

## COMMENTS

### A STUDY ABOUT THE USE OF THE TERM “LEGAL FACTS”

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*The article describes, referring to characteristic examples, the use of term “legal facts.” Referring to a study of the Brazilian scholar Thiago Reis, the article explains why, in the beginning of Savigny’s career the term “legal facts” had importance as a manner to summarize the hitherto separated forms of possession, and how the term continued to be central to Savigny’s thinking, now turning into a central point of reference for legal science which was thought as being independent from philosophy and religion. Reis’ study furthermore allows to describe how the term was used thereafter in Germany, namely mostly to defend the achievements of legal science against new approaches and losing sophistication. When, using presentations made at a seminar that was held in 2015 in Almaty, the article further describes the use of the term “legal facts,” it argues that the higher reliance on the term throughout the CIS as compared to Germany may be linked to the lesser degree of detail knowledge about the historical contexts in which the term has been used, but also the lower degree of certainty about the benefit of the rules in the context of which the term “legal facts” is used. In other words, the same ambiguity typical for the use of the term in Germany exists throughout the CIS, and the term seems to lead to the expectation that there is an objective rule for the issue to be dealt with, it being unclear where the basis for such rule is.*

*Keywords: civil law; property law; history of law; theory of law; legal terminology; German law; CIS legal theory; studies about Savigny.*

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## 1. The Ambit of this Article

This article describes a discussion about “legal facts” which has taken place in 2015.<sup>1</sup> In doing so, it focusses on an ambiguity and misunderstandings which appear to be characteristic for legal theory at large when using terms that are similarly abstract like the term “legal facts.” Better understanding this very ambiguity and the mentioned misunderstandings can be helpful in order to avoid those very misunderstandings and mistakes, and improve the use of abstract terms. Relating to the very term “legal facts,” it is likely that similar terminological problems come up again, for instance in the context of the digitalization.

## 2. The Almaty Civil Law Seminars

In 2015, the 20<sup>th</sup> in the series of well recognized conferences<sup>2</sup> on Civil Law in Almaty took place. As usual for this series of seminars sponsored by the GlZ, the topic of the seminar was determined during the conference in the previous year. In relation to 2015, the Kazakh side had proposed the topic “legal facts,” which the German side felt uneasy about given the theoretical tendency presentation using this topic would likely have, but the German side ended up agreeing with the topic. When preparing for the seminar, Rolf Knieper found the dissertation of a Brazilian scholar, Thiago Reis,<sup>3</sup> who had researched and tried to trace the context of the use of the term in the context of the scientific work of Savigny. Thiago Reis, in turn, had looked into the manner in which the theoretical work of Savigny developed, was understood and used, including by Brazilian scholars.<sup>4</sup>

<sup>1</sup> See the discussion reflected in Гутброд М. Последствия признания регистрации ценных бумаг юридическим фактом // Юридические факты как основания возникновения, изменения и прекращения гражданских правоотношений: Материалы Междунар. науч.-практ. конф. в рамках ежегодных цивилистических чтений, посвященных 20-летию НИИ частного права и 10-летию Казахстанского Международного Арбитража (Алматы, 21–22 мая 2015 г.) [Max Gutbrod, *Consequences of Recognition of Securities Registration as a Legal Fact in Legal Facts as Grounds for the Appearance, Change and Termination of Civil Legal Relations: Materials of the International Scientific and Practical Conference Within the Framework of Annual Civil Readings Dedicated to the 20<sup>th</sup> Anniversary of the Private Law Research Institute and the 10<sup>th</sup> Anniversary of the Kazakhstan International Arbitration (Almaty, 21–22 May 2015)*] 371–377 (M.K. Suleimenov (ed.), Almaty, 2016) (hereinafter *Seminar Materials*).

<sup>2</sup> See a history of the conferences also contained in *Seminar Materials*, at 8.

<sup>3</sup> Кнепер Р. Юридические факты: возникновение и упадок одного правового института в немецком праве [Rolf Knieper, *Legal Facts: Emergence and Decline of a Legal Institute in German Law*] in *Seminar Materials*, at 55.

<sup>4</sup> The key work by Reis is Thiago Reis, *Savignys Theorie der juristischen Tatsachen* (Frankfurt am Main: Vittorio Klostermann, 2013) with *infra* notes to this footnote to be understood as reference to this book. Worth of comparing to the understanding of the term “legal fact” in the CIS is also Reis’ description of elements of the reception of Savigny in Brazil, see Thiago Reis, *Teixeira de Freitas, lector de Savigny*, 49 *Revista de Historia del Derecho* 181, 181–221 (2015) (Jun. 2, 2018), also available at [https://www.academia.edu/25842511/Teixeira\\_de\\_Freitas\\_lector\\_de\\_Savigny\\_Revista\\_de\\_Historia\\_del\\_Derecho\\_n.\\_49\\_2015\\_](https://www.academia.edu/25842511/Teixeira_de_Freitas_lector_de_Savigny_Revista_de_Historia_del_Derecho_n._49_2015_).

Whilst, this article can only look at some aspects of the debate, it will also attempt to determine the rationale under which the thoughts have been presented. This article will first trace the historical use of the term in the work of Savigny (see below Section 3), in German debate (Section 4) and in the CIS (Section 5).

### 3. Emergence of the Term “Legal Fact”

The use of the term “legal fact” changed throughout the work of Savigny.

#### 3.1. Use of Term in Relation to Property Law and Possession

Reis traces the manner in which the term “legal fact” has come into existence, namely as an abstraction of the two possible situations of possession, that is, for a good to be either held directly for the owner or possession being held for another one (for instance if a stolen good has been leased).<sup>5</sup> It becomes quite clear from Reis’ description of the debate at the time what a progress the emergence of such an abstract term was as compared to casuistic previous thinking that stressed the difference among direct holding and transferring possession to another person.<sup>6</sup> It is also obvious in Reis’ description of thinking at the time how similar this type of abstraction was to the abstract thinking that generally emerged at the time, in particular philosophies of the likes of Kant and Hegel.<sup>7</sup> The reference to facts in the term “legal fact” seems to have been felt do be particularly helpful in summarizing all those cases in which court interference was required to give the owner of the right the physical good from the one that was in possession of this good, but at the same time the use of this factual element faced criticism by those who felt the relevant object of the court interference should be more detailed.<sup>8</sup>

The manner in which the German Civil Code has set rules relating to possession and transfer of ownership<sup>9</sup> can be seen as a confirmation of the fact that the value given to abstract terms in general and in relation to things in the discussions started by Savigny was seen as being useful to encourage a the use of terms with a similar degree of abstraction. Whilst, therefore, the generally accepted ideas of Savigny’s can be seen as a point of reference for discussion of the rules of the German Civil

<sup>5</sup> See *supra* note 4, at 33 ff. For the even more differentiated way of looking at the situation from the perspective of Roman law see *supra* note 4, at 46; see also *supra* note 4, at 186.

<sup>6</sup> See *supra* note 4, at 50.

<sup>7</sup> The relation to scholars following Hegel for instance is discussed in *supra* note 4, at 64. In *supra* note 4, at 102 there is a comparison with Gans who, very much like his teacher Hegel, argued that everything factual had an intellectual component.

<sup>8</sup> See *supra* note 4, at 36 ff. about Binz.

<sup>9</sup> See in particular Bürgerliches Gesetzbuch [BGB] [German Civil Code] § 929 and the following paragraphs and the focus of discussion on their interpretation to this day, see Dorothee Einsele, *Wertpapierrecht als Schuldrecht* 101 ff. (Tübingen: Mohr, 1995).

Code,<sup>10</sup> the rules of the German Civil Code related to property law would probably more appropriately be referred to as being an object of interest, but not being a point of reference, at least not outside of Germany.<sup>11</sup> Rather, the solutions German law reached and in particular the fiduciary property which has at least in a broader sense been made possible by the mentioned rules has typically been criticized including by German scholars and other countries including CIS countries have generally not adopted the solution proposed by the German Civil Code.<sup>12</sup>

### **3.2. Use in Savigny's System**

It seems that later, when, in conceptualizing his system and therefore Savigny had to address the whole of legal relations existing, he used the term "legal fact" more generally for the situation that, in Savigny's understanding, would be characteristic for every legal dispute, namely when the relevant will of two parties conflicts.<sup>13</sup>

#### *3.2.1. Importance of the Term "Legal Facts" in the Context of Savigny's Thinking*

In this context, on the one hand, one could argue that the very term "legal fact" does not have relevance for the understanding the work of Savigny because the use of the term changed over time and the term has not been explained by Savigny.<sup>14</sup> On this basis, one could assume that the convincingness of the whole of the text of Savigny's description of the system was more important to Savigny and his followers than to define the insulated term "legal fact."<sup>15</sup> Also, the term "legal fact" appears to have been

<sup>10</sup> See in general terms, Rolf Knieper, *Gesetz und Geschichte* 199 (Baden-Baden: Nomos, 1996) and directly tracing the abstract manner in which the transfer of property is regulated in the BGB to Savigny at 200. In Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* 523 (2<sup>nd</sup> ed., Göttingen: Vandenhoeck & Ruprecht, 1967) the level of arguments made by Savigny and other scientists of their time is taken as a basis for the criticism of the BGB. Characteristically, the position Savigny had on the desirability of codifications in general, see *Id.* at 39 and in particular see *Id.* at 398, does not predicate the influence Savigny's thinking had.

<sup>11</sup> For instance, Wieling in Hans Josef Wieling, *Sachenrecht* 827 (5<sup>th</sup> ed., Berlin: Springer, 2008) argues that fiduciary property is a consequence of the practical need for a security and the decision of the BGB relating to the pledge, namely those in § 1205 and the following paragraphs, require possession for such security to exist. In Changmin Chun, *Cross-border Transactions of Intermediated Securities: A Comparative Analysis in Substantive Law and Private International Law* 193 ff. (Berlin: Springer, 2012), and Einsele 1995, at 545, there are reform proposals for securities settlement under German law without discussion of the specifics of German property law.

<sup>12</sup> Which typically took the form of criticism of the court practice implementing the BGB, see in particular Wieacker 1967, at 522 on fiduciary property. Knieper 1996, at 142–143 criticizes the openness in contractual implementation of the reservation of title, and at 200, the abstraction of property contracts in the BGB.

<sup>13</sup> See the main text around *infra* note 15. That the elements of will that conflict are difficult to articulate in this very general form is also evidenced by the problems in clearly delineating the general prohibition of a waiver of one own rights, see Гражданский кодекс Российской Федерации (часть первая) от 30 ноября 1994 г. № 51-ФЗ, Собрание законодательства РФ, 1994, № 32, ст. 3301 [Civil Code of the Russian Federation (Part One) No. 51-FZ of 30 November 1994, Legislation Bulletin of the Russian Federation, 1994, No. 32, Art. 3301], Art. 9(2).

<sup>14</sup> For the history and the changes in use see *supra* note 4, at 176 ff.

<sup>15</sup> See *supra* note 4, at 178.

chosen on purpose in order to relate to, in an abstract fashion, the situations that required regulation because different wills contradict each other.<sup>16</sup> Furthermore, the term “legal fact” was a good basis to discuss how far humans were to be understood as being well intentioned or, to the opposite, their intentions as being immoral.<sup>17</sup>

On the other hand, however, the term seems to have had key importance with the context of Savigny’s thinking in that it had the function to find a way to address the importance and, potentially, the objectivity of legal rules,<sup>18</sup> without such legal rules having to refer to philosophical systems<sup>19</sup> or without it becoming clear whether only the one or the other rule is equitable.<sup>20</sup>

### 3.2.2. *The Abstractness of the Term “Legal Facts” as Characteristic of the Level of a Debate Reached in Savigny’s System*

Viewed from a different angle, the increased level of abstraction of the rules which had been required to give a general denomination to the right to possess seems to first have been used by Savigny in relation to property rights. Afterwards, when Savigny’s perspective became more general, he seemed to have integrated the method used in connection with property law into the totality of questions which he found relevant for legal debate and which came to constitute his system of law. This integration appears to have been based on Savigny’s conviction that terms of a similar plausibility to those related to possession could be found by research whenever the need for such terms arose. Accordingly, when working on his system, he would use an abstract term such as the term legal fact in order to reach and maintain a certain level of abstraction in his thought.<sup>21</sup> The material he used and the way he would argue would typically be, in some not overly transparent manner, interrelated with legal history,<sup>22</sup> but would not necessarily need to be only

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<sup>16</sup> See *supra* note 4, at 121 for Savigny.

<sup>17</sup> See the relation to religion and the thought that only “*Naturrecht*” would include those ill-disposed, *supra* note 4, at 120, tellingly, Savigny excluded family relations, apparently as they were seen as being counterintuitive to the rules driven legal regulation.

<sup>18</sup> Reflected in as “Rule for the artificial setting and increasing the natural border for individual freedom” (“*Regel für die künstliche Bestimmung und Erweiterung der Naturgränze individueller Freiheit*”), cited after *supra* note 4, at 122 (my translation).

<sup>19</sup> *Supra* note 4, at 124.

<sup>20</sup> Again best evidenced in relation to possession and the (open) discussion in this relation, see *supra* note 4, at 82.

<sup>21</sup> That is the most plausible interpretation of the account of the use of the term “legal facts,” see *supra* note 4, at 175.

<sup>22</sup> The selective use of history by Savigny is stressed in Gerhard Dilcher, *The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization*, 24 *Rechtsgeschichte Legal History* 20, 20–23 (2016) (Jun. 2, 2018), available at [http://data.rg.mpg.de/rechtsgeschichte/rg24\\_020dilcher.pdf](http://data.rg.mpg.de/rechtsgeschichte/rg24_020dilcher.pdf).

based on legal history.<sup>23</sup> Similar like with legal history, the intuitive, not explained choice of a central term like the term “legal facts” in Savigny’s system seems to be interrelated to the ambiguity of Savigny’s position on legislation. It remains an object of speculation whether or not Savigny believed that it was possible to determine legal issues by positive legislation such as the civil codes<sup>24</sup>.

#### **4. The Further Development of the Term into Modern German History**

In the further German debate as traced by Reis, there is continuity in some of the topics being addressed, but the meaning of the term “legal facts” changes. In any instance, whilst, as in more detail described below, the term lost the more detailed context to the totality of legal phenomena, it at least partially continued to be treated as confirming major importance.

##### **4.1. Positivism and Legal History**

It would seem natural that positivism, the focus on the letter of the law that is frequently associated with Kelsen, gains in importance after the civil law codification had been introduced. Accordingly, also the previous speculation about theories could have become obsolete, and, starting with the implementation of the new legislation, interpretation of law could have become central for legal science. Accordingly, alongside with the acceptance of Kelsen’s theory the previous debate about the origins of law that was linked to Savigny’s system and the term “legal fact” (see above Section 3.2) could have become obsolete. To the opposite, in the summarizing view by Reis a main difference between Kelsen and others is that Kelsen and Kelsen’s predecessor referred to a different source than the others for the origin of equity and the law that is to be accepted as being stronger than legislation, with the real difference between Savigny’s and Kelsen’s remaining unclear.<sup>25</sup> In particular, Kelsen did not criticize the ambiguity in Savigny’s relation to legislation. Characteristically, the part of theory that, according to Kelsen and his group, has become obsolete appears to not be easy to determine in that it is defined more by reference to individuals (Puchta and Savigny) as opposed to clearly defined modes of thought, and the main criticism is more lack of clarity on whether equity is sought in history of law or philosophical necessity<sup>26</sup>. Moreover, there seems to be acknowledgement

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<sup>23</sup> Reluctantly, because neither based on Roman law nor on statute, see the reference to the rules on international private law being in formation in Friedrich Carl von Savigny, *System des heutigen Römischen Rechts V* (Berlin: Veit, 1849).

<sup>24</sup> See the discussion in Wieacker 1967, at 394.

<sup>25</sup> Namely in the reference of Kelsen to Bergbohm, see *supra* note 4, at 85 ff., in particular 88–90.

<sup>26</sup> *Supra* note 4, at 90.

by Kelsen and his group of legal positions that are stronger than positive law, and the relation of what could also be referred to as natural law to the positive law appears to have become even less clear than before.<sup>27</sup>

#### **4.2. The Term “Legal Fact” as a Relict and the Debate in National Socialism**

It seems plausible that the very term “legal facts” only is taken up again after Kelsen had already formulated his position.<sup>28</sup> Indeed, Reis relates how the term “legal fact” had importance in the 30-ies. One possible reason for the term to not be used for an active debate earlier is that the underlying options about the origins of law, in spite of, as discussed, not being overly clear, were addressed by descriptions of the origins rather by terms. Furthermore, had the term been used earlier, one could speculate, this used would have forced those who used the term to make choices which scholars did tend to avoid. When the term “legal facts” was attacked by von Hippel as a reason for which the real sociological, historical and philosophical causes not being considered in what von Hippel desired to be a long-term working program for legal science,<sup>29</sup> it seems the term “legal facts” was mostly associated with formalistic reasoning and to what was understood as legal technical constructions. The attack on terms that were associated with formalism as “legal fact” was, in national socialism, very much in line with the fashion of the day. Nevertheless, the main defender of legal facts was, in the debate initiated by von Hippel, a scholar that had lost his professorship through the upheaval of national socialist students. In an attempt to regain recognition this scholar referred to the time now being different new, insisted, without much depth in any new arguments, in the term being important and replaced the Latin translation of the first word of term “legal facts” with the German one (instead of “juristische Tatsachen” he used “rechtliche Tatsachen”).<sup>30</sup>

#### **4.3. The Term “Legal Fact” and the Freedom of Will**

As if it were for testing a bigger selection of possibilities to use the term, the term “legal facts” is also frequently used in the context of another phenomenon of substantial relevance for civil law, namely the consequences an act of will can and should have,<sup>31</sup> and how – by specific legislation (as has, after some time, been done in Germany<sup>32</sup>), or interpretation of existing law (seemingly based on considerations derived from natural law which again were understood as having a force bigger

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<sup>27</sup> *Supra* note 4, at 90.

<sup>28</sup> Reis in *supra* note 4, at 90, sees the beginning of the very school of Kelsen in 1911, but going back to 1892.

<sup>29</sup> *Supra* note 4, at 11 (n. 1).

<sup>30</sup> “Rechtlich” instead of “juristisch,” *supra* note 4, at 6 (n. 1).

<sup>31</sup> See the link in particular to related works of Manigk *supra* note 4, at 9.

<sup>32</sup> For the relatively speed history see *infra* note 35, at 173.

than that of positive law, that is, being a basis for arguments against possible plans for legislation<sup>33</sup>) those consequences are to be regulated. However, not really surprisingly, the term “legal fact” does not seem to have had real (as opposed to emotional<sup>34</sup>) impact on the debate.<sup>35</sup> Nevertheless, the debate seems to have called attention and a more fundamental change in approach in that the act of will is at least by some being understood as having a content that can be determined without referring to the will of the party that can be empirically determined.<sup>36</sup>

#### **4.4. Perception on the Contemporary German Debate**

More recently, the term appears to have lost relevance in the German debate.<sup>37</sup> Rules are now generally seen as being based on what law establishes, and when law does not establish satisfactory rules, be it because it law implemented is incomplete or the law rules give non satisfactory results, a case by case review is seen as being more appropriate.<sup>38</sup> At the same time, it does seem to be characteristic that this very case by case approach quickly resorts to general terms such as good faith.<sup>39</sup> Such tendency does seem to confirm the dynamics of the use of terms, the fact that some abstraction is seen as being helpful and more easy to understand and

<sup>33</sup> See Jürgen Habermas, *Faktizität und Geltung* 117 (Frankfurt am Main: Suhrkamp, 1992): “the scientific discussion about the subjective right was from the beginning characterized by subjective rights with independent content which were to be given a higher degree of legitimacy as opposed to the politically set laws” (my translation).

<sup>34</sup> See Thomas Lobinger, *Werner Flume (1908–2009)* in *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler. Bd. 2: Eine Ideengeschichte in Einzeldarstellungen* 323, 327 (S. Grundmann & K. Riesenhuber (eds.), Berlin: Walter de Gruyter, 2010): “in a time that has lost its ability to appropriately evaluate” (my translation), or “somehow, this type of dogmatics has lost importance for me” (my translation) in Hans Schulte, *Harry Westermann (1909–1986)* in *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler. Bd. 1: Eine Ideengeschichte in Einzeldarstellungen* 305, 317 (S. Grundmann & K. Riesenhuber (eds.), Berlin: Walter de Gruyter, 2007). In contrast, when Stefan Gernhuber, *Die Billigkeit und ihr Preis* in *Summum ius summa iniuria* 205, 216 (Universität Tübingen. Rechts- und Wirtschaftswissenschaftliche Fakultät. Rechtswissenschaftliche Abteilung; Tübingen: Mohr, 1963) refers to the feeling that an irreversible process is taking place, he directly refers to the increase of relevance of court decisions and indirectly to the ability to find abstract rules.

<sup>35</sup> In Reinhard Zimmermann, *The New German Law of Obligations* 174 (Oxford: Oxford University Press, 2005) the origin of the concept of general conditions of sale, which had been linked to the debate, is remembered as being with Raiser, but non of the theoretical is remembered, at 177 reference to the “model of society.”

<sup>36</sup> See *supra* note 33.

<sup>37</sup> Even a scholar interested in history would not have known about the term before the discussion referred to happened, see *supra* note 3, at 54.

<sup>38</sup> See the description of the methodology preferred in Germany in Max Gutbrod, *Review of Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler No. 2.4* (unpublished manuscript) (on file with Review of Central and East European Law (RCEEL)); see also Шрамм Х.-Й. Факты и право: Фридрих Карл фон Савиньи и учение о “юридических фактах” [Hans-Joachim Schramm, *Facts and Law: Friedrich Carl von Savigny and the “Legal Facts”*] in *Seminar Materials*, at 63, 70 ff.

<sup>39</sup> Schramm 2016, at 63, 70.

that this level of abstraction is more easily found in property law, but that the level of abstraction itself is not an object of attention and that conclusions (in this case the inappropriateness of abstraction) are drawn without having regard to this concrete abstraction the level of abstraction is not a matter to itself be followed.<sup>40</sup> As a consequence, it would now not surprise to find a reference to doctrinal structures without it becoming clear what doctrinal structures are, and the term of doctrinal structure appearing in the very text or in the index<sup>41</sup>.

## 5. Notes on Use in Post-Soviet Debate

The seminar in Almaty and the book published with the contributions to it, whilst certainly not comprehensive, gives, I would believe, a worthwhile overview of the ways the term “legal facts” is used and where it is believed the origins of this term, but also its potential challenges are.

### 5.1. Overview of the Articles in the Seminar Materials

In the articles, the origins of the term “legal fact” are mostly seen in Soviet<sup>42</sup> and the theory of post-Soviet countries,<sup>43</sup> partially in French science,<sup>44</sup> without much attention given to the time or circumstances when the text referred to has been written.<sup>45</sup> Like if it were a law, the importance of the terms seems to be self-understood,<sup>46</sup> but at the same time at least its extent is also seen as being based on law,<sup>47</sup> that is, not requiring any further basis. On the other hand, a legal fact is seen in a reality that has to be taken into account by legislation<sup>48</sup> or to which law is to adapt.<sup>49</sup>

<sup>40</sup> Schramm 2016, at 63, 70.

<sup>41</sup> See *supra* note 35, at 226.

<sup>42</sup> Numerous notes in *Seminar Materials*, at 30, 42 ff., among them, for instance, works dated 1916, 1946, 1957, 1959, 1960 and 1974, also 1954, *Seminar Materials*, at 47, but as well contemporary textbooks, among those most frequently mentioned from Soviet times are Agarkov, *Seminar Materials*, at 30, Tolstoy, *Seminar Materials*, at 42, Krasavchikov, *Seminar Materials*, at 119, 516 (without citation of the work referred to).

<sup>43</sup> Reference, for instance, is made to a work by Krasovska, in Ukrainian and a work dated 2006, *Seminar Materials*, at 89.

<sup>44</sup> Сулейменов М.К. Юридические факты в гражданском праве: проблемы теории и практики [Maidan K. Suleimenov, *Legal Facts in Civil Law: Problems of Theory and Practice*] in *Seminar Materials*, at 15.

<sup>45</sup> See the time of publications mentioned in *supra* note 42.

<sup>46</sup> Suleimenov 2016, at 11.

<sup>47</sup> *Id.*

<sup>48</sup> In an as morally loaded relationship like marriage, see Гонгало Б.М. Юридические факты в системе “женщины-мужчины” [Bronislav M. Gongalo, *Legal Facts in the System “Women-Men”*] in *Seminar Materials*, at 143.

<sup>49</sup> Коструба А.В. Правопрекращающие юридические факты в механизме правового регулирования гражданских имущественных отношений [Anatoliy V. Kostruba, *Right-Terminating Legal Facts in the Mechanism of Legal Regulation of Civil Property Relations*] in *Seminar Materials*, at 89.

In other contexts, the legal fact is seen as the reason for legal consequences to arise or end.<sup>50</sup> Such facts can be based on the will of the parties<sup>51</sup> or an official.<sup>52</sup> Sometimes, reference is made to facts that are to be evidenced<sup>53</sup> and which are to be documented.<sup>54</sup> At times, rather, reference is made to something that happened in reality, is complex,<sup>55</sup> has legal consequences<sup>56</sup> or needs to have those consequences for social reasons.<sup>57</sup> In yet other contexts, the term legal facts allows to make the link to the need of new norms that are to be based on what is common internationally<sup>58</sup> or socially relevant.<sup>59</sup>

In other contexts, it is stressed that the term is unclear,<sup>60</sup> contradictory,<sup>61</sup> too narrow in the sense that it does not include long term relations like marriage or labor relations,<sup>62</sup> that further research is needed<sup>63</sup> and that a wealth of views about the terms exists.<sup>64</sup> Nevertheless, the discussions occurring<sup>65</sup> in the context of the term “legal facts” are

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<sup>50</sup> Kostruba 2016, at 91. *See also* Ярко́в В.В. Особенности познания и доказывания процессуальных юридических фактов [Vladimir V. Yarkov, *Aspects for Understanding and Establishment of Procedural Legal Acts*] in *Seminar Materials*, at 492 ff. – the term “legal facts” appears to be used for every circumstance a court takes into account.

<sup>51</sup> *Ocunova C.* Нотариальный акт как юридический факт [Sanita Osipova, *Notarial Act as Legal Fact*] in *Seminar Materials*, at 365 on the right to establish facts by others than the court in Latvia.

<sup>52</sup> *See supra* note 48, at 141 for the preconditions for the right to marry earlier.

<sup>53</sup> Куйкабаева Д.Б. Юридические факты в гражданском процессуальном праве Казахстана [Dinara B. Kuikabaeva, *Legal Facts in Civil Procedure Law of Kazakhstan*] in *Seminar Materials*, at 518.

<sup>54</sup> *See Андреева Л.А.* Договор как юридический факт в трудовом праве России [Lyubov A. Andreeva, *Contract as Legal Fact in Russian Labor Law*] in *Seminar Materials*, at 552 for labor law.

<sup>55</sup> Кунигенас Г.В. Юридические факты в гражданском праве Республики Казахстан и других стран [Galina V. Kunigenas, *Legal Facts in Civil Law of Kazakhstan and Other Countries*] in *Seminar Materials*, at 117.

<sup>56</sup> *See supra* note 44, at 15. *See also supra* note 53, at 519 in particular for circumstances like prior decisions which lead to procedures to be stopped.

<sup>57</sup> *See supra* note 54, at 553 for labor law.

<sup>58</sup> *See supra* note 54, at 553 for collective employee rights.

<sup>59</sup> *See supra* note 54, at 553 for insurance.

<sup>60</sup> *See supra* note 55, at 117.

<sup>61</sup> *See supra* note 55, at 117.

<sup>62</sup> *See supra* note 44, at 42.

<sup>63</sup> Кузнецова Н.С. Юридические факты в механизме гражданско-правового регулирования общественных отношений в соответствии с законодательством Украины [Natalya S. Kuznetsova, *Legal Facts in the Mechanism of Civil-Legal Regulation of Public Relations According to the Ukrainian Legislation*] in *Seminar Materials*, at 123 in relation to acts by public administration.

<sup>64</sup> *See supra* note 44, at 38.

<sup>65</sup> *See supra* note 63, at 119 ff.

seen as allowing to determine the right place of the discussion of a program<sup>66</sup> and allowing to raise the incompleteness of the law.<sup>67</sup>

In a sense a more eloquent than typical summary of all those positions is the hope that either a rule or a legal fact provide answers for the questions at hand.<sup>68</sup>

### **5.2. Potential Use of the Term for Property Law?**

One discussion returned, in a sense, to the area of law from which the term originated, namely property law.<sup>69</sup>

Addressing the use of the term legal facts for the registration systems for securities seemed appropriate because the registration of securities has been referred to as legal fact in Russian literature<sup>70</sup> and, more generally, because there is a broad international discussion about whether there is a need for or a benefit of new legislation for securities given that they are not necessarily physical goods.<sup>71</sup> Furthermore, in a context where registration can easily be made accessible to a large group of people, including potential transferors and transferees of rights as well as creditors of both, and relevant information can be recorded in a timely manner, the principles applicable to physical things can be taken as guidance for the treatment of registrations and adapted to such registrations. For instance, it can be made sure that that not more information is disclosed than needed for this one transaction, in other words, that the securities are individualized.<sup>72</sup>

As related issues have been broadly discussed in the literature in both Russia and Germany and also being addressed on the level of a proposed international convention, there are plans to expand on those beginnings.

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<sup>66</sup> Камышанский В.П., Грядя Э.А. Решение о резервировании земель как юридический факт [Vladimir P. Kamyshanskiy & Eleonora A. Griada, *Decision on Reservation Lands as Legal Fact*] in *Seminar Materials*, at 587; see also *supra* note 63, at 119 referring to the difference between contracts and other reasons for obligations as an example.

<sup>67</sup> See Kamyshanskiy & Griada 2016, at 589 relating to construction licenses.

<sup>68</sup> See *supra* note 49, at 86.

<sup>69</sup> See Max Gutbrod, *The Term "Legal Facts" and the Theory of Property Law* (Jun. 2, 2018), available at [https://www.academia.edu/13498139/The\\_Term\\_Legal\\_Facts\\_and\\_the\\_Theory\\_of\\_Property\\_Law\\_Russian\\_](https://www.academia.edu/13498139/The_Term_Legal_Facts_and_the_Theory_of_Property_Law_Russian_).

<sup>70</sup> That even beyond the discussion of Savigny property law attracted attention to the term of a legal fact is visible of Ioffe in *supra* note 44, at 47.

<sup>71</sup> See, for instance, the contributions to *Unkörperliche Güter im Zivilrecht* (S. Laible et al. (eds.), Tübingen: Mohr, 2011).

<sup>72</sup> Individualisation is broadly discussed in literature on securities holdership, see, for instance, Erica Johansson, *Property Rights in Investment Securities and the Doctrine of Specificity* 171 (Berlin; Heidelberg: Springer, 2009).

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## Conclusion

Whilst the title for the discussion at the seminar seemed narrow and theoretical, one might say that, in not keeping with the narrow theoretical topic the discussion did not really focus on what was intended, namely on developing the term “legal facts.” Nevertheless, an evaluation of this discussion, as described above, allows significant conclusions.

On the one hand, the discussions confirm how a theoretical and abstract debate can appear to be absolute and encompassing, but in reality depend on the very specific circumstances in which the term is used.<sup>73</sup>

Furthermore, although the overview is partial, it allows a typology of the use of abstract terms. A very general term like “legal facts,” in its origin, was used to unite seemingly different subcategories for possession. Later on, the term was used in relation to key elements of legal science in general. The term ends up being used as an addition to the line of thought that could also be referred as strengthening or as embellishment of a legal argument.

When, like in Germany, the term is used keeping the surroundings of the term in mind, the use of the term tends to be connected to an ambiguity the term has. Namely, on the one hand, it is stressed that the term can help in formulating rules. On the other hand, there is a tendency to use the term as a confirmation for rules, in particular rules that have been introduced after the term “legal fact” started to be broadly known, with the term then being seen as a reason to keep with the existing rules.

The, compared to Germany, higher reliance on the term throughout the CIS appears to be linked to the lesser degree of detail knowledge about the historical contexts in which the term has been used, but also the lower degree of certainty about the benefit of the rules in the context of which the term “legal facts” is used. In other words, the very same ambiguity with which the term is linked in Germany also exists throughout the CIS, but this ambiguity leads to other results because the rules are not seen as being as stable as in Germany.

In both cases, at times the use of the term, both based on its history and its abstractness, seems to be linked to the expectation that there is something like an objective rule for the issue to be dealt with. It would however, in a quite similar way as at the time of the origin of the term, be unclear whether those rules are such of local law, theory of law, usefulness, foreign jurisdictions or history. Often, my impression is that the use of the term leads to underestimating the intricacy of such rules by the very legal scientists that to use such abstract terms, and that the abstractness of the terms hinders debate about the detail of the consequences of regulation, and accordingly makes it more difficult to convince those that are not

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<sup>73</sup> See *supra* note 4, at 33 Reis arguing to this effect.

natural participants of the mentioned debate of the results the debate around the term leads. On the other hand, the term may, from time to time, encourage more fundamental, systematic thinking.

In summary, theoretical assertions are frequently misunderstood when they are applied to different circumstances. Nevertheless, they can be hugely helpful when adapted to the circumstances in question.

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