Manufacturing Legal Facts

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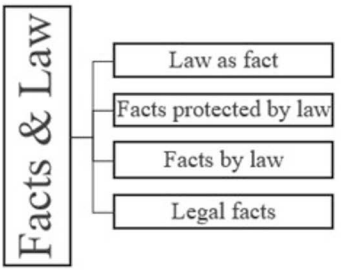
1. Introduction

In any legal proceeding, there needs to be a set of facts on which to base a decision. It is often said that the facts of a case are found by the court. In the folllowing, we will outline how these legal facts are manufactured in different types of proceedings before the court, and that in many cases they – intentionally – do not live up to the claim that truth can be found. We will thus delineate how legal facts are produced in different types of litigation and that the truth claim at stake varies depending on the type of litigation. Finally, we argue that legal facts are neither found nor constructed but manufactured.

Several perspectives can be distinguished in the field of 'law and fact': Firstly, one can describe law or individual legal systems as facts (law as fact). Secondly, one can look at how law reacts to facts: For example, it prohibits racist statements or the denial of the Holocaust, and it protects the free expression of opinions in public discourse (legal protection of facts). Thirdly, law itself creates facts by influencing behavior through law or judgements (facts by law). Furthermore, law itself determines facts within the framework of legal processes on the basis of which judicial decisions are made (legal facts).

In the first case, law itself is a fact. This perspective also includes positions such as Eugen Ehrlich's sociology of law which holds the view that the validity of law depends on facts. In this case, one can speak of a normative legal-realistic concept of validity which makes validity, among other things, dependent on factual relations of recognition. The second and third perspectives refer to extra-legal facts to which the law pertains. For example, expressions of opinion which are fundamentally protected by law. In the last case, it is a question

Figure 1



of how facts are recognized, established or (re)constructed as such according to the law. In law, there are basically two connecting factors. One is customary law. If a legal practice has existed for a long time and the conviction prevails that this is legal (*opinio iuris*), then one can speak of (legally binding) customary law. On the other hand, in the context of court proceedings, facts that are relevant for the proceedings are determined; in this respect, one can also speak of 'legal facts.' Our paper will focus on what it means when law itself establishes facts in the context of legal proceedings, especially civil and criminal proceedings. In doing so, we will draw on the legal situation in Germany.

2. Where Legal Facts Arise: A Very Brief Introduction

Before we talk about the rules of origin for legal facts, we must look at when they came into being. They arose in the context of legal proceedings. In national law, there are three types of legal proceedings in which facts are established: civil, administrative, and criminal proceedings.

In addition, there are other procedures such as lawsuits under constitutional and European law. However, it is always required that the basic proceedings have at least begun or have even been exhausted so that the facts (the 'facts of the case') have already been established at that point. Thus, there is little to be found concerning the question of the emergence of legal facts. Therefore, let us take a closer look at the three types of proceedings in which facts are established. In civil proceedings, one citizen sues another. This in-

cludes, for example, disputes between landlord and tenant or employer and employee. In criminal and administrative proceedings, the state sues the citizen. In this case we are confronted with fraud, murder, and theft, or overly large chicken coops and swimming pools.

In civil proceedings, the principle of production or negotiation applies. According to this, what the parties present to the judge by consensus is considered a fact. What is fact is therefore determined by the parties. If the disputing persons A and B both state that the traffic lights were green when B drove his car through them, then it is a fact for the judge. The fact that the traffic light may have been red is of no interest. What is presented by the disputing parties is considered to be true. In Roman law, this was elegantly summed up with *da mihi factum, dabo tibi ius* ('give me the facts, I'll give you the law').

This framework includes two important points: First, the parties determine what is fact. And secondly, the facts are borne by the consensus of the parties or, if they disagree, determined by the judge on request. At first glance, this might be disturbing to non-lawyers: Why is it of no importance in trials what actually happened? Why can't the judge question eyewitnesses or look at the data from a surveillance camera to determine whether the traffic light was actually green? This is because the main focus of civil proceedings is that – roughly speaking – the involved parties walk out of the courtroom pacified. The public's interest in a fair decision based on facts that are as objective as possible is not of priority here. The so-called 'formal truth,' which results from the consensually presented facts, is sufficient for this type of process.

Once the fact-finding is completed (*da mihi factum*), it comes to the heart of the legal work – the subsumption. In subsumption, 'the facts are brought under the norm' or, to put it more pathetically, the factual is interwoven with the normative. We will return to this procedure later. As soon as this has been done, the judge pronounces the law (*dabo tibi ius*) in the form of a judgement or a decision. This is based on the following steps of procedure:

1) Determination of the facts ('Sachverhalt').
2) Legal assessment/subsumption
3) Delivery of the judgement or order

At the same time, there are administrative and criminal proceedings to be executed. In this case the state is involved, which investigates 'ex officio' what really happened. In contrast to civil proceedings, it is not the principle of ne-

gotiation but the principle of investigation that applies here. The facts are not negotiated but investigated. In this kind of search for facts, a distinction must be made between different procedural stages, especially in criminal proceedings:

1) Preliminary investigation – Is there an initial suspicion? (suspect)
2) Preliminary proceedings – Is there sufficient suspicion? (accused)
3) Main proceedings – Is the suspect guilty? (defendant/accused)

In the first two procedural stages, the facts are determined by the public prosecutor (e.g., by searching for and questioning witnesses) while in the main proceedings they are decided by the judge (by questioning the same witness again). For the judgement it is of relevance what facts the judge was able to establish. This is the stage for which the procedural rules of fact-finding were established. Once the facts are established in the main proceedings, i.e., the so-called 'facts of the case' are determined, they are legally assessed by the judge – as in civil proceedings. In a last step, the judgement will be pronounced.

3. Rules of Fact-*Finding*

Based on the distinctions discussed above, the different procedures used by the court to determine the facts on which its judgement is established can be outlined in more detail. In all areas of law, the separation between facts and law can already be found in the judgement, since the facts are always decided first, followed by a legal evaluation.

3.1 Facts in Civil Proceedings

Determining the facts of a case in civil law is one of the most difficult tasks, especially for aspiring judges and lawyers. The basic principle is easily comprehensible: As already explained, civil proceedings are about the legal dispute of two (or more) legal subjects of civil law, i.e., citizens who are of equal rank before the law. Since the latter bring the matter before the court to resolve their legal dispute, the main principle is that the parties determine the procedure and the subject matter of the proceedings. It follows that the parties determine the beginning – by filing a lawsuit – and the end – by judgement,

settlement, or discharge – of the legal dispute. Central to the present discussion is that the parties determine the factual basis of the legal dispute at the same time. This results from the so-called 'principle of contribution' ('Beibringungsgrundsatz') according to which the court may only base its legal assessment on those facts that have been submitted by the parties. Two basic constellations must be distinguished: First, the parties can present facts in agreement. In this case, the court has no possibility to review the facts. However, in the second case, there are usually factual differences concerning the decisive points of the dispute, so that a taking of evidence is necessary. This determines which alternative of the facts presented by the parties is correct.

This two-tiered approach results in the distinction of who must present a certain fact (so-called 'burden of presentation') and who must prove it (so-called 'burden of proof').

3.1.1 The Presentation

Based on the alternative facts presented by both sides, it is in a first step the court's task to determine which points are in dispute. Insofar as the court is presented with a concordant set of facts, it is bound by these and is, so to speak, 'blind' to everything that is not directly presented by the parties. If the buyer of an item – e.g., a toaster – wants to return it because of a defect, he must also claim that it is defective. In the case of the toaster, this would be the fact that it does not heat up sufficiently. Whether the court must examine how the toaster heats up depends on the reaction of the seller: If the seller refuses to take back the toaster – and of course also to refund the purchase price – by claiming that the low temperature is a special energy-saving function, then the seller must also claim that the toaster is not defective. As a consequence, the low temperature is a fact that the court can no longer examine. In order to be open to judicial review, the seller is required to dispute the temperature that the toaster reaches.

At this point, it must be emphasized that as long as a fact is undisputed, it does not matter whether or not it is actually true or at least true to the knowledge of the court. In principle, the parties of civil proceedings have a duty to tell the truth.[1] However, this only concerns the circumstances that are in dispute between the parties, i.e., it does not embrace undisputed cir-

1 § 138 para. 1 ZPO.

cumstances.[2] Therefore, it is also possible that even if the court knows that a certain fact described by the parties is not true, it may be 'forced' by them to accept their view. If the parties agree that there was one meter of snow on the day in question in August, this is to be accepted by the court as true, even if it is false according to its own knowledge. The court's own expertise is only relevant when it comes to assessing the alternative facts that can be considered.

Furthermore, everything – and here the burden of proof plays a decisive role – that is asserted by one party and not contested by the other in a sufficiently substantiated manner is assumed to be true.[3] If it is said that an item is defective – e.g., that a pool is leaking – the seller must claim that this is not true. In our example, that means that the pool is leak-proof. Thus, what one party claims but the other does not dispute can become part of the facts of the case.

It is important to note that under certain circumstances more stringent requirements are to be placed on such a denial. It may be sufficient for one party to claim that a fact of the other party is not true.[4] Normally, the other party does not have to give reasons why this is the case and how it could have happened otherwise. However, under certain circumstances, such a proof may be required: If it is rather difficult for one side of a dispute to make a factual allegation, while the opposite side can do so easily, this advantaged side cannot limit itself to denying it.[5] If the subject matter of the dispute touches, for example, the internal production process, it is not possible for the individual purchaser to overlook it as a whole. Therefore, the manufacturer cannot limit himself to denying that a mistake has been made during the quality control. He must rather describe the circumstances that prove that the necessary care was taken. Only if he substantiates this, the objection is relevant, so that the fact is disputed.

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2 Stadler ZPO 2022: § 138 para. 2. The citations here and in the following comply with the rules of a quotation system used in German Law. In the case of comments to paragraphs the respective commentators are not individually indicated in the bibliography, while the respective books of commentaries are listed under the names of their editors/authors in alphabetical order.

3 Results from § 138 para. 3 ZPO.

4 Laumen 2016: 3rd chap., para. 12.

5 Federal Constitutional Court, Decision 06.10.1999, Az. 1 BvR 2110/93, Rn. 40, NJW 2000: 1483.

3.1.2 Proof

Once it has been determined which facts are undisputed and which are disputed, the next level is to determine the facts for the judgement. This is done through procedures of taking and assessing evidence.

3.1.2.1 Strict Evidence Procedure

In principle, there is the so-called 'strict evidence procedure' for this. There are written rules on which evidence is admissible and in which procedure it has to be collected.[6] In civil law, the *numerus clausus*[7] of evidence applies with the testimony of witnesses, the expert appraisal, the visual inspection, the deed and – as subsidiary evidence – the hearing of the parties.[8]

The most common means of evidence is the witness. The witness is supposed to tell the court about his or her own perceptions in the past. At the same time, the witness is the most uncertain means of evidence, since both the human sensory apparatus and the human memory are not geared to testifying in a court case.[9] This is most obvious in road traffic. Without aids, it is impossible to determine what specific speed a vehicle is traveling at, or how large a certain distance is. For the court, therefore, error is much more likely than lying to prevent a testimony that is not consistent with the actual course of events.[10]

The expert appraisal is supposed to inform the court about valid principles of expertise, the state of the art and to assess a situation accordingly. A visual inspection is deployed when it comes to examining the condition of a certain object. Finally, the deed concerns the content of a specific document.

3.1.2.2 Free Assessment of Evidence

The fundamental standard is the free assessment of evidence by the court.[11] This concerns a subjective standard of the court when it considers the proof of a fact to be proven: "The judge may and must, however, be content in actually doubtful cases with a degree of certainty that is useful for practical life and

6 Laumen 2016: 2nd chap., para. 24.
7 Bacher ZPO 2022: § 284 para. 11.
8 §§ 371 ZPO.
9 Häcker 2021: para. 13.
10 Ibid.: para. 14.
11 § 286 ZPO.

that silences doubts without excluding them completely."[12] It is important that a differentiation according to the individual case is made, whereby the possibilities of proof are also to be considered. For example, the statement that a document has been sent is not sufficient as a proof that it has been sent off. Although in Germany around 99.995% of all letters are sent correctly, a simple proof is possible by using a registered letter. In contrast, the probability of a paternity test of 99.95% is sufficient, as a further proof is simply not possible.[13]

Certain rules of evidence may contain an exception to the free assessment of evidence, e.g., in the case of a document. In this case the court must accept the content of the document as accurate, unless the opposing party succeeds in proving that the document itself has been falsified.

This results in two constellations that are to be examined for fact-finding:

3.1.2.2.1 The Proof of a Certain Fact Is Provided

If a party succeeds in convincing the court of an alleged fact with the evidence offered, the court will base its legal assessment on this.

3.1.2.2.2 Proof Cannot Be Provided

The situation becomes more difficult, however, if a party does not succeed in proving a certain fact, the so-called 'non-liquet situation.' In this case, the so-called 'burden of proof' must be applied: According to this, it is asked who has to provide the evidence for a disputed fact.[14] These regulations are very differentiated in detail and depend on the respective substantive law. In principle, however, the person who has to prove a fact and thus bears the burden of proof is the one who benefits from it. If, for example, in proceedings for compensation for pain and suffering, it is argued that the injured party suffered a long-term restriction of mobility as a result of the injury, the injured party must prove this by submitting medical reports. If he or she fails to do so, the court cannot use the long-term consequences as a basis for assessing

12 "Der Richter darf und muss sich aber in tatsächlich zweifelhaften Fällen mit einem für das praktische Leben brauchbaren Grad von Gewissheit begnügen, der den Zweifeln Schweigen gebietet, ohne sie völlig auszuschließen." "Anastasia" Federal Constitutional Court, Judgement 17.02.1970, Az. III ZR 139/67, NJW 1970: 946.

13 Federal Constitutional Court, Judgement 14.03.1990, Az. XII ZR 56/89 FamRZ 1990: 615–616.

14 Laumen 2016: 9th chap. para. 2.

the damages for pain and suffering. The burden of proof thus ultimately determines as a legal rule which factual basis has to be considered if an actual clarification of a circumstance is not possible. It is important to note that the party not burdened with proof does not have to prove the opposite: if the burdened party fails with its submission, the submission of the opposing party applies.

3.2 Facts in Criminal Proceedings

While civil proceedings are subjugated to the will of the parties, criminal proceedings deal with the situation that the citizen faces the state. This implies a relationship of superiority and subordination. Due to this relationship, the so-called 'official investigation principle' ('Amtsermittlungsgrundsatz') or inquisition principle applies here, i.e., the court has to determine the actual facts independently of the submissions of the persons concerned.[15]

The basis of the entire procedure is the rule-of-law principle that doubts are always to the benefit of the accused, 'in dubio pro reo.' Therefore, the accused himself does not have to prove his innocence; rather, it is necessary that the facts he is charged with are fully proven. It does not have to be established that the accused is innocent. The latter does not have to prove his innocence either. The only decisive factor is whether a conviction is likely on the basis of the evidence available.[16] A special constellation of this principle is the so-called 'choice determination.' This occurs when a decision between two factual constellations cannot be made without a doubt, the alternatives are further comparable in terms of legal ethics, and at least one alternative is realized in any case.[17] If a car that has been proven to be stolen is discovered in the possession of a defendant, there is either the possibility that he stole it himself or that he bought it from the thief. In the first case he would be guilty of theft, in the second case of accepting stolen property. If one were to strictly apply 'in dubio pro reo,' one would conclude that both offenses are not existent, since they are mutually exclusive, and none can be proven beyond reasonable doubt. In order to avoid such an unsatisfactory result, a conviction according to the milder offense – in this case receiving stolen goods – is

15 § 155 para. 2 StPO, Schmitt StPO 2020: § 155 para. 2.

16 Schmitt StPO 2020: § 170 para. 1.

17 Fischer StGB 2021: § 1 para. 33.

possible. Theft and purchasing stolen goods have a comparable unlawful content, since both are directed against the property of others, so that a decision between the two does not seem necessary.

The investigations are not conducted by the court itself; rather, it is the responsibility of the prosecutor to gather both incriminating and exculpating facts for the accused and to bring them to court. Therefore, the criminal proceedings are divided into the following sections:

3.2.1 Preliminary Investigation

The standard here is the initial suspicion, i.e., the possibility of a prosecutable offense exists according to criminalistic experience. There are no restrictions concerning the possible factual basis. The initial suspicion can thus arise from a multitude of circumstances. For example, in the case of a car driver who is found to be under the influence of tetrahydrocannabinol (THC), regular consumption can be concluded from the presence of tetrahydrocannabinol-carboxylic-acid which is why the initial suspicion of illicit possession or even trafficking can be deduced

3.2.2 Investigation

If such an initial suspicion is assumed, the preliminary proceedings are to be opened. Here, the prosecutor examines whether a conviction of a criminal offense is probable – the so-called 'sufficient suspicion' – and exists.[18] Since the standard is the probability of conviction, the prosecutor must forecast the court's decision. Therefore, it is necessary to ask not only about the facts of the case but whether a conviction is possible according to the evidence of the criminal proceedings.[19] Thus, a strict standard is set for the factual basis, already taking into consideration the principle of doubt.

In criminal proceedings, the confession of the accused, the testimony of witnesses, the expert opinion, objects of inspection as well as documents count as evidence. The collection of this evidence is also specifically regulated. While in civil proceedings it is basically irrelevant how a party obtains evidence, in criminal proceedings only facts that the state has obtained in a legally regulated procedure can be recognized as evidence.[20] Thus, a judicial

18 § 170 StPO; Schmitt StPO 2020: § 170 para. 1.

19 Higher Regional Court (OLG) Karlsruhe, Decision 16.12.2002, Az. 1 Ws 85/02, Rn. 20, juris.

20 Decision 16.06.2015, Az. 2 BvR 2718/10 and also BVerfGE 20, 162 (223).

order is required for the interception of an accused's telecommunications, which also requires an offense of considerable importance regulated with the help of an exhaustive list. If questioning of witnesses during a court hearing is not possible, the accused must at least have the possibility of an adversarial questioning through his or her lawyer. If these requirements are not met, it does not automatically follow that evidence cannot be used. Rather, the public's interest in criminal prosecution must be weighed against the accused's interest in complying with the rules of criminal procedure.[21] A result of this can be that a certain piece of evidence cannot be introduced into the proceedings, although it would prove the guilt of the accused beyond doubt.

When it comes to evidence, the confession, or the admission of the accused, is central, as this is the starting point for determining the facts of the case. However, a confession must always be verified and cannot simply be assumed to be true.

Witness statements are the most frequent but also the most difficult evidence in criminal proceedings. Witness testimony also poses the problem that witnesses can refuse to testify in later proceedings. If this is the case for justified reasons, especially when it comes to close family members, statements made beforehand may no longer be used in the court proceedings.[22] Also, the former interrogators can then no longer be questioned about the statement as 'hearsay witnesses.' This often leads to dismissals, especially in domestic violence proceedings, because the injured parties subsequently refuse to testify, while objective proof is not possible without their testimony.

Less important are deeds and visual inspection. Experts play a role especially in medical matters.

If, at the end of the investigation, the prosecutor concludes that a conviction is likely because of the admissible evidence, a public prosecution must be filed. In doing so, the prosecutor names the evidence gathered from which the accused facts arise and thus creates the basis for the judicial investigation of the same.

3.2.3 Criminal Trial

Subsequently, the court itself examines whether the basis of the case file offers sufficient suspicion of the offense.

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21 Federal Constitutional Court, Decision 13.05.2015, Az. 2 BvR 616/13, HRRS 2015 Nr. 824 Rn. 41.

22 Schmitt StPO 2020: § 252 para. 12.

If this is the case, the hearing takes place. Here, the aforementioned standard is further tightened: The basis of the judgement is only the evidence of the aforementioned categories and that which has been introduced into the main hearing (principle of orality or 'Mündlichkeitsgrundsatz'). Even if a witness has already testified in the preliminary proceedings, he or she must now make this testimony again so that it can find its way into the judgement. Likewise, the procedure for taking evidence is precisely regulated.

The appraisal of the evidence is ultimately the task of the court. Here, too, there is a free assessment of the evidence.[23] Regulations according to which a certain piece of evidence has an absolute evidentiary value are missing. In principle, the above-mentioned standards also exist here, wherefore the court must only reasonably exclude possible doubts. The court's free assessment of the evidence can only be subsequently reviewed to determine whether it is contradictory, unclear or incomplete, or whether it violates the laws of reasoning or established principles of experience ('Erfahrungssätze').[24] Thus, the assessment of evidence in the so-called "pistachio ice cream case[25] was criticized by the Federal Supreme Court: After several members of a well-situated family from Stuttgart had already died under not entirely clear circumstances, the youngest daughter ultimately died of food poisoning after eating pistachio ice cream with her aunt, who had married into the family. A post-mortem examination later revealed arsenic poisoning. Due to the chronological sequence, it was clear that the arsenic had been administered to the deceased two hours before the first symptoms. Although the parents could thus also be considered as perpetrators, the previous court convicted the aunt on the basis of several pieces of circumstantial evidence: She had been present at all other unexplained deaths of the family, furthermore, she had removed food supplies after the death from the house and had finally attracted attention with inappropriate behavior at the funeral. The Federal Supreme Court allowed the appeal against this, as the assessment of the evidence against the aunt was only based on circumstantial evidence which was interpreted negatively to her disadvantage. The necessary conviction of the commission of the offense could not be drawn from this. The murder was not solved by the courts.

As a result, it should be noted that due to the strict regulation of the gathering of evidence in criminal proceedings and despite the principle of offi-

23 § 261 StPO.

24 Fischer StGB 2021: § 261 para. 39.

25 Federal Court of Justice (BGH), Judgement 31.07.1996, Az. 1 StR 247/96, HRRS database.

cial investigation, the result can often deviate from the actual circumstances, since there either remains a point of contention or certain evidence cannot be gathered according to the prescribed procedure.

4. Finding, Constructing, and Manufacturing Legal Facts

The basis of a correct (in the highest claim: just) judgement is the truth of the facts. We argue that the facts in a trial are ultimately always legal facts, facts of law, which make only a limited claim to truth. A claim to objective truth – assuming that it exists and can be determined from unlimited evidence and resources – cannot be made for several reasons:

The law itself limits the determination of facts for a variety of reasons. One such reason is, for example, the rule of law in the case of the provocation of a crime which is contrary to the rule of law: A person who has no intention of committing a crime is persuaded to do so by an undercover investigator. So even if the rule of law could access evidence, sometimes it forbids itself to do so. Often it might be restricted to look for evidence at all: intelligence can sometimes be withheld if state or military secrets are involved. Even if evidence, as already described, was obtained with other means of proofs than those permitted in the respective type of proceedings, it will not be used. As explained in the previous section, there are prohibitions of evidence (prohibitions of facts of evidence, prohibitions of means of evidence, prohibitions of methods of evidence and relative prohibitions of evidence) which limit the investigation of facts.

The assessment of the (usable) evidence is also still subject to the court, i.e., the respective judge: due to the principle of free assessment of evidence, the judge still has a great deal of leeway in evaluating the evidence and ultimately recognizing a legal fact.

However, a restriction does not only result from the restriction of the means and the leeway of the judges but also in the possible scope of the means by which facts can be established. Whereas in criminal proceedings the official investigation principle applies, and the state mainly takes the investigation of the facts into its own hands (although the defense can still present facts), in civil proceedings it is left to the litigants through the principle of production ('Beibringungsgrundsatz'). The big difference is not necessarily a result of the circumstance that the parties are private: This could be supported by the fact that litigants are usually not legally pre-educated when experiencing

the legally relevant life event (for example, an accident) and the subsequent reporting of it (usually to the police). Those who do not know which circumstances are legally relevant also pay less attention to them. If one's own perception is trained by prior legal knowledge, for example through police training or a law degree, there is a higher probability of more consciously perceiving the decisive circumstances.[26] In the trial, however, not only the private parties but also the public prosecution must rely on (mostly) legally untrained witnesses. The real difference lies in the different resources of the state and the private sector and thus in the possible extended possibilities of hiring expert opinions et cetera. However, no matter who investigates, resources are always limited. A trial may not take an infinite amount of time, nor do the public prosecutor's office or the parties to the trial have an infinite amount of money at their disposal.

The overall result is that the scope of what could potentially be recognized as fact in a trial depends very much on the parties, the prosecution, and the judge. In addition, there is limited evidence as well as limited resources of time and money. Therefore, the question of objective truth is not forming the basis of the court's decision. However, according to the generally accepted view, this would be the basis for a correct judgement. How can one speak of correctness if the facts of the case cannot claim to be objectively true?

At first glance, 'truth' seems to imply that there are things that exist independently of our imagination and that there is only one complete and correct description of how the world is (so called ontological realism).[27] It is difficult to prove this assumption with philosophical arguments. Without going into further detail on individual concepts of truth and their application in fact-finding, the focus here should rather be on the fact that even with a concept that does not have such high requirements, truth cannot be met in a legal context because of the limitations discussed above. Even if one does assume unlimited resources, reliable witnesses, etc.: the scientific and philosophical determination of truth is entirely distinct from the legal determination of facts.[28] In science, there is a free choice of methods. The only limitation of science is one of logical necessity: the method must be scientifically proven. In the legal process, methods do not only rely on scientific interests but mostly on the constitutional principle of the rule of law. Therefore, one can rather

26 In favor of this position: Upmeier 2010: 72.

27 Definition from Putnam 1981.

28 Upmeier 2010: 147.

state (metaphysically-realistically) that there are different degrees of approximation to 'the' truth. This idea is also supported by the concept of 'finding the verdict,' to which the court retires before pronouncing the verdict. But just as the judgement is not 'found,' a finding of facts does not take place in the determination of the facts. The verdict does not reveal itself to the judge. This romantic notion, along with the elevated sitting position of the judge, the illocutionary force of the judgement, the required elevation of the persons in the courtroom, underscores an almost theological authoritativeness. If one had to formulate this process in constructivist terms, one would say that truth is constructed. However, this assertion is too simple in its brevity. Even if what is determined legally is always subjectively colored and sometimes also wrong, it is not completely arbitrary. To call the determination of facts a *finding* or simply a *construction* would be wrong. Since the term 'manufacture' no longer refers to traditional but to modern craft work in which highly specialized workers from different disciplines work together on a final product and the court precisely uses such highly specialized methods to determine the facts of a case by being very careful in its construction, we may speak of *manufacturing legal facts*.

The judgement is limited in the scope of its claim, despite the coercion it imposes: It is only absolute as far as the established facts are concerned. These facts can – with good reason – only be determined by limited means. In a further step, another limitation is added to the subsumptions made so far: in certain cases – so-called 'hard cases' – one cannot necessarily assume a single correct decision.[29] However, this is what judges convey in the language of their judgements: Every judgement contains the only correct normative assessment of the only correct set of facts. The fact that these limitations of the claim are not linguistically conveyed to laypersons is an existing challenge.

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