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The Normative Force of the Factual

Legal Philosophy Between Is and Ought

Springer

Contents

How the Facts Enter Into the Law

Clemens Jabloner

Abstract This article addresses the role of "facts" in the application of the law; distinguishing "facts of reality"—things as they are—and the "state of facts" as established by a court when rendering a judgment. The law being a normative order, an order of "ought", can only process "facts of reality" by transforming them into "states of fact". This process designates their entry into the legal system. Hence the author construes the finding of fact as being a separate, procedural act of law, its formula being: "The court deems it established". Of course, the "state of fact" itself is often layered and contains normative elements, which are transformed into factual ones. This repeated transformation is prone to errors and conceals accountability in the relationship between the court and expert witnesses. This is a particularly topical issue which even increased cooperation may not change for the better; instead, the separation between expert knowledge and decision making should be made transparent.

1 Introduction: Legal Mind and Expert Mind

"Anyone who copies or falsifies currency with the intent that it be brought into circulation as real and genuine shall be punished with imprisonment of one to ten years," as stated in Section 232 para. 1 of the Austrian Criminal Code: The elements of the offence and the legal consequences.

Someone copies euro notes to pay for his opera tickets. This behaviour fits the elements of the offence, which should in turn trigger a legal consequence. The elements of the offence are therefore fulfilled when they correspond to something concrete. But since only a statement about facts—and not the facts themselves—is subsumable, only this constitutes the "state of facts", that is, the facts stated in the judgment. Hereinafter, "state of facts" shall therefore mean a linguistic *assertion* of facts, whereas the facts themselves are empirically knowable events or situations.

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The so-called "legal subsumption", i.e. bringing into correspondence the elements of the offence and the state of facts, is the most important tool for the application of law: when the legal facts of the offence are met, a person authorized to do so should impose the prescribed legal consequences.

Before the authority appointed to enforce the law—be it a court or an administrative authority—imposes the legal consequences, it must therefore resolve a twofold task: on the one hand, it has to determine the legal framework for the elements of the offence and the legal consequences; on the other hand, it has to determine the facts as provided in the elements of the offence and bring them into the form of "state of facts".[1] The former is a normative-doctrinal task, the latter a logical-empirical one.[2] Both are knowledge, i.e. "knowledge functions", for which the authority needs a specialized "legal mind" and an expert mind. Moreover, both functions lead to a decision, that is to say a "function of the will". The expression of the "function of the will" is a legal act, a well-founded judgment—or even an act of coercion.

The court must have its own legal mind: *iura novit curia*. The required expertise, on the other hand, can be so demanding that it needs support. For the provision of expertise there are different legal and technical models, including (but not limited to) an officially appointed expert, a collegiate body of experts, an official representative of an administrative authority, an expert advisory board, and finally the use of private expertise.[3]

When the same person exercises legal and expert knowledge, the distinctions discussed in this contribution are psychologically less noticeable as when the two functions are divided among different people. That does not alter the fundamental problem, however. Only when the expert witness comes into play does it become very clear. The sole task of the expert witness is to identify certain facts and to clarify them by means of his particular expert knowledge. The division of responsibilities between law and expertise—where it is personalized—can even be considered a special element of the separation of powers.[4]

At the first glance one is tempted to equate the distinction between matters of law and matters of fact with the separation of competence between the judge and the jury, as it is the case in American civil procedure.[5] However, generally speaking, this

[1] Cf., for example, Engisch (1996), p. 57.

[2] Here, concrete, individualized facts, general empirical propositions and logical inferences are linked together—cf. Wolff (1947), p. 165, and, more in-depth, Petschek and Stagel (1963) p. 215. On "empirical judgments", cf. Rechberger (1974), p. 113; on the problem of judicial everyday theories, see also Pawlowski (1999), para 266.

[3] Cf. for more details Merli (2013), pp. 173–188.

[4] According to Klecatsky (1961), p. 311. On the other hand, the Austrian Administrative Court does not consider it problematic that an administrative body draws on its own expert knowledge when deciding a case (cf. VwSlg 8303 A/1972; VwGH 31 January 1995, 92/05/0230).

[5] Cf. Weiner (1966).

is only one possible way. In many jurisdictions, and especially in criminal procedure, the jurors also decide upon questions of law.[6]

The relationship between the legal mind and outsourced expertise has always been delicate and has often been addressed in the literature.[7] Today, the problems have only become clearer; they first appear as issues of bias: at the request of the Austrian Supreme Court, the Constitutional Court rejected the unrestricted dual role of the expert witness in criminal proceedings, who works first as an in-house expert for the prosecution, then as an expert witness for the court.[8] In administrative procedure, the role of the agency's in-house experts is questionable with regard to the fair trial requirement of Article 6 of the European Convention on Human Rights.[9] The issue is only more pressing in continental jurisdictions, where the court typically has to appoint an expert witness on its own if it lacks the necessary expertise, without the parties being involved, and without them being able to present their own expert witnesses.

Even deeper than these issues lies the question of demarcation: on the one hand, it is about the practical incompetence of the legal mind in the face of expertise—a situation that is sometimes criticized on an abstract level, but is oftentimes accepted not unwillingly. Across the entire legal system, we perceive that the substantive content of the law, whether it is statutory or case law, is dispensed with when a tired jurist becomes too familiar with expertise. It is certainly clear that, in an increasingly complex world, more and more expertise is required. As a result, this may, of course, lead to a "privatization of the law", in the specific sense that the standards and norms drafted by expert circles are blindly incorporated into the law. In this way, certain interests can be enforced by means of the democratic process.[10] Nevertheless, if genuine political decisions are masked as neutral expertise, this certainly is a problem for democratic legitimacy.[11]

On the other hand, there is also the opposite tendency, where issues become regulated by law or by the courts that one might think are the sole responsibility of experts. This problem only intensifies when dealing with a knowledgeable defendant, such as a physician who does not want his medical assessment to be measured by criminal law, a frequent problem in medical malpractice trials. Both tendencies collide when there is a governmental regulatory impulse, which is then immediately delegated to expert circles.

The following is an attempt to shed some light on the problems outlined above. The main aim is to determine the status of the legal facts, which oscillates so

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[6] For example, Article 91 of the Austrian Federal Constitutional Act empowers the jury (Geschworene) to decide upon the "guilt" (Schuld) of the accused, which is understood to encompass both the facts and the law.

[7] Cf. Kaufmann (1985), p. 1065.

[8] Cf. VfGH 10 March 2015, G 180/14, among others.

[9] Cf. Merli (2015), p. 29.

[10] For a basic explanation, cf. Eisenberger (2016), pp. 118, 128.

[11] Cf. Eisenberger (2016), p. 150.

peculiarly between the normative and the factual spheres. If this succeeds, we could gain a clearer—and more ideologically critical—view of the problems mentioned.

2 The State of Facts as a Component of Legal Procedure

2.1 *Is and Ought*

If we understand law as a normative order and, accordingly, see the task of jurisprudence in describing, but not creating or evaluating the law, then everything stands or falls by the consequent distinction between what is and what ought to be, between norms and facts, between knowing and willing.[12] However, the law does not exist for its own sake; it is intended to control human conduct, so it needs to be applied. In doing so, the law naturally runs into the facts and must incorporate them without losing its normative character.

The linkage between these two spheres is what operates as the "state of facts", or *Sachverhalt* in German, which must be distinguished from mere "facts", or *Tatsachen*.[13] With its help, the law—here in its judicial concretization—processes the facts. This coupling is also necessary because a social system can only communicate with its environment through specific interfaces.[14] The carefully guarded border between norms and facts thus becomes permeable at certain crossings. At these points, however, the facts (*Tatsachen*) are not simply rubber-stamped but are transformed, translated or imported as needed. That is the function of the "state of facts" (*Sachverhalt*).

2.2 *The Truth of the Facts*

The court determines the facts with which it applies its legal provisions, applying rules of evidence. Today, these rules require the court to determine the true facts by proceeding logically and empirically in order to reach appropriate conclusions. Historically this is by no means a self-evident as examples as the trial by ordeal or a confession extracted through torture amply demonstrate.

Of course, the procedural rules can still prescribe more or less specifically which sources may be used and which may not (inadmissible evidence) and, if necessary, even in which hierarchy. Both the receiving of evidence as well as its appraisal can be regulated in a constitutional framework (Article 6 ECHR). In addition, there is

[12] Cf. Kelsen (1967), pp. 70 ff.

[13] The modern German terminology is very keen to distinguish correctly between the elements of the offence (*Tatbestand*) and the state of facts (*Sachverhalt*). For the historical development of this wording, see the original German version of this article: Jabloner (2016), p. 203.

[14] Cf. Luhmann (2004), p. 381.

the principle of "free evaluation of evidence," (*freie Beweiswürdigung*) which is a subset of judicial discretion.[15] The court is, in principle, free to appraise the evidence in any way it sees fit. This does not amount to arbitrariness, since the court remains obliged make its conclusions in a transparent way. Finally, the court must, in principle, be certain of at least the "superior probability" of the facts; their mere possibility is not enough. However, procedural law may provide for further mitigation, for example if "prima facie evidence" already suffices. Only when the court is no longer able to balance alternative versions of the "state of facts" does it reach for the "*in dubio pro reo* rule" in criminal law.[16]

The free evaluation of evidence is of central importance in several respects: on the one hand, it is the expression of a paradigm shift away from the medieval Inquisition process, which equated truth with absolute certainty—and, out of longing for the same, resorted to torture—until insight into the inefficiency of this method prevailed.[17] More rational, and, incidentally, more humane, are empirically obtained findings and confidence in the court's power of judgement. On the other hand, this modern legal understanding is thoroughly compatible with a modern understanding of science, according to which science cannot provide absolute truths, but (only) falsifiable theses.

It must be admitted that, in the course of a trial, ultimately everything is negotiated, including the truth.[18] However, from an internal point of view, the court is thoroughly committed to a correspondence theory of truth: that the state of facts is understood as a mirror of the real conditions or circumstances.[19] The evaluation of evidence thus only compensates for the uncertainty that is gradually deconstructed—or rather, that is continuously reconstructed—in the scientific falsification process; a process which has no end. In a trial, which must legally come to an end, this is done by the court.

That even the truth is negotiated before the court is strikingly exemplified by the principle of "formal truth", as it is known to some continental traditions. In civil procedure, the parties can "agree on the facts", which means that the court has to take for granted what the parties assert unanimously, even if that is untrue; it has to confine itself to the law and has to take the facts as given: *da mihi facta, dabo tibi ius*. The parties' assertions are not understood as statements of knowledge but are put forward as manifestations of intent; as Georg Petschek has elegantly phrased it, the party wants "*to accept the relevant facts as binding regardless of their truth*".[20]

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[15] Ringhofer (1966), p. 25.

[16] Cf. Engisch (1996), p. 69.

[17] It is a feature of a more modern worldview that certainty has been dispensed with. Such a view can permit only one religion. If God is no longer properly believed in, then certainty must be defined differently. So here it is precisely the beginning of the Enlightenment that gives birth to monsters.

[18] On why a seemingly pragmatic model of scientific truth finding—consensus theory—approaches a legal proceeding, cf., pointedly, Möllers (2010), p. 127.

[19] Cf. Schweizer (2015), p. 79.

[20] Petschek and Stagel (1963), p. 227.

However, beyond this disposition, in criminal and administrative procedure, the principle of "substantive truth" applies; meaning that the court has to investigate the facts itself regardless of the will of the parties.

2.3 *The "Ought" of the Facts*

To which world does the state of facts belong? Kelsen addresses this question in the second edition of his *Pure Theory*, in a discussion on the constitutive nature of case law: "*Even the ascertainment of the facts that a delict has been committed represents an entirely constitutive function of the court*", and further: "*It is only by this ascertainment that the fact reaches the realm of law, only then does a natural fact become a legal fact – it is created as a legal fact.*"[21]

Kelsen calls "legal fact" what in this essay has been called "state of facts". What is relevant is that the mere facts of reality need to be transformed into the facts of the case by an act of the court: Apparently, Kelsen does not refer to the triviality that the court can only determine what it knows, but that the court generates the facts in their normative meaning in the first place by "ascertaining" them. Thus, even with regard to the facts, the court has to impose an act of volition according to its cognitive function. This may not always be self-evident. Nevertheless, even where there is no room for free evaluation of evidence, because the facts are so clear, the court must seek to establish *this* fact rather than *another*.

The normativity of the state of facts does not therefore result from the court's compliance with legal rules, as those also exist for factual activities such as driving a car. Nor is the sole determining factor that the court makes a decision. To be sure, every decision contains a normative element insofar as "making a decision" means, at a minimum, setting a norm for oneself, binding oneself to a certain behaviour. However, by no means is every decision aimed at producing an act of law. It is also necessary for the subjective "ought" to be an objective "ought". Moreover, for that, it is decisive for the court to be in a procedure that leads to an act of law—the judgment.

Having thus obtained the facts logically and empirically, the law-applying body must transform this knowledge into a statement that becomes part of the verdict's reasons. Through this act of volition, the facts mutate from the realm of the "is" into that of the "ought": *so shall it be*; or: *so shall it have been*; or: *the court takes it for granted.*[22] *The court deems it established*—that is the positively magical incantation for it.

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[21] Kelsen (1967), p. 239.

[22] *Prima vista*, one could understand the facts as fiction. The concept of fiction, however, is dubious. In a legal sense, it can only be used where something is established as counterfactual, not merely if it is established. In contrast to Vaihinger, Kelsen argued that, although the law can be seen as fiction, this view is not helpful within the law. Of course, the court's acceptance of the facts does not preclude that things have actually happened; on the contrary. Seen in this way, the facts are normalized by the court, but not fabricated. For more detail, cf. Kletzer (2015).

2.4 *The Function of the State of Facts*

In the context of the judgment, the state of facts has a specific relationship to the verdict: the state of facts has no meaning on its own, but exists only because it underpins a judgment, whereas the judgment does not make sense without the specific state of facts. A judgment is an individual legal norm. As such, it applies only within a certain scope. It regulates human behaviour, so it must be determined who has to behave in what way, when and where. In its specificity as an individual and concrete norm, a judgment cannot be thought of without this provision.[23]

That the determination of the state of facts in the judgment occurs in due course with other elements does not affect its logical precedence. It can therefore be understood as a "constituent component of legal procedure".[24] That means that a legal act can be a constituent part of another legal act, just as a statute is composed at least of three component acts: the adoption of the bill in the two chambers of Congress and the signing into law by the President.

Ultimately, the independent existence of the state of facts is also shown in how they can be more or less "taken for granted" in the appeals process if the appellate court is not allowed to rehear the facts.[25] Strictly speaking, the appeals court cannot "review" the evidence procedure[26]: either the evidence is examined anew or the court only looks for procedural errors. At most, evidence can be produced in this context in order to verify the relevance of procedural errors.[27]

As soon as a judgment finally enters into legal force—that is, when it is no longer appealable—it creates an "ought-fact", which includes not only the legal evaluation, but also the state of facts. Fundamentally, the "dogmatization" of an event or other facts that has been achieved in this way is immutable; that any dispute must end corresponds to one of the most fundamental functions of the law, keeping and restoring the peace. In modern, constitutional procedural rules, this is of course limited once again. Very serious errors in fact-finding can lead to the case being reopened, even after a long period. This may be restricted, however, to such instances as when sources have been forged or new sources emerge, not merely if the existing sources are reappraised. Here, of course, we have a decisive difference to—ever revisionist—science.[28]

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[23] Alternatively, state of facts could also be interpreted as a resolute condition of validity.

[24] The other founder of the "Pure Theory", Adolf Merkl, remarked that in a dynamic perspective, a legal act of a certain force is composed of various partial acts like the many frames of a film. Cf Merkl (1927), pp. 91 ff.

[25] The binding effect of the facts resulting from the force of law (in the broader sense) is discussed in doctrine and case law in two contexts, first with regard to which factual changes terminate the scope of the decision and how to react to this in procedural terms—cf. Ringhofer (1953), pp. 87, 120.

[26] Cf. Pawlowski (1999), para 267.

[27] Cf. VwSlg 6714/A and 9723A/1978 as well as *Ringhofer* (n. 14) 366. This case law, however, has rarely gained practical relevance.

[28] The discipline of historiography, as any science (*Wissenschaft*), is involved in a constant process of falsification. Here it should be noted that, in exceptional cases, the law "dogmatizes" certain

3 The Janus-Faced Facts

3.1 The State of Facts as a Re-Entry of the Facts

In this transformation of the facts from "is" to "ought", one may well observe a triviality, an exercise of thought and will, which is envisaged by the law all the same. It has not yet been clarified, however, how this transformation takes place. A closer look shows that the "law"[29] has to perform a special mental operation: it can only admit those facts that have previously been carefully isolated from it by transforming them in components of the legal act; an operation of "re-entry".

We have to thank Niklas Luhmann for the use of this conceptual figure for the purposes of legal theory.[30] George Spencer-Brown's "laws of distinction" provide the theoretical basis for this.[31] The area of law is distinguished from its environment, the realm of facts. In order to make statements about facts within law, an operation of re-entry is required: The law somehow needs to identify and process the facts within its own system. But we also find re-entry in other places within the law: for example, if one wants to talk about natural law within positive law, then positive law must mention it somehow, must explicitly or implicitly adopt it, e.g. via a reference in the constitution. When we speak of declaratory judgments, we mean "authoritative clarifications" within the legal system, that is, legal acts, and not—as the word "declare" suggests—claims about the truth.

We now propose to also use this conceptual figure for the processing of the facts, for the ascertainment of the state of facts. This can also be connected to an important concept introduced by the late Kelsen, the *modally indifferent substrate*. According to this, the same content, "X exists", could be *dressed* either in the modus of the "is" or in that of the "ought".[32]

Admittedly, re-entry borrows a conceptual figure from mathematics for purposes of legal theory, while ignoring its specific context. Ultimately, Kelsen, too, borrowed the—explanatory—basic norm, avowedly quasi *per analogiam*, from the transcendental philosophy of Kant.[33]

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historical truths positively or negatively. This is the case when Holocaust denial is a criminal offence or, vice versa, when it is not allowed to accuse someone of an offence that has already been struck from his criminal record. The motive behind such prohibitive norms is not the suppression of lies or truths, but to contain the danger emanating from certain assertions.

[29] Which is to say, the people who apply the law.

[30] Cf. Luhmann (2004), p. 226 and Luhmann (2000), p. 130.

[31] Spencer-Brown (1972). On the reception of this idea, see Luhmann (2013), pp. 46 ff.

[32] Kelsen (1991), p. 60, and Mayer (1990), p. 144. Cf. also Röhl (1995), p. 80.

[33] Kelsen (1967), p. 205 and Walter (1999), p. 11.

3.2 *The Stratification of the Facts*

The efficacy of "re-entry" as a conceptual figure, however, becomes clear only when we dissect the state of facts more closely. This analysis is necessary because such facts are—in the words of Karl Engisch—"*the result of circuitous cognitive findings and conclusions*."[34] The "circuitousness" arises mainly because the facts of a case are by no means "brute facts", but are often social facts, which are themselves the result of an interpretation according to pragmatic rules, like a communicated self-commitment that we interpret as promise. We create social facts with linguistic means. John Searle vividly describes how our reality, from money to football matches, is shaped by such facts.[35] A subset important for us are those facts that are not only the result of a linguistic convention but also, when interpreted in the schema of a legal norm, are supposed to be objective with the addition of an "outside convention", in Searle's terminology. If, for example, the money received on the basis of a reward is to be taxed, then the reward, itself the product of interpretation, re-enters the proceedings as a fact—and, in a next step, is transformed into a fact of the case in a component of the legal act.[36]

But even at the level of the "natural" facts remaining after this distinction, the game goes on: for the expert witness does not merely determine "brute facts", as if by measurement; rather, she may also be required to qualify them as "reasonable", "probable", "dangerous", and so on, and often only this statement is subsumable.

A well-known example is mental illness: if properly seen as scientific fact—not deconstructed as purely social phenomenon—then it is impossible to overlook the extent to which normative interpretations are involved. This applies in particular to forensic psychiatry, which deals with such concepts as "dangerousness" and the like.[37] Since the law uses corresponding terms, the expert witness is often able to obtain her facts only on the basis of norms, whether they are predetermined standards or even values set by herself. These rules come in many forms: as diagnoses or prognoses, technical standards, accounting rules, professional customs, or occupational ethics. All these normative elements may overshadow the court's role, which should—at least *prima vista*—be responsible for the normative assessment in the first place.

At this point, it should become clear that facts in more complex cases could be the result of a multiple layering process, precisely in the form of "re-entries" in both directions: normative interpretations become facts and facts become norms. Obviously, such an iterative process is susceptible to factual errors as well as to the concealment of responsibility.

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[34] Engisch (1996), p. 61.

[35] Cf. Searle (2010), p. 90.

[36] This also applies to foreign law, in the sense of private international law. The court hears an expert witness on foreign law, thus treating the law as a fact.

[37] Cf. fundamentally Foucault (1977), p. 21. Cf. also Kopetzki (1991), p. 2. Expert opinions in forensic psychiatry often lack in quality.

4 On the Possibility of a Distribution of Roles

4.1 A Question of Law or of Fact as a Criterion?

It is basic legal knowledge that the determination of the facts takes place from the perspective of possible statements of facts, and that these in turn determine the applicable legal norms, in Engisch's famous formulation of the *focus wandering back and forth*.[38] Heinz Mayer made it clear that this can only be achieved methodologically safely by the court developing a theory regarding a relevant fact—that is to say, something like a blueprint—which is then procedurally examined to determine whether the established facts confirm or reject this theory.[39] This is also precisely the crux of the matter, as the quality of the proceedings depends greatly on whether the judge is able to express the theory to be proven, the questions to the expert witness, as precisely as possible. The expert witness then responds by stating the facts and draws conclusions from them based on her knowledge. These conclusions in turn lead to the elements to which the law ties a legal consequence. Based on this, the court establishes the state of facts. Before that—contrary to an often inaccurate legal or doctrinal way of speaking—it would be better not to speak of the "facts" at all.

One might think that this division of tasks alone would lead to a clear demarcation of the functions of factual and legal authority. Here, however, the notoriously difficult problem gets in the way of distinguishing questions of law and of fact.[40] This problem occurs in particular when the relevant facts require "informed evaluations" from an expert.[41] It is true that the demarcation can be very difficult, not least as a consequence of the phenomenon of "mixed legal and factual questions" in the handling of undefined legal terms, which is well known to the every court.[42] Ultimately, however, it is up to the lawmaker, who can clarify whether he is formulating actual facts or referring to legal findings of fact.

If the law remains unclear, the demarcation between questions of law and questions of fact falls within the discretion of the court, namely of the final appellate court with regard to its jurisdiction: as it typically does not rehear the facts, treating an issue as a question of law means a deeper appellate review.[43] One example here is whether industrial plants or factories pose a hazard according to regulations of public economic law, which today is considered to be a question of law, but initially

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[38] Engisch (1996), p. 15. For a critique of this metaphor, cf. Müller (1994), p. 254. At this point of consideration, however, it is not a question of how the authority establishes the facts, but how the established facts become "state of facts", that is to say, how they find their way into the proceedings.

[39] Mayer (1990), p. 145.

[40] This is—so to say—the global problem of applying the law. Cf. Weiner (1966).

[41] "Sachkundige Wertungen", cf. Funk (1990), p. 9.

[42] For more detail, see the original German version.

[43] Cf. Pawlowski (1999), para 268.

was a question of fact.[44] If an issue qualifies as a question of fact, the court is more closely bound by the findings of experts than if it is established as a question of law. The demarcation is therefore the reflection of the judge's bond to the facts; the more vague legal terms that are used, the more judgments that are required, the sooner the court makes it a question of law.

4.2 *Knowing and Willing*

It is by no means a concern that expert witnesses have normative resources. Of course, it should be noted that the lawmaker—or, if necessary, the court—has the authority to decide on the scope of these resources. To how great an extent is a question of policy. Accepting all of the assessments of the experts would lead to overly casuistic and inflexible regulations and would arguably be nonsensical. We must therefore acknowledge that normative standards also apply to factual issues. However, this also makes clear what really is going on: the issue is not the demarcation of questions of law and fact, but the separation of the functions of knowledge and volition, of cognition and decision.[45]

Courts and expert witnesses have in common that they are reluctant to admit that their product is not only the result of a process of thought, but also one of decision. This has to do with the nature of mere "decision-making" as entirely democratic: anyone can do it, whereas the application of expertise conveys prestige. Naturally, one will argue here that it is about "well-balanced decisions", and so forth, but that does not change the fact that courts are "*apparatuses for the permanent transformation of decision-making functions into cognitive functions*"[46] and that every court makes their recent (even if unprecedented) case law look like interpretations of well-established law.

Therefore, what really matters is transparency and the renunciation of ideology on both sides. As far as the court is concerned, I would like to emphasize the case law of the Austrian Administrative Court, which requires the administrative authority to determine *"the facts underlying the decision ... concretely"*.[47] This obliges the court to expresses that it has critically noted the findings of the expert witness and has adopted his view as its own. It would really be too limited to see this requirement only an admonition for the smartest and appeal-proof wording in the reasoning. Of course, as always with the law, this can only be done by means of an imputation; whether the judge actually has these thoughts remains concealed and is a question of judicial ethics.

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[44] For more, cf. Pürgy (2013), pp. 27 ff.

[45] Cf. Grunsky (1974), p. 412.

[46] Franßen (1998), p. 417.

[47] The Administrative Court has now restated this classic case law—cf. most recently Erk Ro 2014/03/0076; Ro 2014/04/0068; Ra 2014/03/0038; 2014/18/0097; Ra 2014/19/0171 and Ra 2015/10/0024.

Expert witnesses must not pretend to always base their findings on pure expertise. Even the argument that certain norms are inherent to a field—such as medical research requiring a specific ethics that doctors can only handle it, and that it is fundamentally inaccessible to the law—is ideology. It is important to emphasize here that this does not mean, for example, that certain decisions should not be left to doctors, but rather that they act in an open space into which the law is more or less "inserted". The borders of this space can be quite fussy. What is essential is that the expert witness discloses normative spaces, that is to say evaluations, in order to open them up to judicial control. In no case, however, may the expert anticipate the judicial evaluation of evidence.

4.3 Coexistence

In the application of law, legal knowledge and expert knowledge must work together; the court and the expert witness are dependent upon one another. It is sometimes assumed that ongoing and deepened cooperation can lead to a kind of "osmosis", in the sense that, over time, a court becomes better acquainted with a material issue and an expert witness becomes increasingly familiar with the legal circumstances.[48] As always in situations of ambiguity, we also hear claims for an increased "dialogue".[49]

These are certainly welcome approaches and considerations. Nevertheless, it is also possible to view the matter critically: precisely because the expert witness has expertise, which is subsequently cast as a norm by the judge, and is therefore immunized, it is possible that there can be too close a relationship in which the two "work for one another" in a negative sense. In order to legitimize its decision, the court relies on the knowledge of the expert witness, who in turn relies on a subsequent immunization by the norm-setting judge. As a result, this means not only a loss of quality, but above all of responsibility: the court thinks it is the expert, and the expert witness thinks she is the court. It seems to me that this danger exists especially where there is regular interaction of a particular court with very specific expert witnesses. The problems certainly do not arise from corruption, but rather from overload or convenience. In a thoroughly counterintuitive way, it just may be a matter of breaking old routines. Of course, this would have to be verified empirically and is therefore already beyond the expertise of the author.

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[48] Similarly, cf. Klecatsky (1961), p. 316.

[49] From Bergthaler (2012), p. 59, who has in mind a situation in which a court has to decide a dispute over the correct scientific method.

Öffentliches Recht), Vol. 71 (2016), at pp. 199–214. For extended acknowledgements and thanks, see there. Here I have to thank Christoph Bezemek and Ulrich Wagrandl for helping me with the English version. It remains for the author to express his hope that the present attempt offers an abstract academic perspective that allows the essay's core claims to be reflected on a general level.

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