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From "*factum*" to juridical fact: Modern legal rationality between facts and norms

*Do "*factum*" ao fato jurídico: racionalidade jurídica moderna entre fatos e normas*

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ABSTRACT: The paper outlines the basic questions and the fundamental approach of a research project that resulted in my doctoral dissertation presented at the Law Faculty of the University of Frankfurt in 2011 and recently published in Germany under the title *Savignys Theorie der juristischen Tatsachen*. Focusing on the influential work of Friedrich Carl von Savigny, especially on his use of the notion "juridical fact", I try to elaborate some distinctive features of modern legal rationality. I develop a specific approach by asking how Savigny – and the jurists that followed him around the world – distinguished between facts and norms. Emphasis is placed here not on *concepts*, but on *distinctions*. In order to grasp the central features of the new legal rationality that emerged in 19th Century Germany, I explore the uses of "factum" in legal discourse since 16th Century legal humanism. Finally, I refer to the reception process of German legal scholarship in Brazil as a case study in the diffusion of a specific form of legal rationality.

Keywords: History of modern legal science; Comparative law; Civil law; Juridical fact.

RESUMO: O artigo oferece um panorama das perguntas e do enfoque do projeto de pesquisa que resultou na minha tese de doutorado apresentada na Faculdade de Direito da Universidade de Frankfurt em 2011, publicada recentemente na Alemanha com o título *Savignys Theorie der juristischen Tatsachen*. Tomando como ponto de partida a influente obra de Friedrich Carl von Savigny, sobretudo o seu uso de "fato jurídico" na sua linguagem jurídico-dogmática, tento indicar alguns traços característicos da racionalidade jurídica moderna. A especificidade do enfoque reside em perguntar como e sob quais condições Savigny – e os juristas que o seguiram neste particular – distinguiram entre fato e direito. Quanto ao método, a ênfase recai aqui não sobre *conceitos*, e sim sobre *distinções*. Objetivando compreender os traços fundamentais da nova racionalidade jurídica que emergiu na Alemanha no séc. XIX, investigo o uso de "factum" no discurso jurídico desde o humanismo do séc. XVI. Por fim, faço referência aos processos de recepção da literatura jurídica alemã no Brasil como um caso para o estudo da difusão de uma forma específica de racionalidade jurídica.

Palavras-chave: História da metodologia jurídica; Direito civil; Direito comparado; Fato jurídico.

1 SUBJECT MATTER AND AIM OF THE INVESTIGATION

The purpose of the present paper is to outline some distinctive features of modern legal thought by following the emergence and diffusion in the West of "juridical fact" as a conceptual tool for stabilizing the tensions between facts and norms in legal discourse. Coined by Friedrich Carl von Savigny (1779-1861) in his *System of Modern Roman Law* from 1840, "juridical fact" was rapidly incorporated into the vocabulary of 19th century German legal science and played a central role in legal doctrine as a general notion applying to all events leading to the acquisition and loss of rights[1]. In this context one would speak, for instance, of seizure or the conclusion of a contract as "juridical facts" in the laws of possession or obligations. Technically, the notion played an analogous role in 19th century German legal tradition to the one played by the ancient notion of *causa* in other legal systems, especially those influenced by French legal scholarship. From a systematic point of view it constituted alongside persons and things the core of the General Part of the legal system, a circumstance that would be decisive for its appropriation by other legal cultures that attempted to rearrange their legal institutions by recurring to this new form of systematization during the 19th Century[2].

Legal scholarship often suggests, and a brief survey of the literature from various legal cultures largely confirms, that 19th century German jurisprudence

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played a decisive role in the conceptualization and diffusion of what has been called a modern (liberal) comprehension of private law[3]. It has already been argued that what German legal science globalized in the period between 1850 and 1930 was not "the view of law of a particular ideology", but rather a "mode of legal consciousness"[4] or, as I prefer to call it, a form of legal rationality. By following the appropriation of this legal rationality in various Western legal cultures in the course of the 19th century, it is possible to establish a network connecting legal realities with different social, political and economic contexts, but operating with the same or – as the case may be – modified intellectual tools. Precisely how and under which conditions this specific form of legal rationality adapted to different cultural contexts, what made it attractive on the local level and in which cases it had to be modified in face of contingent factors can only be grasped through a comparative approach.

Legal historians have already pointed out not only the much more limited scope of what is usually meant as comparative legal history, but also some of the intrinsic difficulties that a genuine comparative approach involves[5]. My aim in the current paper is to present an overview of what I believe to be central aspects of the body of ideas globalized in the 19th century not by emphasizing reception processes or transplants, but rather by identifying cross-cultural problems, the categories in which they were conceived, and analyzing the factors that might have conduced to similar or discrepant solutions in different legal systems.

For this I will draw on a few significant sources, centering their interpretation on a particular problem, namely the specific form of normativity produced by this legal rationality and its relation to the effective or ineffective transformation of certain societies, especially those in North and South America, into modern (liberal) societies. By focusing on "juridical fact" I try to grasp some central aspects of this rationality not on the basis of how it *defines* law and main legal concepts like contract and property, but of how it *distinguishes* between fact and law, i.e. between juridically irrelevant situations that remain outside the legal spectrum and those that, because of certain features, ought to produce legal consequences.

I wish to investigate what features transform a mere factual relationship into a legal one, how and in view of which practical goals they were conceptually elaborated and what factors were decisive for their appropriation by jurists outside of Germany. By focusing primarily not on concepts, but on how distinctions between the legal and the non-legal are drawn, I hope to gain a new perspective into the way this form of rationality operated. In short, the question to be addressed is: How did jurists in the West change their comprehension of the relationship between the normative order and facts of social life when a new mediating category of this relationship was introduced in legal discourse?

2 SAVIGNY AND MODERN LEGAL THOUGHT – EMERGENCE OF THE NOTION

In my PhD dissertation[6] I develop the idea that "juridical fact" emerged in 19th century German legal science as a new way of structuring the legal world on an empirical basis, as part of the project of Savigny and other pandectists to integrate the social dynamics of legal relations into legal thought[7]. That this approach rested on strong assumptions of German objective Idealism[8] about the law and the world as a whole does not change anything about its empirical character; it rather constitutes one of its specific traits.

Kennedy observed that this conception of legal science owes much of its remarkable impact on modern legal thought to the fact that it combined a constructive and systematic exposition of "legal institutions" (Rechtsinstitute), upon which legal rules ultimately rest, with a simultaneous elaboration of "legal relations" (Rechtsverhältnisse) that are "given by the events of life and insofar appear in their concrete context and complexity"[9]. In this attempt to combine philosophy and history in legal method, "juridical facts" played a crucial role by providing the "factual conditions for the application of a legal rule" and thus mediating between the "system" and social reality, as a sort of first-degree conceptualization in legal science[10].

Contrary to what is often suggested in legal scholarship, Savigny built his theory on "juridical facts" and "legal relations", not on "subjective rights". This shift of emphasis in comparison to some of his contemporaries such as Georg Friedrich Puchta raises questions not only about the extent to which the form of legal rationality that emerged in the 19th Century was really individualistic and formalist in nature, as scholarship and critics since the turn of the 20th century have suggested[11]. It raises questions also about what really changes in legal doctrine if one starts conceiving the legal world in terms of facts and relationships[12].

Taking "juridical facts" as a key category of modern legal rationality, the problem here is how and under what circumstances Savigny and his contemporaries provided modern legal thought with an analytical framework that, in spite of its idealistic background,

proved to be adaptable to other intellectual tendencies until the rupture caused by the rise of National Socialism in the 1930s. But it also proved to suit – in a sense still to be defined – the task of understanding law in European societies of the 19th and early 20th centuries. The analogous use of such categories in other fields, like Durkheim's "social fact" and Marx's "relations of production", is a good indicator of a broader intellectual context that surpasses the horizon of professional jurists.

3 FACTUM, FACTS AND JURIDICAL FACTS IN LEGAL DISCOURSE – HISTORICAL BACKGROUND

The idea that knowledge of facts and fact construction is, together with knowledge of rules, an indispensable part of legal reasoning, leading eventually to a kind of precategorization of juridically relevant situations, is not new and has recently attracted the attention of works on legal theory[13]. However, the use of expressions such as "fact" and "juridical fact" in legal discourse becomes more problematic (and thus increasingly interesting) in light of some recent research in the History of Science on "fact" as a central category of modern scientific discourse. It has been argued that "fact" as something objective, valid independently from your evaluation or mine, as a category structuring the way we experience the world and, consequently, the way we argue in relation to empirical data was an invention of Francis Bacon in the early 17th century[14]. Historians have tried to show how this notion migrated from the law of evidence to its broader usage in philosophical discourse.

For my present purposes, the history of fact is helpful not only in order to grasp some important aspects about its use in legal discourse, but also to state the problematic more precisely. To say that lawyers distinguish between *factum* and *ius* since the Romans in matters such as error (*error facti*/*error iuris*) or procedure (*quaestio facti*/*quaestio iuris*) is to state the obvious; the problem consists rather in determining since when and under which conditions *factum* is employed categorically, i.e. as a general and central category in the comprehension of the legal world.

In the works of some jurists from the late 16th and early 17th centuries can be found what I believe to be the first such use of *factum* in legal thought. Through the attempts to order law as a system independent from the disposition of the Justinian *corpus iuris* it is possible to trace the use of *factum* in legal discourse back to the debates on history and historical method in French Humanism.

Johannes Althusius' *Dicæologica* (1617), for instance, commences by asserting that the most general division in legal science is the one between *factum* and *ius*[15], later assigning great importance to *factum* as the matter upon which the form *jus* is constituted, technically: as *causa*. But the important source here is Jean Bodin's reformulation of the Gaian triad into *personae*, *res* and *factum* in his *Juris universi distributio* (1578). From here we get to his *Methodus ad facilem historiarum cognitionem* (1566) and François Bauduin's *De institutione historiæ universæ et ejus cum jurisprudentia coniunctione prolegomenon* (1561), where it is possible to establish a connection between the categorical use of *factum* in legal discourse and an increasing interest for human action regarded from a non-normative, empirically ascertainable point of view[16].

Not surprisingly, a rationalist like Leibniz could find nothing but contempt for the work of Althusius, exactly because he seemed unable to distinguish correctly between facts and norms: "ut breviter dicam, est haec Methodus non ex Juris sed Facti visceribus sumpta. Personae enim et Res sunt Facti, Potestas et Obligatio, etc. Juris termini"[17].

4 APPROPRIATING A FORM OF LEGAL RATIONALITY IN DIFFERENT LEGAL CULTURES

"The one fundamental notion in law is that of a juridical fact. Then, that of a juridical relation – not of a subjective right, for this is a notion concerning effects; neither that of a subject of rights, which is merely a term in a juridical relation". The passage was taken from the preface to a tract on private law published in Brazil in the mid 1950s by Pontes de Miranda (1892-1979) [18] and, in spite of its stenographical brevity, has the interpretative advantage of showing *in nuce* his peculiar emphasis on the priority of "facts" and "relations" over any subjectivist or metaphysical foundation of legal reasoning.

Pontes de Miranda's readings of Wittgenstein's *Tractatus* might have well played a decisive role in his critique of metaphysics, but his discussion of German jurisprudence and its conceptual framework was in fact much indebted to Teixeira de Freitas (1816-1883), a lawyer whose work on a Civil Code for Imperial Brazil in the 1850s was crucial for the formulation of an alternative codificatory concept to the then ruling French model in Latin America. Freitas' 200-page introduction to the first draft of the Civil Code from 1855 is strong evidence not only of a critical appraisal of contemporary French and German legal

science, but also of his attention to the modernization of central aspects of social and economic life, such as the mobilization of land and reorganization of credit[19].

Both authors provide an example of how the appropriation of German legal ideas was by no means merely receptive, but rather critical and connected with transformations in their own societies: Freitas during the first surge of modernization following the abolition of the slave trade in 1850, Pontes de Miranda during a second wave promoted by a political regime tending to authoritarianism from the 1930s.

Legal historians have already dedicated a considerable amount of research to the circulation and impact of German legal science on other legal systems, generally restricting the inquiry to an individual case of reception[20]. We are also well acquainted with important aspects of the process in Germany, e.g. how it came to have its institutional strength in the unique organization of 19th century German universities[21]. A comparative approach to the problem remains, however – with I believe one exception[22] – largely unexplored. And yet there are plenty of indications not only that the contact with this form of legal rationality coined by 19th century German jurists was a decisive factor in the transformations of legal thought in various legal systems, but also that the social and economic contexts in which this contact was elaborated seem to be surprisingly similar, thus making the identification of cross-cultural problems more plausible[23]. The idea here is not to tell stories about modern private law and legal thought, but to compare solutions to common problems, identify specific features of each legal culture and, hopefully, offer some reflection on the formation of modern (liberal) normative orders in the West since the 19th century on a sound empirical basis.

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NOTAS

[1] See e.g. Bernhard Windscheid, *Lehrbuch des Pandektenrechts*. 3rd ed. Düsseldorf: 1870, p. 150.

[2] Henri Capitant provides a good example in France by emphasizing "la nécessité d'une partie générale consacrée à l'étude des notions premières et des elements communs qui se rencontrent dans les diverses institutions juridiques", in a clear effort to treat the *Code Civil* under a new systematic perspective by interpreting it in terms of "institutions juridiques" and "rapports de droit" centered around the three general notions of "personnes", "choses" and "faits juridiques". Cf. *Introduction à l'Étude du Droit Civil*. *Notions Générales*. 4th ed. Paris: 1922, p. 5. (1st ed.: 1898).

[3] On the specific connection of Savigny with Modernity see Joachim Rückert, *Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law*, in: Juridica International IX (2006), p. 55-67.

[4] Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in: Trubek/Santos (eds.), *The New Law and Economic Development*. Cambridge: 2006, p. 22-24.

[5] Cf. Charles Donahue, *Comparative Legal History in North America*, in: Tijdschrift LXV (1997), p. 1-17.

[6] Recently published as Thiago Reis, *Savignys Theorie der juristischen Tatsachen*. Frankfurt a.M.: Klostermann, 2013.

[7] On German legal scholarship and its social context cf. James Whitman, *The Legacy of Roman Law in the German Romantic Era*. Princeton: 1990.

[8] Cf. J. Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny*, Ebelsbach: 1984.

[9] Savigny, *System des heutigen römischen Rechts*. v. 1. Berlin: 1840, p. 10. See also Kennedy, *Three Globalizations in Law and Legal Thought*, p. 27.

[10] In the words of a prominent Italian jurist of the early 20th century: "Ciò, che si suol chiamare, in lato senso, la vita del diritto e più esattamente si direbbe la sua storia, è pertanto un continuo scorrere di situazioni, il cui successivo comparire e scomparire, in quanto sia rilevato entro i limiti del tempo, costituisce il fatto giuridico", cf. Francesco Carnelutti, *Teoria Generale del Diritto*. Roma: 1940, p. 256.

[11] This critical appraisal goes back to Weber's Sociology of Law, but found a powerful propagator in Franz Wieacker's *A History of Private Law in Europe, with particular reference to Germany*. T. Weir (trsl.) Oxford: 1995. On Wieacker's *Privatrechtsgeschichte* see Rückert, *Geschichte des Privatrechts als Apologie des Juristen – Franz Wieacker zum Gedächtnis*, in: *Quaderni Fiorentini* 24 (1995), p. 531-562.

[12] For an interesting perspective cf. Werner Flume, *Rechtsakt und Rechtsverhältnis. Römische Jurisprudenz und modernrechtliches Denken*. Paderborn, 1990.

[13] See Geoffrey Samuel, *Epistemology and Method in Law*. Aldershot: 2003.

[14] See Lorraine Daston, *Baconsche Tatsachen*, in: Rechtsgeschichte 1 (2002), pp. 36-55; Barbara Shapiro, *A Culture of Fact: England, 1550-1720*. Ithaca: 2000; Idem, *The concept "fact": Legal origins and cultural diffusion*, in: D. Sugarman (ed.), *Law in History: Histories of Law and Society*. 1996, p. 245-270.

[15] Johannes Althusius, *Dicæologicæ libri tres,* Herbornae Nassoviorum: 1617, p. 1: "His duobus membris, facto & jure, tota Dicaeologica constat & perficitur. [...] Atque haec duo, factum & jus, tanquam generales & communes affectiones per omnes Dicaeologicae species sunt diffusa, quibus nulla jurisprudentiae pars vacare potest".

[16] Historians of science have, here again, made a seminal contribution, showing that *historia* meant in the 16th century as much as experience or empirical knowledge, cf. Arno Seifert, *Cognitio historica. Die Geschichte als Namengeberin der frühneuzeitlichen Empirie*. Berlin: 1976; and the studies collected in Pomata & Siraisi (eds.), *Historia. Empiricism and Erudition in Early Modern Europe*. Cambridge: 2005.

[17] Leibniz, *Nova methodus discendæ docendæque Jurisprudentiæ ex artis Didacticæ Principiis*. Francofurti: impensis Johannis Davidis Zunneri, 1667. Akad.-Ausg. Berlin: 1971, p. 298.

[18] *Tratado de Direito Privado*. Parte Geral. 4th ed. São Paulo: 1983. v. 1. p. XVI. (1st ed.: 1954).

[19] See Teixeira de Freitas, *Consolidação das Leis Civis*. 3rd ed. Rio de Janeiro: 1876, p. CLXXII ff.

[20] We are well informed about jurists borrowing from German jurisprudence in the USA, cf. Mathias Reimann, *Historische Schule und Common Law. Die deutsche Rechtswissenschaft des 19. Jh. im amerikanischen Rechtsdenken*. Berlin: 1993, and *The reception of continental ideas in the common law world 1820-1920*. Berlin: 1993; Italy, cf. Paolo Grossi, *Scienza giuridica italiana. Un profilo storico*. Milan: 2000; France, cf. Olivier Motte, *Savigny et la France*. Bern: 1983.

[21] Pierangelo Schiera, *Il Laboratorio Borghese*. Scienza e politica nella Germania dell'Ottocento. Bologna, 1987.

[22] This being the recent work of D. Kennedy, *Three Globalizations of Law and Legal Thought* (*supra* n. 2).

[23] Accounts on the developments of American private law in the 19th century, e.g., suggest a good deal of structural similarities with the Brazilian context of the same period as outlined above, cf. Morton Horwitz, *The Transformation of American Law, 1780-1860*. Oxford: 1992.

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