McGill Law Journal
Revue de droit de McGill

Fact

René Provost

Volume 66, numéro 1, september 2020

URI : https://id.erudit.org/iderudit/1082040ar
DOI : https://doi.org/10.7202/1082040ar

Aller au sommaire du numéro

Éditeur(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (imprimé)
1920-6356 (numérique)

Découvrir la revue

Citer cet article

Provost, R. (2020). Fact. *McGill Law Journal / Revue de droit de McGill*, *66*(1), 67–72. https://doi.org/10.7202/1082040ar

Fact

René Provost[*]

"It's a fact!" is a way of ending a conversation, with the intimation that the matter imposes itself upon us, in a manner that does not leave open the possibility of challenge. The basis of the impossibility of challenge, usually unarticulated, is that a fact is an ascertained reality that simply exists, and that as such it is not open to debate (leaving aside the possible challenge to the very existence of the fact). That is very much the way in which the law represents the fact: as something with which it may be in relation, but wholly distinct in its essence. It is interesting to stop and consider the extent to which the law is wedded to this construct, before turning to consider the implications for law of the suggestion that facts are made, not born.

Where does the fact come from? This might come across as a strange question, but in fact (!) it is one that bears pondering. The fact emerged as an autonomous social concept as a by-product of the emergence of formalized law. As such, the law has played a central role in the elaboration of a concept that has spread to other disciplines and entered the public imagination as an idea necessary to give meaning to human existence. The fact, as a stand-alone concept, came from the law, but it was created in a fit of inattention while jurists were devoting enormous energies to the study of legal norms and legal institutions. Still today, with one limited exception to which I shall come presently, a reflection on the concept of the fact is not thought necessary to accompany a reflection on the concept of law, even though the former implies the latter. Many faculties of law, like McGill, have a course on *Foundations of Law*, but none has a course on *Foundations of Fact*. Law and fact may be the *summa divisio* of legal discourse, but jurists feel concerned only with one half of the equation.

The story of the invention of the fact tracks the story of the emergence of the two great Western legal traditions. Each of the common law and

* Professor, Faculty of Law, McGill University. The original version of this entry was adopted as part of the *McGill Companion to Law* at a meeting in March 2015.

Citation: (2020) 66:1 McGill LJ 67 — Référence : (2020) 66:1 RD McGill 67

civil law has, in its own distinctive way, supported the emergence of an autonomous concept of fact.

The story of the invention of the fact in the common law is an institutional one. The desire to project royal authority throughout the land despite a limited force led to the creation of the travelling courts, to bring the King's justice to everyone in the country. At the same time, there was a concern not to attempt to displace local customs. Judges were instructed (by writs) to convene a tribunal in a given place to hear a given complaint, but initially no attempt was made to stipulate the rules that ought to govern the resolution of the dispute. Instead, a jury of local men, "true and free," would determine the just outcome of the matter. In this setting, there was no distinct sense of fact and law; instead, the jury would be selected both for their prior knowledge of local practices or customs, and for their familiarity with the people and events involved in the case. In other words, fact and law were fused in the institution and composition of the jury. Gradually, the judge's task of ensuring that the case remained within the terms of the writ grew to encompass more elaborate, complex rules of procedure and, eventually, substantive law. The common law, in Maine's expression, "has at first the look of being gradually secreted in the interstices of procedure." In parallel, there was a progressive move away from total reliance on the jury to know the people and circumstances of a case, eventually to favour instead the giving of evidence by witnesses. Thus it came to be, over a period of several centuries, that the judge would be seen as "the trier of law" while the jury was "the trier of fact." The judge may be called to provide a justification for his conclusion of the law, recorded in yearbooks and other reports, paving the way for *stare decisis*; no such account was ever demanded of juries, who were there simply to discover the facts. The law was a matter of interpretation, opening the door to the possibility of error and justifying the need for a right of appeal, on questions of law. The facts were the facts, and there was no basis in this mindset to seek to have a court of appeal revisit them. The common law came to grow considerably, and juries in some jurisdictions came to disappear or be more marginal, but the structural division between "questions of law" and "questions of fact" remains to this day.

The story of the emergence of the fact in the civil law is a normative one. The invention of the fact, in the civil law, is tied to the written form and more specifically to the evolution in forms of legislation. The civilian formulation of legal rules stands as the end result of a process of the gradual expulsion of facts from the law. Looking at the oldest sources of law we have access to, they typically are expressed in narrative form with no attempt to excerpt from the story the legal standard that it is taken to represent. The story is the story, and people take away from it whatever they may be able to read into it. Talmudic law follows this pattern with

central, divine, or divinely inspired text surrounded (sometimes literally, on the page) by commentaries and interpretations, but without a reformulation of a rule that might overrule the initial story. The Roman *Law of XII Tables* is already a more abstract formulation, shedding the specifics of the story to hold only onto the constitutive parts of what can be construed as the rule. For example, "If anyone shall publish a libel ... let him be beaten to death with clubs." This is a skeleton of the story, but one that can be adjusted to fit many particular events. Roman forms of legislation following this general approach survived for many centuries and travelled to France with the expansion of the Roman Empire, especially in the Midi in which Roman influences were felt most strongly and where regional customs came to be written much earlier. After a period of intense fragmentation of France in political, economic, and legal terms, doctrine took over to attempt a more systematic formulation of legal principles detached from the vernacular of the hundreds of *pays de droit écrit* in the South and *pays de droit oral* in the North. In the wake of a royal edict to write down all customs in the fifteenth century, Domat in the seventeenth century elaborated a new structure for the organization of legal concepts in private law that was to become the architecture of the *Civil Code*. More importantly for our purpose, he was followed in the eighteenth century by Pothier, who contributed to the civilian tradition the legislative style that is one of its defining characteristics. Whereas up until then, the approach was to start with a practical problem from whence a principle would be extracted, Pothier on the contrary offers a statement of principle that could be applied to any number of situations. Thus, he starts his 1764 *Traité des obligations* with the following first principle: "Il est de l'essence des obligations, 1. Qu'il y ait une cause d'où naisse l'obligation. 2. Des personnes entre lesquelles elle se contracte. 3. Quelque chose qui en soit l'objet." The economy and elegance are undeniable, and it is no surprise that the drafter of the *Code Napoléon* drew largely and literally from Pothier's work. The evolution that is remarkable for our purpose here is the complete disappearance of any factual elements from the formulation of the legal standard. Not all articles of the *Civil Code* are expressed in such purely conceptual terms, but it is notable that this trait is represented as the very quality that marked the *Code* as the most scientific approach to legislation. The fact has been expelled from the narrative, leaving only the sublimated law that can thereafter be applied to any imaginable factual setting.

We see in the institutional and normative construction of the common law and civil law that the fact has come to be represented as something detached from the law. The law does of course have something to say about facts, and it might be said that my missing *Foundations of Fact* course does exist under the label of *Evidence*. I might be tempted to retort that "evidence rules" could be taken as an oxymoron, seeing that if something is evident, why do we need rules about it? (Slightly) more seriously,

the function of rules of evidence as represented in legal discourse echoes the metaphor of the filter: "Just the facts, ma'am," says the detective to the witness, as an invitation to keep out the "pre-law blah-blah-blah." In other words, evidentiary rules are means to allow efficient use of legal resources to weed out facts that have no bearing on the application of the given substantive rules. As such, they affirm rather than impugn a *summa divisio* between fact and law. More generally, law is represented by legal discourse as a device to reveal the truth about facts, a capacity central to the law's claim to legitimacy.

In Clifford Geertz's poetic evocation, "[m]an is an animal suspended in webs of significance he himself has spun." What he suggests by that is that we have no access to the world surrounding us that is unmediated by constructs of one kind or another. There are important implications flowing from this for the law, in that if facts are made, not born, the process of that creation ought to be a central focus of interest for jurists. I suggested in the first part of this essay that the institutional and normative evolution of the common and civil law signals, on the contrary, a marked disengagement with the fact as a concept. Rules of evidence are only a small part of a much broader process of factual construction of legal facts, significantly shaped as well by the techniques and habits, formal and informal, visible and invisible, of lawyers, judges, professors, students, litigants, the media, etc. All of this constitutes the law, according to Geertz, as "part of a distinctive manner of imagining the real. At base, it is not what happened, but what happens, that law sees," such that "fact[s are] normative from the start." There is here a paradox, in that the legal representation of the act of legally characterizing something as a fact makes invisible the norm that is relied upon in that operation. In law, to call something a fact is to make a claim that its normative underpinning ought not to be interrogated, to urge that we withhold judgment on the norms that structure our understanding of facts.

The construction of facts for the purpose of applying the law has both collective and individual dimensions. At one level, it emerges as a necessarily collective endeavour because no one in society can unilaterally create their own meaning system and impose it on all others. We stand ineluctably in a relationship with others, and legal norms are a way of communicating. To form a community is to agree on a set of differences that we elect to overlook, and conversely to proclaim not only shared values but a common outlook on the world. In this respect, members of a given community literally see the world in the same way, at least to some extent. De Sousa Santos offered the useful metaphor of mapping to illustrate this feature of law: law is a form of mapping in that it offers a highly selective survey of the mass of facts that surrounds us. The genius of maps is not in their precision but in their omission. What facts we choose to overlook determine what reality we thus construct. A map that in-

cludes all available information would be useless, as in the short story by Borges in which the king demands a fully accurate map only to be given one that does just that but that is the same size as the country. What's more, every map has its legend, not only a code that allows understanding but also a myth that grounds its validity. For the law as a distinctive manner of imagining the real, the myth is in part that facts are simply there, standing apart from the law.

The point can be taken in a different direction by taking seriously Martha-Marie Kleinhans and Rod Macdonald's suggestion that each individual is a site in which multiple legal orders intersect and in which legal norms are produced. Facts would thus be made, in a normative sense, at an individual level ("Is the dress black and blue or gold and white?"). The idea is pushed to an extreme by Nicholas Kasirer's unpacking of Michel Tournier's *Vendredi ou les limbes du Pacifique*, in which Robinson Crusoe, alone on his island, decides to create laws. Fascinatingly, this includes not only writing down a charter and a code of rules of behaviour and punishment for violations, but also naming every rock and every creek. In other words, Robinson is legislating not only norms to guide behaviour, but also facts to create a world in which he can inhabit as a fully human being.

I started this short piece by a reference to the evolution of the common law and civil law, and indeed what I have said here is specific to a Western construction of fact and law. Other traditions, including Aboriginal legal traditions and Islamic law, do not adhere to this *summa divisio*. Not only is law culturally contingent but, as a necessary consequence, so is fact.

References

Baker, Sir John, *An Introduction to English Legal History*, 5th ed (Oxford: Oxford University Press, 2019).

Daube, David, "The Form is the Message" in David Daube, ed, *Ancient Jewish Law: Three Inaugural Lectures* (Leiden: EJ Brill, 1981) 71.

De Sousa Santos, Boaventura, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14:3 JL & Soc'y 279.

Gazzaniga, Jean-Louis, *Introduction historique au droit des obligations* (Paris: Presses universitaires de France, 1992).

Geertz, Clifford, "Local Knowledge: Fact and Law in Comparative Perspective" in *Local Knowledge: Further Essays in Interpretative Anthropology*, 3rd ed (New York: Basic Books, 2000) 167.

———, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973).

Glenn, H Patrick, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed (Oxford: Oxford University Press, 2014).

Goodwin, Frederick, ed, *The XII Tables*, (London, UK: Stevens and Sons, 1886).

Kasirer, Nicholas, "Le droit robinsonien" in Nicholas Kasirer, ed, *La solitude en droit* privé (Montréal: Thémis, 2002) 1.

Kleinhans, Martha-Marie & Roderick A Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12:2 CJLS 25.

Maine, Henry Sumner, *Dissertations on Early Law and Custom* (Kitchener: Batoche Books, 1999).

Pothier, Robert Joseph, *Traité des obligations*, t 1 (Paris: Debure, 1764).

Shapiro, Barbara J, *A Culture of Fact: England, 1550-1720* (Ithaca: Cornell University Press, 2000).

Tournier, Michel, *Vendredi ou les limbes du Pacifique* (Paris: Gallimard, 1967).