(2), 160(1), 2011, No. XIP–3121 [interactive]. [accessed 04-05-2011]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=396814&p_query=&p_tr2=>.

The Supreme Court of Lithuania Senate decision 20 June 2003 No. 40 On the Practice of the Courts applying Rules of the Code of Criminal Procedure regulating the Writing of the Sentence. *Teismų praktika.* 2003, No. 19.

BAUDŽIAMOJO PROCESO SIEKIS – TIESA

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Santrauka. *Lietuvoje vis dažniau pasigirsta nuomonių, jog Lietuvos baudžiamajame procese tiesos nustatymas, jos paieška yra tam tikra iliuzija, kurios nereikia nustatinėti, ieškoti, o užtenka pasitenkinti formaliąja (teisine) tiesa. Tiesos supratimas yra priskiriamas*

prie subjektyviojo, o ne praktinio pažinimo galimybių. Tai reiškia, jog absoliuti tiesa kaip materialus objektas negali būti pažinta, ji yra tik atitinkamų aplinkybių požymis, žinojimo savybė. Baudžiamąją procesinę veiklą vykdantys asmenys (įskaitant ir teismą) yra procesinės formos tarnai, o kartu ir įkaitai, todėl jie yra nepajėgūs priartėti prie objektyvios, absoliučios tiesos ir turėtų tenkintis formaliąja (teisine) tiesa. Formalioji (teisinė) tiesa – iš formalaus prado kilusi konstrukcija, kurią taikant teisingumas yra suvedamas į tam tikrą formą, taigi justicija yra ne kas kita, kaip savotiškas formalumas, nes ji pasitenkina ne nuodugniu praeityje padarytų nusikalstamų veikų, jų padarymo aplinkybių aiškinimusi, o, geriausiu atveju, paviršiniu tokių aplinkybių tyrimu ar nagrinėjimu. Baudžiamajame procese formaliąja tiesa laikytinos tokios žinios, išvados apie padarytos nusikalstamos veikos aplinkybes, kurios, nors ir atitinka padarytos nusikalstamos veikos pažinimo aplinkybes, tačiau šių aplinkybių pažinimo lygis neatitinka išsamaus, visapusiško tų aplinkybių pažinimo kriterijaus. Formaliosios tiesos atveju padarytos nusikalstamos veikos aplinkybių pažinimo lygis yra labiau tikėtinas nei tikras. Ši pozicija yra kritikuotina.

Straipsnyje nagrinėjama tiesos kaip baudžiamojo proceso tikslo, jos pažinimo problema. Bandymai dirbtinai skaidyti tiesą į atskiras jos kategorijas ar formas yra ne kas kita kaip savotiškos procesinės formos erozijos pateisinimas. Formos atžvilgiu tiesa gali būti „absoliuti" arba „santykinė", o patys terminai „absoliutus" arba „santykinis" tiesos atveju parodo tik skirtingą tiriamo reiškinio, t. y. tiesos, pažinimo lygį. Kitos tiesos formos, t. y. „materiali", „formali", „subjektyvi" ir pan., yra ne kas kita kaip „absoliučios" ar „santykinės" tiesos išraiškos. Objektyvumas yra ne atskira tiesos forma, o jos savybė, kuri nepriklauso nuo žmogaus norų ar valios. Straipsnyje išreiškiama nuomonė, kad klasikiniame baudžiamajame procese turėtų būti nustatinėjama ne formali (teisinė) bet absoliuti tiesa. Tiesa yra ne tik baudžiamojo proceso siekiamybė, bet ir išvestinis, reguliavimo principas, idėja, kuri veikia tik klasikiniame baudžiamajame procese. Baudžiamojo proceso formose, kurios yra organiškai atsiskyrusios nuo klasikinio proceso formos (teismo baudžiamojo įsakymo, privataus kaltinimo bylų procesuose ir kt.), absoliuti tiesa yra nepasiekiama, geriausiu atveju čia yra pasitenkinama santykinės tiesos pažinimu.

Reikšminiai žodžiai: *baudžiamasis procesas, tiesa.*

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