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## **Judicial discretion in the late *ius commune***

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### **Introduction**

1.

According to a conventional view, the fact-finding process has historically received two fundamentally diverging approaches. On one hand we have the model of a free evaluation of facts developed by common lawyers. Its peculiarity is often supported by a contrast with a second model, developed in continental Europe, which shows a closed system of legally regulated proof. According to this conventional dichotomy, on one hand we have free proof, on the other the process of fact-evaluation is constrained by a detailed set of rules predetermined by the lawgiver.

There is scholarly consensus, however, that this conventional view is not entirely accurate. Recent work has shown that a degree of judicial discretion was recognised in the formative stages of continental procedure in the late-sixteenth century.<sup>1</sup> But what remains to be clarified is the extent and the depth of this recognition. In other words, whether this discretion should be seen as a purely superficial phenomenon, one which did not alter the fundamental structure of the system of proof<sup>2</sup> or whether it was the fruit of a real mutation of the *internal* evidentiary structure.

The purpose of this paper is to show that this discretion came from a rethinking of the basics: it came first of all from a rethinking of the idea of fact, and, closely connected to it, of the relationship between issue of fact and issue of law.

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<sup>1</sup> See, for example J. H. Langbein, *Torture and the law of proof: Europe and England in the ancien régime* (Chicago, 1977); G. Palazzolo Alessi, *Prova penale e pena* (Naples, 1979), and B. Schnapper, "Les peines arbitraires du XIII au XVIII siècle (Doctrines savantes et usage français)," in *Tijdschrift voor Rechtsgeschiedenis*, 41 (1973), pp. 237-77.

<sup>2</sup> This is suggested, for example, in L. J. Cohen, 'Freedom of proof', in *Facts in law*, ed. W. Twining (Wiesbaden, 1983), pp. 1-21 at 9-10.

2.

In his treatise on presumptions (1587) Jacopo Menochio stakes out an interesting and challenging position about the notion of 'fact'. It centres around his view that facts emerge from empirical observation. But this is in turn connected with an arresting and original conception of a rigid separation between law and fact, and indeed, of the position of the judge in regards to the fact. Menochio was able to make of this distinction one of the key notions on which his treatise hinges, making his work a turning point in the literature on presumptions.

The growth of a distinctive model of fact-finding is a complicated and difficult process. This is an uncommon phenomenon in the general ambit of law, in so far as its whole operative structure is influenced not only by legal science but is greatly dependent on suggestions received from basic modes of thought about finding the truth. One of the key features of this construction is embedded in the very notion of 'fact'.<sup>3</sup> This notion may be summarised by saying that in his treatise Menochio outlined the foundations for an assimilation of facts object of judicial evaluation with empirical facts, namely, anything capable of being perceived by the senses. This understanding was a major factor in the rigid separation of the issue of fact from the issue of law.

## 1. The old rhetorical heritage

To begin to understand the significance of Jacopo Menochio's position we need first to take a step back and consider, albeit briefly, the context in which the distinction between law and fact was usually discussed: the rhetorical theory of *status* (*στάσις*, *constitutio*, issue).<sup>4</sup> This doctrine had an immense influence on the formation of ideas of procedure, shaping the way we conceive of judicial reasoning.<sup>5</sup> At its foundation is a fundamental idea: that of creating boundaries between different kinds of controversies. It begins from the observation that the confrontation between two parties is the source of a plurality of conflicts of a different nature. From an analysis of them a number of classes emerge, the rationale of which is to put order in

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<sup>3</sup> See on this *B. Shapiro*, *A culture of fact: England, 1550-1720*, Ithaca, 2000; and *Id.*, *The Concept 'Fact': Legal Origins and Cultural Diffusion*, in: *Albion*, 26, 1 (1994), pp. 227-52.

<sup>4</sup> The translation of *status* into 'issue' appears in *Thomas Wilson*, *Arte of Rhetorique*, London, 1560, p. 88. See on this generally *L. Calboli Montefusco*, *La dottrina degli "status" nella retorica greca e romana*, Zürich, 1986.

<sup>5</sup> See on this *M. Heath*, *Hermogenes on issues*, Oxford, 1995, pp. 70-3.

the dispute. Each class is structured according to an appropriate scheme of reasoning called *status* and requires its own kind of proofs.<sup>6</sup>

A fundamental distinction separates two clusters of issues (*status*): the first collects questions about facts (*status rationales*), the second about the law (*status legales*).<sup>7</sup>

Controversies about facts - issues of fact, *status rationales* – address three main questions:<sup>8</sup>

(i) The first (*status coniecturalis*) is related to controversies in which the point at issue is the existence of the fact, as for example “did Titius do it?” (*an fecerit*), and owes its name to the use of conjectures.<sup>9</sup> In his treatise Jacopo Menochio was keen to specify that all conjecture is concerned either with facts or with intentions (*coniectura de re* and *coniectura de animo*).<sup>10</sup> According to Quintilian’s influential account, this is the province of artificial reason (*ratio artificialis*).<sup>11</sup>

(ii) The second issue (*status definitionis: quid sit*) regards the definition of the fact. It occurs when the defendant does not deny the fact, but argues that it may constitute a wrong: the controversy shifts then to the defining of the nature of the wrong, as, for example, “can the fact of which we are discussing be defined as theft?” This involves problems of description, such as, for example, to define “what kind of person he is, whether a miser or a flatterer, or other cases in which both a person’s character and manner of life is described.”<sup>12</sup>

(iii) The third issue (*status qualitatis: quale sit*) discusses the quality of the fact. The fact is admitted but the disagreement regards the quality of the action, including the rightness or wrongness, as for example, “was it just?” (*an jure ac recte fecerit*).<sup>13</sup> Rhetorical sources approach this category as the most problematic, for the discussion goes beyond a pure statement about the physical existence of the fact to making a judgement of its value, such as, for example, the honesty and utility of the action.

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<sup>6</sup> Quintilian, 3, 6, 21: “Hermagoras statum vocat, per quem subiecta res intellegatur et ad quem probationes etiam partium referantur.”

<sup>7</sup> Quintilian, 3, 5, 4: “Illud iam omnes fatentur esse quaestiones aut in scripto aut in non scripto. In scripto sunt de iure, in non scripto de re: illud rationale, hoc legale genus Hermagoras atque eum secuti vocant, id est νομικόν et λογικόν.” A brief synthesis in I. Maclean, *Interpretation and meaning in the Renaissance: the case of law*, Cambridge, 1992, pp. 77-8.

<sup>8</sup> Quintilian, 3, 6, 80: “tria esse, quae in omni disputatione quaeruntur: an sit quid sit quale sit; quod ipsa nobis etiam natura praescribit.”

<sup>9</sup> Cicero, *De inventione*, 1, 10: “cum facti controversia est, quoniam coniecturis causa firmatur, constitutio coniecturalis appellatur.” Franciscus Duarenus, “Libellus ad §. Agerius l. qui Romae, De verborum Obligationibus,” in: *Opera omnia*, Lyon, 1558, p. 405: “quaestionem autem iuris esse diximus, cum status causae iuridicalis est: quaestionem facti, cum est coniecturalis, & coniectura verum quaeritur.”

<sup>10</sup> Quintilian, 7. 2. 1: “Coniectura omni aut de re aut de animo est. Utriusque tria tempora, praeteritum, praesens, futurum,” quoted in *De praesumptionibus*, q. 19, p. 27.

<sup>11</sup> Quintilian, 6. 4. 4.

<sup>12</sup> Cicero, *Topica*, 22, 83: “qualis sit avarus, qualis adsentator ceteraque eiusdem generis, in quibus et natura et vita describitur.”

<sup>13</sup> G. Kennedy, *The art of persuasion*, London, 1963, p. 310.

The other class of issues (*status legales*) is rooted on a disagreement on the interpretation of the law, and in particular it includes: i) issues of letter and spirit (*scriptum et voluntas*) arise when the parties notice a contradiction between the words and the intention of the legislator; ii) issues of conflict of laws (*leges contrariae*), when the disagreement regards the contrast between two laws; iii) issues of ambiguity (*ambiguitas*), when the law may be subjected to a different construction.<sup>14</sup>

Now, the plurality of questions treated by the theory of *status* implies a kind of enquiry which is at odds with the empirical notion of fact. It implies a perspective in which questions about the existence of the fact (*status coniecturalis: an sit*) are intertwined with issues of definition (*status definitionis: quid sit*) and quality (*status qualitatis: quale sit*). In other words, the reconstruction of the fact grows out of a net of relations rooted within a global perspective, one which is influenced by criteria — such as definition and, above all, quality — that encompass more than a pure judgement about the empirical existence of the fact. To put it bluntly, the inquiry is not focused only on the empirical existence of the fact: the reconstruction cannot be separated from its evaluation.

The distinction between law and fact, once transferred to the ground of judicial procedure, turns into a difficult concept. In medieval procedure a precise distinction between fact and law was absent, for the fact, in its empirical dimension, was beyond the jurists' reach. The point is that the fact was the result of human creation, it was literally a *factum*, and fact, understood as deed (*res gesta*), cannot be described only in physical terms, for example by a statement about its existence.<sup>15</sup> It was the result of a stance toward a certain set of values, not of sensorial perception. In this perspective, the conviction that facts – like natural facts – are 'given' or evident, was absent.<sup>16</sup> Although the separation of law and fact appears as an uncontroversial notion, and as such was a staple principle in basic rhetorical teaching, in medieval procedure the notion of a clear-cut separation of the two issues was absent: its basic understanding was that historical facts could not be reduced to empirical events.<sup>17</sup>

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<sup>14</sup> *Quintilian*, 7, 6, 5-8

<sup>15</sup> For a survey of the different meanings of *factum* see *Johannes Calvinus* (Kahl), *Lexicon iuridicum*, Genf, 1612, s.v. "factum," col. 1066.

<sup>16</sup> *Alessandro Giuliani*, *La controversia*, Pavia, 1966, pp. 122-3.

<sup>17</sup> A similar distrust for a clear-cut distinction between law and fact is held today by common lawyers. According to A.A.S. Zuckerman the distinction between law and fact "is a misleading oversimplification." He observes that it would be difficult to describe a fact without recurring to a "non factual judgement," and "even if such a system of isolation of fact from value were practically feasible, it would hardly be attractive;" *A.A.S. Zuckerman*, *The principles of criminal evidence*, Oxford, 1989, p. 22 and 27.

## 2. Separation of fact and law

The real turning point came with an assertion emerging from Menochio's treatise on presumptions: "the issue of fact is entirely dependent on the determination of the judge, not so the issue of law" (*quaestio facti, tota est in potestate iudicis, iuris vero non*).<sup>18</sup> This statement announces that the distinction between the two kinds of matter considered within a dispute, the issue of law and the issue of fact, assumes the character of a rigid separation.<sup>19</sup> Repeated in countless citations, this statement was a staple principle in late-sixteenth century legal literature.

However, the significance of the point raised by Menochio would be missed if one fails to consider his efforts to answer two fundamental questions, namely, what is 'fact'? and, what is 'law'? His view is consigned to a simple statement. On one hand there are facts: their essence is to be objects of sensorial perception, in other words, they are everything that can be inspected by eyesight or touched by hand (*ea quae oculis cerni, vel manu tangi, ut quod corporeum*). On the other there is the law, represented as an incorporeal entity, a purely abstract notion, object of intellectual speculation (*est quid incorporale, quod nec oculis cerni, nec manu tangi*).<sup>20</sup> The immediate source of this view is easy to discern: it is the distinction of corporeal and incorporeal things (*res corporales et incorporales*) from Justinian's *Institutiones* (*Inst.* II.7), which Menochio shifts to a new context to describe the contrasting character of fact and law. For the late-sixteenth century jurist the dualism of corporeal and incorporeal things was a pervasive and powerful idea. Going beyond legal texts, it was enshrined in Cicero's *Topica*, the text still used in the late-sixteenth century in the liberal arts training propedeutical to the university study of law.<sup>21</sup> Going even further, this dualism was the leading theme of a whole set of theological writings in which it encapsulated the contrast between the corporeal and mutable essence of the secular world as opposed to the eternal and

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<sup>18</sup> *Menochio*, De praesumptionibus, lib. I, quaest. 11, n. 6, p. 17. The usual reference is to D. 50.1.15pr: "cum facti quidem quaestio sit in potestate iudicantium, iuris auctoritas autem non sit;" and D. 48.16.1.3-4. For a useful synthesis of this discussion see *Althusius*, *Dicaeologica*, lib. 1, cap. 9, n. 2, p. 23, who cites Menochio, Duarenus and Donellus.

<sup>19</sup> I owe this point to *Alessandro Giuliani*, *Il concetto di prova*, Milan, 1961, pp. 223-7.

<sup>20</sup> *Menochio*, De praesumptionibus, lib. I, quaest. 11, n. 15-6, p. 17: "facti esse dicimus, ea quae vel oculis cerni, vel manu tangi, ut quid corporeum, possunt ... Ius est quid incorporale, quod nec oculis cerni, nec manu tangi potest." Menochio cites *Inst.* II, 7 "De rebus corporalibus et incorporalibus."

<sup>21</sup> A law student would have known this text through Severinus Boethius' commentary: "Definitionum duo sunt genera. Primum, unum earum rerum quae sunt, alterum earum rerum quae intelliguntur. Esse ea dico, quae cerni tangi possunt, ut fundum, aedes, parietem ... Non esse rursus ea dico, quae tangi demonstrative non possunt: cerni tamen animo, atque intellegi possunt;" in *Manlius Severinus Boetius*, *In topica Ciceronis commentarius*, Paris, 1535, n. 27, pp. 112-3.

absolute character of the spirit.<sup>22</sup> Hence, when Menochio attributed to fact and law the character of corporeal and incorporeal he was using categories rich with a wide range of overtones.

To begin to understand the statement of a rigid separation between fact and law we need first to turn to contemporary discussions about the nature of law as science based on purely intellectual foundations. This is a central motif that coloured late-sixteenth century writings with the cultivation of an ideal of jurisprudence as an autonomous science based on principles. Perhaps the main idea is that in law all processes of reasoning are rational, since justice is based on eternal principles, and in some fundamental ways the separation between fact and law became even deeper because of the conviction that the essence of the norm was certainty, and this was elevated to be the constitutive element of law. But the crucial point for the purposes of this argument is that the increased concern with law was counteracted by a diminished interest in fact. It was precisely the pursuit of a sphere of norms, object of a purely intellectual speculation, which was to determine a sharp distinction between law and fact.

The point was argued countless times in a whole genre of treatises which described the world of norms as independent from historical or contingent elements, but as a legal abstract, to be examined in terms of certainty associated with the idea of *ratio legis*. Perhaps the most well-known and probably one of the most influential examples was Jean Bodin's *République*, whose goal of rationalisation culminates with the design of a universe of laws resting on mathematical principles; but this is only one of a multitude of works inspired by a pervasive interest for *ordo* and *methodus* that profoundly marked the literature of the time.<sup>23</sup>

### 3. Analyzing the separation between fact and law

Let us turn for example to Hermannus Vulteius (1555-1634), a German jurist who studied for some time with Jacopo Menochio at Padua. He divided his *Jurisprudentia Romana* (1590) in two parts: the first (*ius absolutum*) is a systematic and methodically coherent account of private law; the second, structurally dependent on the first (*ius relatium*), is an exposition of

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<sup>22</sup> *Tertullianus*, *De carne Christi*, 5; *Lactantius*, *Institutiones divinae*, 7.12; *Seneca*, *Epistula* 58; *Lucretius*, I, v 304; I draw the citations from *B. Windscheid*, *Sistema delle pandette*, transl. Fadda and Bensa, Turin, 1902, t. 1, vol. 1, p. 654.

<sup>23</sup> See the concluding chapter "De la justice distributive, commutative et harmonique et laquelle des trois est propre à chacune République," in *Jean Bodin*, *La République*, Paris, 1583, p. 1013.

judicial procedure (*cuius praxin quodammodo ostendit & usum*).<sup>24</sup> The crucial point of his construction is a conscious separation of law and fact, which can be set out as follows:

question of fact:	question of law:
uncertain and vague	certain and defined
based on <i>hypothesis</i>	based on <i>thesis</i>
minor premise ( <i>assumptio</i> )	major premise of a syllogism ( <i>propositio</i> )
prior	posterior <sup>25</sup>

This text brings together some important threads that may be convenient to examine separately.

(i) *Certain and uncertain*. The separation between law and fact is the premise for a distinction between two methods of investigation: in contrast with the certainty required by the interpretation of the law, fact finding is inescapably uncertain (*facti enim quaestio nunquam certa esse potest*).<sup>26</sup> Facts are mutable and contingent, diverse and immeasurable (D. 22.6.2) and for this very reason they outnumber the words that are supposed to define them (D. 19.5.4), and thus resist being constrained into predetermined *formulae* or rules (D. 1.3.10 and D. 1.3.12). As a result their investigation is inherently problematical: even the most expert is likely to fail (D. 22. 6. 2: *etiam prudentissimos fallunt*). In conclusion, any standing is slippery on a ground that lacks the cast-iron guarantees given by certain rules, and offers only the perilous categories of probability and verisimilarity.<sup>27</sup> The most central motif stemming from the reference to the uncertainty of facts is that the investigation is associated with a specific method of inquiry, exclusively conjectural, and thus, within an Aristotelian framework, the notion of fact was confined to a lower status in the epistemological scale, one circumscribed to conjectural and contingent observation.<sup>28</sup> Their proper method of

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<sup>24</sup> *Ius absolutum* and *Ius relatum* are the titles of Book I and Book II that symmetrically divide *Hermannus Vulteius*, *Jurisprudentiae Romanae a Justiniano compositae libri II*, Marburg, 1590.

<sup>25</sup> *Vulteius*, *Jurisprudentia Romana*, fol. 374v: “facti quaestio incerta est atque vaga, quaestio iuris certa & definita: illa hypothesin continet, haec thesin: illa syllogismi assumptionem, haec propositionem: illa tempore posterior est, haec prior; in accomodando tamen thesin ad hypothesin illa tempore prior est, quippe de qua prius ut capite superiori dictum est, constare oporteat, haec posterior.”

<sup>26</sup> *Antonius Fabrius*, *Codex Fabrianus*, Geneva, 1674, lib. 8, tit. 30, def. 21, p. 1093: “Facti enim quaestio nunquam certa esse potest, & in iudicantis arbitrio semper posita est.” The uncertain nature of the cognition of facts is derived from D. 22.6.2.

<sup>27</sup> A discussion of probability is beyond the scope of this paper. It may suffice to note the awareness of legal writers for the revival of scepticism, as shown by *Francisco Mantica*, *De coniecturis ultimarum voluntatum* [1579] Frankfurt, 1580, lib 1, tit. i, n. 9, fol. 2r: “Unde rationes quae ex coniectura pendent, disputationibus huc, & illuc trahuntur, nullamque adhibent persuadendi necessitatem: ut inquit Cicero lib. 2 *Academica*.” On this influential text see *C. Schmitt*, *Cicero Scepticus: a study of the influence of the *Academica* in the Renaissance*, The Hague, 1972. See also below n. 123.

<sup>28</sup> *R. W. Serjeantson*, *Proof and Persuasion*, in: *The Cambridge history of science*, vol. III: *Early Modern Science*, Katherine Park and Lorraine Daston (eds.), Cambridge, 2006, pp. 132-75 at 158. See also *P. Dear*,

investigation cannot be separated from the whole apparatus made available by rhetorical theory, and primarily presumptions and conjectures.<sup>29</sup> They made possible a kind of enquiry by which facts were isolated and reconstructed by means of a procedure that, following the example of the inquiry into natural facts, assumed the character of an empirical investigation.

(ii) *Thesis and hypothesis*. The separation between law and fact is reinforced by the diverging character of the question they address, either general or particular, which Vulteius, as other sixteenth-century authors, describes making use of the rhetorical categories of *thesis* and *hypothesis*.<sup>30</sup> The substance of this point is that law is interpreted according to logical and binding rules, for, like the thesis, it addresses the general, not the particular. It is precisely on these grounds that law, overlooking the contingent, was elevated to a science based on general principles, on the premise that “iura, non in singulas personas, sed generaliter constituuntur.”<sup>31</sup> It is not just a coincidence that by the mid-sixteenth century Themis, the goddess of justice, began to be represented blindfolded.<sup>32</sup>

(iii) *Major and minor premise*. The separation of law and fact is the premise for the identification of judicial reasoning with the formal scheme of a syllogism, in which the major premise (*propositio*) is the law, and the minor premise (*assumptio*) is the fact. The significance of this point would be missed without first considering that it shows a basic concern with an important question: how to explain the progression from fact to law; and this in turn entails the need to establish the nature of this connection. According to this author the

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Jesuit mathematical science and the reconstitution of experience in the early seventeenth century, in: *Studies in the history and philosophy of science*, 18 (1987), pp. 133-75.

<sup>29</sup> *Nikolaus Vigelius*, *Centuriae octo quaestionum juris controversi*, Hamburg, 1608, p. 5: “I think that legal maxims, from which law is not deduced, should be admitted in questions which depend more on fact and judge’s discretionality such as those on the testator’s will and the parties’ intention, rather than questions of law. Since we cannot have firm rules here, this is the place of conjectures. (*Regulae autem juris, ex quibus non sumitur jus, in iis quaestionibus quae ex facto magis, & ex arbitrio iudicis, quam ex jure dependent, admittendas censeo, quales sunt in quibus de voluntate testatoris, de mente contrahentium quaeritur. In his enim quia certas leges habere non possumus, coniecturis locus est*).

<sup>30</sup> As it is well known, according to rhetorical theory any question brought into dispute may be classified under two main headings: *thesis* and *hypothesis*. While the *thesis* involves an abstract and general question (e.g., ‘is the sky rounded?’ or ‘is there more than one world?’) the question raised in the *hypothesis* addresses concrete particulars or specific persons (‘should Cato marry Martia?’ or ‘should the agreement with Titius be kept?’) and are accompanied by circumstances, summarised in the verse, *quis? quid? ubi? quando? quomodo? quibus adminiculis?* *Hypothesis* and *thesis* were relevant as a basis for the distinction between issue of law and issue of fact. See on this *Ulrich Zasius* (Zäsi), *Rhetorica legalis*, Frankfurt, 1565, col. 383, n. 10, from which the examples are drawn.

<sup>31</sup> *Nikolaus Vigelius*, *Dialectices juris civilis libri tres*, Basel, 1581, p. 458. *Uldericus Zasius*, *In titulos Digesti veteris commentaria*, in: *Opera omnia*, Frankfurt, 1590, t. I, n. 105, fol. 101: “Legislator considerare debet, quid in universum utile sit, non quid mihi vel tibi vel Titio vel Sempronio, utile est.”

<sup>32</sup> *M. Sbriccoli*, “La benda della giustizia. Iconografia, diritto e leggi penali dal medioevo all’eta’ moderna,” in *M. Sbriccoli, P. Costa, M. Fioravanti* (eds.), *Ordo iuris. Storia e forme dell’esperienza giuridica*, Milan, 2003, pp. 41-95 and *D. E. Curtis* and *J. Resnik*, “Images of Justice,” in *Yale Law Journal*, 96 (1987), pp. 1727- 72 at 1755.

nature of this connection is logical, and is given by the structure of the syllogism. The resulting picture is that the juridical consequence stemming from a fact originates in the norm according to a strictly logical procedure.

(iv) *Prior and posterior*. Finally, and strictly connected with the above point, is the view that fact and law are linked by both a chronological and a logical succession. Of course, facts – both human and natural – are accompanied by juridical situations (obligations, rights, faculties), but the interesting aspect emerging here is the attempt to describe the progression from fact to law in a way that contemplates the fact as a source, or – as Cuiacius wrote – as a *cause* of juridical effects, implicitly stressing the centrality of the notion of causation to the growth of the science of law.<sup>33</sup> In other words, the function of the fact is essentially that of the foundation of effects, in a relationship that jurists enshrined in the formula *ex facto ius oritur*. Thus, the question about the nature of the connection between fact and law receives a solution in terms of logic.

The effects of this view reverberate at the level of the emerging architecture of the state. The most significant was probably the progressive partition of two areas of law: substantive law and procedure. The first clear example is believed to have appeared in the works of Hugo Donellus (1527-91), who conceived of law as a set of rights to be distinguished from the remedies which enforced them.<sup>34</sup> Another example is Vulteius who, as mentioned above, drew a line between *ius absolutum* and *ius relatum*. The point is that the view that fact and law might be connected by a syllogism contains *in nuce* the instruments for an effective control over a professionalized body of judges through the control of the logical processes which underpin any judgement. In this context the judge's independence appears as a danger to be blotted out. He is in a subordinate position to the legislator, and his office is the application of the law to the fact; he cannot go beyond the limits set by the issue of fact, otherwise he would turn into a legislator (*judici non est statuere sed statutam facto accomodare*).<sup>35</sup> Building on these premises, procedure receives a systematic dogmatic structure, the starting point of which is a rigid separation of law and fact.

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<sup>33</sup> *Jacobus Cuiacius*, ad D. 22. 6 rubr, in: *Corpus iuris civilis*, Lyon, 1618, citing Harmenopoulos, defines *factum* as “caput & causam effectus, id est, rem ipsam.”

<sup>34</sup> See on this *P. Stein*, The *ius commune* and its demise, *The Journal of Legal History*, 25, 2 (2004), pp. 161-7.

<sup>35</sup> *Dionysius Gothofredus*, Ad S.Q. Turpillianum (D. 48.16.1.4), n. 15, in: *Corpus juris civilis Romani*, 2 t., Amsterdam and Leyden, 1663, t. 1, p. 736: “factis quidem controversis Leges accomodare potest, non Leges condere; vis haec Legis est, non iudicis.”

#### 4. Judicial discretion

The crucial point emerging from the rigid separation between law and fact was the founding of a system of proof that emphasised judicial discretion: according to a recurrently cited formula, the question of fact depends on the determination of the judge (*quaestio facti est in arbitrio iudicis*). The picture emerging from the treatises we are examining shows that the system of proofs that marked the late *ius commune* only partially constrained the judge in predetermined rules of evaluation of facts. Such a system did not work according to pure automatism; its rules did not exhaust the range of evaluations upon facts. In fact, despite the straitjacket of an extensive body of rules set out in great detail, the judge still possessed a degree of autonomy, in which judicial discretion (*arbitrium*) had a great relevance.<sup>36</sup> In these cases the decision was based upon the examination of the circumstances of the particular case, and decided according to his subjective persuasion.<sup>37</sup>

Jurists claimed that judicial discretion stemmed from the uncertain and multifarious character of facts: they argued that because facts cannot be predetermined by a certain principle, their evaluation must be left to the determination of the judge.<sup>38</sup> The consequences of this position were far reaching. Recent work has shown the relevance of the so-called *poenae arbitrariae*, namely, cases in which in absence of *probatio plena* (namely, a confession or two irreproachable witnesses) the judge was allowed to inflict a lesser punishment (*poena arbitraria*) to fit the available evidence.<sup>39</sup> What happened was aptly synthesised by an anonymous jurist who wrote that “today all punishments depend on judicial discretion, even those established by law” (*iudici hodie omnis poena est arbitraria, etiam a*

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<sup>36</sup> Menochio, *De praesumptionibus*, lib. 6, praes. 49, n. 28: “hoc esse arbitrium, ex quo a jure determinatum non est.” See on this Nobile, *Il principio del libero convincimento del giudice*, Milan, 1974, pp. 113-9.

<sup>37</sup> It seems worth noting that the presumption *hominis* is dependent *per definitionem* on the determination of the judge. On the contrary, the presumption *juris tantum* and the presumption *juris et de jure* are legal proofs: their conclusion is predetermined by law; nevertheless, their premise is given by the perception of a thing or of a fact. Menochio notes: “probationes illae mediae, quae potius facta appellantur, quibus ad has praesumptiones iuris, de iure, ac etiam iuris tantum devenitur, a iudicis voluntate pendent,” in *De praesumptionibus*, lib. 1, q. 44, n. 4, p. 58.

<sup>38</sup> Duarenus, *Disputationes anniversariae*, in: *Opera omnia*, Lyon, 1558, lib. 1, cap 27, p. 216: “Quod totum relinquendum est arbitrio iudicis, ut quidam ex interpretibus non levis auctoritatis prudenter admonet, cum nulla iuris regula ac diffinitione certa.”

<sup>39</sup> See on this J. Langbein, *Torture and the law of proof. Europe and England in the Ancient Régime*, Chicago and London, 1977; G. Palazzolo Alessi, *Prova penale e pena*, Naples, 1979, and B. Schnapper, *Les peines arbitraires du XIII au XVIII siècle (Doctrines savantes et usage français)*, in: *Tijdschrift voor Rechtsgeschiedenis*, 41 (1973), pp. 237-77.

*iure determinata*).<sup>40</sup> This is the most visible aspect of a profound transformation in the system of proof. While Romano-canon sources inspired a system of closely regulated proof, between the sixteenth and the seventeenth century a new system of evaluation based on opposite principles emerged. Using John Langbein's phrase, this was a 'revolution of the law of proof', which determined a turn from a system based on certainty towards free judicial evaluation of proof, in which "the standard of proof was not certainty, but rather the subjective persuasion of the trier."<sup>41</sup> In this context the judge monopolised the process of fact-finding: he reconstructed the fact from the examination of the circumstances in an investigation inspired to the model of an observer, for facts are primarily things that can be seen or touched.

The recurring references to the sense-perception of the judge found a firm foundation in the scholastic conceptual framework, which offered an idea of certainty grounded on eyesight. This theory, cited sometimes by Menochio, was set out according a scale of degrees of certainty that culminated with the full cognition (*certa scientia*) given by observation. Turning to the version which appears in the influential *Enchiridion sive Manuale confessoriorum et poenitentium*, first published in 1553 by the jurist and theologian Martin de Azpilcueta (1493-1586), this theory is set out as follows:

- (i) science, or visual cognition of the thing (*scientia, vel cognitio visiva rei*)
- (ii) faith, or cognition, by which we firmly believe what we cannot see (*fides, vel cognitio, qua firmiter ita esse iudicamus, id quod non videmus*)
- (iii) opinion, or cognition by which we believe the existence (or non-existence) of what we cannot see (*opinio, vel cognitio qua iudicamus aliquid esse vel non esse, quod non videmus*)<sup>42</sup>

The leading idea emerging from this text is that precisely because it has been seen, the fact is certain. The observer cannot be deceived by the regular physical operations of cause and effect, related in this case to vision.<sup>43</sup> Building on these premises, jurists considered a scale of

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<sup>40</sup> Handwritten note in *Roberto Maranta*, *Speculum aureum et lumen advocatorum praxis civilis*, Venice, 1595, pars iv, p. 80, copy held at the Biblioteca Augusta, Perugia, Italy. This is accompanied by a citation to *Didaco Covarrubias*, *Variae resolutionum*, lib. 2, cap. 9, n. 8, n. 12, on which see below, n. 66.

<sup>41</sup> *Langbein*, *Torture and the law of proof*, p. 49.

<sup>42</sup> *Martinus Azpilcueta*, *Enchiridion sive Manuale confessoriorum et poenitentium* [1553], Venice, 1584, cap. 27, n. 279, p. 1004-5. An account broadly similar to Azpilcueta's appears in *Menochio*, *Consilia*, Venice, 1609-13, vol. I, *cons.* 82, fol. 211v.

<sup>43</sup> *P. Dear*, *From truth to disinterestedness in the seventeenth-century*, in: *Social Studies of Science*, 22, 4 (1992), pp. 619-31, at 621-2.

degrees of certainty which culminated with the standard of full cognition (*in se* or *in suo lumine*), and which they associated with the metaphor of light and eyesight.<sup>44</sup>

It was precisely in this context that some late-sixteenth century jurists emphasised one particular source of cognition in the fact-finding process: the judge's individual sense-perception. The standard source is a text by the Spanish jurist Diego de Covarrubias (1512-77). He asserted that the judge may deny credit to witnesses or documents on the basis of pieces of information either emerging from the judgement or known to him as a judge (*iudex poterit non adhibere fidem testibus, aut instrumentis ex his, quae in iudicio contingerint, vel quae sibi, ut iudici nota fuerint*). This was tantamount to saying that the judge had *carte blanche*: he could decide by conjecturing about elements which barely appeared in the acts and only he perceived (*ex his coniecturis, quae in ipsis actis minime apparent, sed solus iudex perciperit*).<sup>45</sup> What more fundamentally qualifies Covarrubias' claim is the recognition that the guiding element in the reconstruction of the fact is the judge's individual sense-perception. It is precisely this sensorial component which confers on the process of fact-reconstruction an empirical character, and, as long as this is based on the perception of the fact, this is the most powerful and direct source of cognition. In this context eyesight (*evidentia rei* or *facti*) emerged as the most complete and satisfactory kind of proof.<sup>46</sup>

There is a further point worth mentioning. The lively interest that surrounds the notion of empirical fact in the civilian writings published between sixteenth- and seventeenth-century seems to be a feature of continental jurists only: it was not shared by their English counterparts. Actually, an analysis of procedural models of the time reveals a divide between the continent and England on this score. This comparison was made in 1565 by Sir Thomas Smith, the first Regius Professor of Civil Law at Cambridge, with reference to the different way to consider the linkage between *quaestio facti* and *quaestio juris*. He registered that in France, "first the fact is examined by witnesses, indices, torments and such like probations to

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<sup>44</sup> A good example is *Josephus Mascardi's* discussion of *evidentia rei* in his *Conclusiones probationum omnium quae in foro quotidie versantur* [1584-88], 3 vols., Frankfurt, 1593, vol. I, quaest. 8, n. 2, fol. 17r. "dispicere non possum, unde clarius, & manifestius Iudex veritatem cognoscere quaeat, quam si res ipsa ob ipsiusmet oculos observetur." Mascardo cited *Didaco Covarrubias's* text mentioned below, n. 66.

<sup>45</sup> *Didaco Covarrubias* (1512-77), *Variarum ex iure pontificio, regio et caesareo resolutionum*, Lyon, 1568, lib. I, cap. 1, n. 7. See also *Nikolaus Vigelius's* reference to the judge's *sententia animi*, in his *Institutiones iuris publici*, Basel, 1572, lib. II, cap. 19, "De ordine cognitionum et officio iudicis," p. 338: "cum de facto quaeritur, iudex non ad unam probationem speciem cognitionem suam alligare debet, sed ex sententia animi sui existimare, quid aut credat, aut parum probatum sibi opinetur: confirmabit motum animi sui ex argumentis & testimoniis, quae rei aptiora, & vero proximiora esse coeperit. Proinde ad circumstantias quoque causae respicere debet, estque persona spectanda, an potuerit facere, et an ante tale quid fecerit, & an sanae mentis fuerit."

<sup>46</sup> See, for example, *Josephus Mascardo*, *Conclusiones probationum omnium quae in foro quotidie versantur* [1584-88], 3 vols., Frankfurt, 1593, vol. I, quaest. 8, fols. 17r-8r.

finde out the truth thereof, and that doene, the advocates doe dispute of the lawe to make of it what they can, saying *ex facto jus oritur*.” In England, on the contrary, the advocates “with their pleading determine and agree upon the lawe, and for the most part and in manner all actions, as well criminal as civil, come to the issue and state of some fact which is denied of one partie and averred of the other: which fact being tried by the XII men, as they find, so the action is wonne or lost.”<sup>47</sup> It would be perhaps out of place to discuss here how this divide rests on two markedly different models of organisation: one combining a jury made of laymen and a professional judge; the other an investigation conducted entirely by professionals. For us the important point is to note how different ways to conceive of the judicial investigation on facts determines different models of procedure.

In conclusion, at the basis of the rigid separation of law and fact the institutional reason is that jurists claimed to constitute a world of legal rules distinct from the world of natural facts; in their speculations they aimed at a separate world of norms, a legal abstract.<sup>48</sup> The result was an expulsion of the contingent from legal science. The view that fact might be an autonomous thing, as an objective existence external to interpretation stems from the discrimination between the two issues. The separation of law and fact was a principle that gained universal assent in early-modern continental Europe. Repeated in countless references to the statement that “the issue of fact is entirely dependent on the determination of the judge” (*quaestio facti, tota est in potestate iudicis*),<sup>49</sup> in the seventeenth-century it was given new life as the basis of the systems of natural law, beginning from Johannes Althusius’ *Dicaeologica* (1617).<sup>50</sup>

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<sup>47</sup> Sir Thomas Smith, *De Republica Anglorum: on the Commonwealth of England*, II, 13 [1583], cited in P. Stein, *Procedural models of the 16<sup>th</sup> century*, in: *The Juridical Review* (1982), pp. 186-97 at 191. See also Plucknett, *A concise history of the common law*, London, 1956, pp. 417-8.

<sup>48</sup> Johannes Althusius, (Althaus) (1556?-1637?), *Dicaeologicae libri tres* [1617], Frankfurt, 1649, lib. I, cap. 1, n. 10, p. 2: “Naturam & affectionem rerum, vel personarum physicam, politicam, ethicam, theologiam, historicam, logicam, aliis artibus relinquimus.”

<sup>49</sup> Menochio, *De praesumptionibus*, lib. I, quaest. 11, n. 6, p. 17.

<sup>50</sup> Johannes Althusius, *Dicaeologica*, lib. I, cap. 1, n. 4, p. 1: “His duobus membris, facto & jure, tota Dicaeologica constat & perficitur.” See on this P. Stein, *Roman law in European history*, Cambridge, 1999, pp. 82 and 123. This principle appears also in Hugo Grotius, *De iure belli ac pacis* [1625] Prolegomena 58, p. XXXVII: “Just as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact.” (*Vere enim profiteor, sicut mathematici figuras a corporibus semotas considerant, ita me in iure tractando ab omni singulari facto abduxisse animum*). Althusius and Grotius are included among the “pioneers and founders” of the northern European natural law school in F. Wieacker, *A history of private law in Europe*, transl. T. Weir, Oxford, 1995, pp. 213-4.