



THE ALLEGATION OF FACTS IN ITALIAN AND ENGLISH CIVIL PROCEDURE

DANIELA NOVIELLO

TABLE OF CONTENTS: 1. - Introduction. 2. - The structure of civil proceedings in the medieval *ordines iudicarii*. 3. - The *preliminary phase* in the *ordo iudicarius*: the method of *positiones*. 4.- The introductory *libellus* and the *litis contestatio*. 5. - The selective logic of the *ordo iudicarius*: “*da mihi factum dabo tibi jus*”. 6. - The notion of law in the Middle Age. 7. - The relation between facts and law according to the medieval notion of law: “*ex facto oritur jus*”. 8. - The selection of the material facts in the *ordo iudicarius*. 9. - The relation between fact and law according to the modern eurocontinental notion of law: “*ex jure oritur factum*”. 10. - Material facts in positive law systems: the inseparability of fact and law. 11. - Transformation of the structure of proceedings in positive law systems: from a biphasic structure to a linear structure. 12.- The changeover from the ‘selection of facts’ to the ‘judgment of fact’. 13. - Facts in the present Italian model of civil proceedings. 14. - Characteristics of the present common law models of civil proceedings: in particular, the English civil proceedings. 15. - Conclusions.

1. Making a decision, the judge must first determine the material facts of the case, and then apply the appropriate rule of law¹.

In a comparative perspective, this matter reveals very interesting implications because the individuation of the material facts of the case reflects, in a sense, the characteristics of each system of law as well as the characteristics of each model of alleging facts in civil proceedings’.

The object of this paper is, in particular, to compare the Italian and English models of alleging facts in civil proceeding’s, in the intent that will be fixed the characteristics of each ones. In this effort, a historic-comparative method of research has seemed appropriate, according to the rise that in reference to civil procedure “*A comparative as well as a historical, approach is essential*”²; more in general, indeed, it has been

¹ W. J. HABSCHIED, *Introduzione al diritto processuale civile comparato* (it. transl. due to A. BRIGUGLIO), Rimini, 1985, p. 24.

² J. A. JOLOWICZ, *On civil procedure*, Cambridge University Press, 2000, *Preface*, X.



stated, on the one hand, that “*Comparison involves history*”³ and, on the other hand, that “*History involves comparison*”⁴.

Moreover, in range of civil procedure’s studies, this method of research has brought to great results, because it has made possible to identify in the Middle Ages the true starting point of civil procedure (“*il vero punto di partenza, il Neuzeit della processualistica*”⁵; and, in particular, in medieval *ordo iudiciarius* the common origin of both civil law and common law civil proceedings⁶.

Considering what above, the results obtained both in historical and comparative legal science represent a very helpful source in the purpose of this paper, especially because historical studies on proceedings have pointed out how historical changes have influenced the creation of different models of proceedings’ in civil law and in common law judicial systems; and, furthermore, because comparative studies have

³ G. GORLA, *Diritto comparato*, in Enc. Dir., vol. 12, Milano 1964, p. 930, nt. 5. Before, T. ASCARELLI, *Premesse allo studio del diritto comparato* (1945), in ID., *Saggi giuridici*, Milano, 1949, p. 12.

⁴ F. W. MAITLAND, *Why the History of English Law is Not Written*, in H.A.L. Fisher (Ed.), *The Collected Papers of Frederic William Maitland*, Vol. 1, Cambridge University Press, Cambridge, 1911, p. 488.

⁵ N. PICARDI, *Processo civile (diritto moderno)*, Enc. Dir., Vol. XXXVI, Milano, 1987, p. 103 ss., who identifies, precisely, the beginning of civil procedure in the 17th and 18th centuries. In this period, in fact, rules of proceedings (until then deferred to the practice of the Courts) were, for the first time, written and collected in treatises named *ordines iudicarii*. The most recent treaty about *ordines iudicarii* is due to L. FOWLER MAGERL, *Ordo iudiciorum vel ordo iudiciarius. Begriff und Literaturgattung* (Ius comune, Sonderheft, 19), Frankfurt am Main, 1984; ID., *Ordines iudicarii and libelli de ordine iudiciorum (from the middle of the twelfth to the end of the fifteenth century)*, Brepols Turnhout – Belgium, 1994. On this argument, see also K. W. NÖRR, «*Ordo iudiciorum*» und «*ordo iudiciarius*», in *Studia Gratiana*, 11, 1967, p. 327 ss., now in ID., *Iudicium est actum trium personarum. Beiträge zur Geschichte des Zivilprozessrechts in Europa*, Goldbach, 1993, 3-19; A.M. STICKLER, *Ordines iudicarii*, in AA. VV., *L'Educazione giuridica*, by A. GIULIANI e N. PICARDI, vol. VI, *Modelli storici della procedura continentale*, Tomo II, *Dall'ordo iudiciarius al codice di procedura*, Napoli 1994, published by the University of Perugia (also in *Dictionnaire de droit canonique*, VI, Paris, 1957, p. 1132 ss.). Among italian historian academics, E. CORTESE, *Il Rinascimento giuridico medievale*, Roma 1992; ID., *Il diritto nella storia medievale*, II, *Il basso medioevo*, Roma 1995, p. 103-142.

⁶ *Ordo iudiciarius* can be considered as the common origin of the model of proceedings in both Civil Law and Common Law systems, because it was widely practiced in the Middle Ages, throughout all continental Europe and in England (“*Dans le Moyen Âge l'ordo iudiciarius a été construit comme une procédure commune à toute l'Europe, y comprise l'Angleterre*» (A. GIULIANI, *Le rôle du «fait» dans la controverse (à propos du binôme «rétorique-procédure judiciaire»*), in *Archives du Philosophie du Droit*, 1995, p. 231).



revealed that the notion of law itself changes from system to system and, so, the relation between the facts and the rule⁷.

So will be shown below the result of a historic-comparative research, which does not have the pretension of being conclusive, but could probably be considered as one stage of research in progress.

2. As touched on above, the true origin of civil procedure has been found in the *ordines iudicarii*. Due to the patient and assiduous work of the *practici* and of the *antiquarii*⁸ and due to the initiative of ecclesiastical authorities (which promoted their use both inside and outside the ecclesiastic order, as a form of warranty for accused prelates also in the disputes between clergymen and laity)⁹, in the Middle Ages the *ordines iudicarii* were diffused all over continental Europe and were considered as a

⁷ For a general overview about the relation between facts and rules in the common law system, see W. TWINING - D. MEIERS, *How To Do Things With Rules*, 5th Ed., Cambridge University Press, Cambridge, 2010, esp. p. 80 ss., p. 195 ss., p. 268 ss.

⁸ In this sense, N. PICARDI, *Processo civile (diritto moderno)*, Enc. Dir., Vol. XXXVI, Milano, 1987, p. 106; ID., *La giurisdizione all'alba del terzo millennio*, Milano, 2007, p. 207 s.

⁹ It has been argued that the circulation of juridical texts and of professors among the most developed schools of law (like the University of Bologna) and transalpine cities constitutes a cultural process which “risponde ad un insieme di riassetamenti importanti delle strutture sociali e politiche. Ne ricordiamo due: la spinta potente dell'ordinamento ecclesiastico verso la diffusione dell'ordo iudicium (al proprio interno, come forma di garanzia per i prelati accusati, e verso l'esterno, come disciplina dei conflitti spesso violenti che contrapponevano gli enti religiosi ai signori laici e alle comunità); e la lenta costruzione di una nuova idea di iurisdictio che le comunità politiche urbane dovevano presto fare propria. La diffusione di un ordo relativamente coerente sia nelle corti laiche sia in quelle ecclesiastiche, con una sequenza di atti «giusti» che i rappresentanti della iurisdictio pubblica devono seguire e imporre, fu dunque un momento importante di costruzione del politico, perché riconosceva di fatto un diritto al processo che da quel momento divenne stabile (vale a dire il diritto di presentare la propria querela davanti a una corte pubblica) e legittimava l'autorità ad assumersi il compito di giudicare secondo un ordine regolato” (M. VALLERANI, *La giustizia pubblica medievale*, Bologna 2006, p. 19 s.). The influence of the rules in Italian proceedings' all over the world at that time, until the 16th century and also in the 17th and 18th centuries, because of the diffusion of the *ordines iudicarii*, is enlightened by N. PICARDI, *Processo civile (diritto moderno)*, Enc. Dir., Vol. XXXVI, Milano, 1987, p. 103 ss., spec. p. 115, where the Italian Roman – canon proceeding's rules are defined as an example of rules in European common proceedings' (“*processo comune europeo*”). Confirming the European extension of the phenomenon is L. FOWLER MAGERL, *Ordo iudiciorum vel ordo iudiciarius. Begriff und Literaturgattung (Ius commune, Sonderheft, 19)*, Frankfurt am Main, 1984; ID., *Ordines iudicarii and libelli de ordine iudiciorum (from the middle of the twelfth to the end of the fifteenth century)*, Brepols Turnhout – Belgium, 1994. Among Italian historical studies, see E. CORTESE, *Il Rinascimento giuridico medievale*, Roma 1992; ID., *Il diritto nella storia medievale, II, Il basso medioevo*, Roma 1995, p. 103-142. In general, regarding the role of the Catholic Church in the diffusion through Europe of the Romanist common law, favored by the universal dimension of the ecclesiastic organization, A. GAMBARO in A. GAMBARO – R. SACCO, *Sistemi giuridici comparati*, nel *Trattato di diritto comparato* directed by R. SACCO, 2^o Ed., Torino, 2006, p. 263-264.



model of regulation of civil proceedings', a genuine source of legal rules, even if they were not strictly legislation¹⁰.

Not all *ordines iudicarii* contained exactly the same rules, so that it's impossible to confirm that they described a sole and uniform way of managing civil proceedings. Anyway, the *ordines iudicarii* had, as a common characteristic, the segmentation of the proceedings in various stages, each ones appointed to a specific procedural activity. As a general rule, case's treatment was divided into three parts (or phases): (a) *preliminary phase*, appointed to the identification of the disputed facts; (b) *trial*, in which the facts disputed between parties, as picked out in the preliminary phase, were proved; (c) *judgment*, which was the decision of the judge (normally, this phase also included rules about a judgment's execution and appeal)¹¹.

Between the preliminary phase and the judicial phase, there was the *litis contestatio*¹², which was one of the most important and characteristic features of the whole proceedings, because it marked the end of the preliminary phase and the beginning of the trial.

In the formal act of *litis contestatio* were included all the facts disputed between parties, picked out by the development of the preliminary *phase*, which had to be proved in the subsequent phase of the *trial*.

3. The *preliminary phase* of the *ordo iudicarius* was going on developing principally between the parties, and the most significant activities reserved to this stage of the

¹⁰ The primacy of legislation and the assignment exclusively to the sovereign –legislator of the power of making proceedings' rules would be established in continental Europe only a very long time later, that is, at the end of 18th century (see N. PICARDI, *Introduzione a Code Louis T. 1 Ordonnance Civile, 1667*, Milano, 1996, p. IX, ss. ; ID. *La giurisdizione all'alba del terzo millennio*, Milano, 2007, p. 105 ss).

¹¹ "Dans les Ordines iudicarii le plane varie selon les différent ouvrages. Il y a cependant des traits fondamentaux et essentiels qui sont plus ou moins commun à tous les Ordines. Dans la forme, ils présentent trois parties qui correspondent à l'organisation de la matière traitée, dans laquelle on distingue les actes introductifs et préparatoires du procès ; les actes qui constituent proprement le procès , de la *litiscontestatio* à la sentence ; enfin les actes qui terminent le procès et le suivent : la sentence, l'exécution de la sentence, et le voies de recours exercées tent contre la sentence que contre son exécution » (A.M. STICKLER, *Ordines iudicarii*, in AA. VV., *L'Educazione giuridica*, a cura di A. GIULIANI e N. PICARDI, vol. VI, *Modelli storici della procedura continentale*, Tomo II, *Dall'ordo iudicarius al codice di procedura*, Napoli 1994, by Università degli Studi di Perugia (also in *Dictionnaire de droit canonique*, VI, Paris, 1957, p. 1132 ss.), p. 6).

¹² The original model of proceedings structured in two parts (fase *in iure* and fase *in iudicio*), marked out by the formal act of *litis contestatio* was, really, already typical of the classic roman proceedings, both in the form of the *legis actiones*, both in the form of the proceedings by *formulas* (upon this issue, E. BETTI, *Processo civile (diritto romano)*, Nss. Dig. It., Torino 1957, p. 1099 ss.). Anyway, respect to the original model, the roman-canonc proceeding's rules reveal some peculiarities, due to the change of the juridical and institutional assets, happened subsequently to the fall down of the Roman Empire.



proceedings, according to the most common classifications of that time, were: “a) «*exceptiones dilatoriae*»; b) «*interrogationes ante litem contestatam*»; c) «*ordo cognitionum*» e «*quaestiones incidentes*»”¹³. Among these, rises particularly in prominence in the purpose of this paper, the activity of making *interrogationes ante litem contestatam*, which served the purpose of introducing the facts of the case (technically, allegation) disputed between the parties and, also, to individuate the facts disputed between the parties, which should to be proved in the subsequent phase of the trial.

By phrasing a question (named *interrogatio* or *positio*), from one party to the other party, the single facts, which were object of the question itself, got entrance in the proceedings; then, according to the kind of the answer of the other party, it was possible to clarify if those facts were disputed or undisputed. The party to whom was made the *interrogatio*, in fact, could answer in the affirmative or in the negative: if the answer was in the affirmative, the fact was considered undisputed; if the answer was in the negative, the fact was considered disputed. In the first case, the fact was shut out the *thema probandum*, in the latter, it was included in the *litis contestatio*, becoming the object of the *thema probandum*, i.e. a matter to be proved in the following phase of the proceedings¹⁴.

Because of this way of alleging facts in the proceedings by making *interrogationes* (or *positiones*), it was usual to subdivide the case in many smaller elements (material facts), upon which each party should obtain an answer from the other party. By making a single *interrogatio* (or *positio*) on the whole case, in fact, one party would risk that the other party, who wanted to deny only some of the material facts of the case, denied really the whole case¹⁵. The activity of making *interrogationes* (or *positiones*) was, therefore, very formal and complex and required a high degree of skill; as a result, it was characterized by a very high, and perhaps excessive, degree of technicality.

Since the purpose of making *interrogationes* (or *positiones*) was to pick up the material facts disputed between parties, which was to be proved in the following phase of the trial¹⁶, leaving out those facts admitted by both parties which did not need to be proved, it is possible to argue that between the *preliminary phase* and the *judicial phase* (of the trial) there was a relation of cause and effect, because the development of the first phase was affected to the clear and organized development of the second phase. And it is also possible to understand why, by the diffusion of the *ordines iudicarij*, it became common to use of the word “*processus*” to describe the entire

¹³ A. MAZZEO, I «*Preparatoria iudicij*» nell'ordo iudicarius del XIII secolo, in AA.VV., *L'Educazione giuridica*, a cura di A.GIULIANI e N. PICARDI, vol. VI – *Modelli storici della procedura continentale*, Tomo II – *Dall'ordo iudicarius al codice di procedura civile*, Napoli 1994, by Università degli Studi di Perugia, p. 153.

¹⁴ “*Si tratta di una sorta di somma algebrica dei segni positivi (risposte affermative) e negativi (risposte negative)*” (M. VALLERANI, *La giustizia pubblica medievale*, cit., p. 87).

¹⁵ M. VALLERANI, *La giustizia pubblica medievale*, cit., p. 86. That led, as a consequence, to the subsequent proof in the trial being extended.

¹⁶ N. PICARDI, *Code Louis, T. I Ordonnance civile 1667*, Milano 1996, *Introduzione*, p. XL.



proceeding's, instead of the word "*iudicium*", which was used before. In fact, the word "*iudicium*" points out, in the *ordo iudiciarius*, only one stage, one phase of the "*processus*"¹⁷.

4. Commencement of judicial proceedings, according to the *ordo iudiciarius*, involved an introductory *libellus*, containing the writ of summons of the defendant, the description of the *res*, which the claimant wanted from the defendant, and the name of the action¹⁸.

It is important to underline that it was not also necessary to describe in the *libellus* all the material facts composing the case. It was instead sufficient to sign on it the name of the action that the claimant wanted to bring. The material facts of the case should be alleged by making *interrogationes* (or *positiones*), during the course of the whole preliminary phase, as described above.

The purpose of signing the name of the action in the *libellus* was only to show briefly, even impliedly, the defendant's behaviour from which the claim originated. In this sense, it has been noticed that the *libellus* was considered as a filter at the beginning of the proceedings, which did not have the purpose of showing all the

¹⁷N. PICARDI, *Processo civile (diritto moderno)*, Enc. Dir., Vol. XXXVI, Milano, 1987, p. 106 ss., spec. p. 107 e 109.

¹⁸L. FOWLER MAGERL, *Ordines iudicarii and libelli de ordine iudiciorum (from the middle of the twelfth to the end of the fifteenth century)*, Brepols Turnhout – Belgium, 1994, p. 38: "In regard to the conception of the *libellus*, JOHANNES BASSLANUS maintained that the exact name of the action, according to the division of actions in Roman law, did not have to be revealed in the *libellus* of complaint sent to the defendant, but that it did have to be given when the defendant appeared in Court. His contemporary PLACENTINUS disagreed. He said that the revelation of underlying reason for the action was sufficient. The citizens of Pisa, incidentally, agreed with neither of them and insisted that the name of the action already be specified in the *libellus* ("Invocato Christi nomine", written in Tuscany at the end of the twelfth century, edited by WAHRMUND, *Quellen*, vol. V.1, p. 14: "Placentinus dicebat, actionem esse edendam in libello; sed hoc ipso intelligebat editam quod causa fuisset expressa...Sed dominus Job. dicebat expressim, quod non compellitur actor, nomen actionis in libello inserere; sed post in iudicio debet nomen exprimere. Sed quidam, ut sunt Pisanii et alii, firmiter tenent et observent, quod actor semper nomen actionis expressim in libello scribat et inserat»). Pope Alexander III rejected entirely the practice of requiring the plaintiff to prepare a description of the complaint before he appeared before the judge. He maintained that the judge himself should inquire about the facts behind the complaint, and that he should do so in a simple manner (X. 2.1.6). GUILIELMUS DE LONGO CAMPO maintained accordingly that the formulation of the complaint was part of the office of the judge (Edited by CAILLEMER, *Le droit civil*, p. 209: "Canonum enim simplicitas editionem actionis non desiderat, sed sufficit iudicis officium implorare"). It was necessary to indicate the name of the action because, on one hand, in the system of *actiones*, there could be more than one action upon the same fact and, on the other hand, in the system of *actiones* each action individuated each right and so, by the indication of the name of the action acted, the claimant indicated the right he was claiming (in fact, just like in the Roman law, in the roman-canonic period it was possible to say that a right was existing only if there was an action by which it was possible to protect it; there were only as many rights, as there were actions), "offrivano una definizione prestabilita per una gamma enorme di comportamenti possibili e per altrettante rivendicazioni in giudizio" (M. VALLERANI, *La giustizia pubblica medievale*, cit., p. 82 ss.).



material facts, but by which it could be possible to understand the case (“*era necessario un filtro iniziale che non tradisse completamente il fatto, ma lo rendesse leggibile agli occhi di tutti attraverso la sua riduzione a pretesa da parte dell’attore*”)¹⁹.

It is possible to say, then, that the real introductory act of the civil proceeding was the *litis contestatio*, because this was the act which contained the description of the dispute, or, better, the indication of the facts disputed between the parties, as pointed out during the course of the *preliminary phase*.

The *litis contestatio* was considered, in fact, “*the constitutive act of the trial because it represented the readiness of both parties to litigate*”²⁰ and its formulation represented a very important stage of the proceedings, to which was dedicated a specific hearing²¹.

Litis contestatio also operated as a bar, in the sense that it marked the point in which, having been defined, during the *preliminary phase*, the matter disputed between the parties, and having shut out all the irrelevant questions or those which could not have been proposed, it was possible to commence the trial before the judge²².

5. It has been stated that the subdivision of the proceedings’ in various phases, each ones appointed to the development of specific activities and to achieve specific purposes reflects a *selective logic*, typical of the *ordo iudiciarius*, according to which distinguishing “fact” and “law” was something clear and defined²³. In other words, the *selective logic* peculiar to the *ordo iudiciarius* impresses upon the structure of the proceedings’ so that, in particular, to the clear distinction between *fact* and *law*

¹⁹ M. VALLERANI, *La giustizia pubblica medievale*, cit., p. 83 ss., spec. p. 85.

²⁰ L. FOWLER MAGERL, *Ordines iudicarii and libelli de ordine iudiciorum (from the middle of the twelfth to the end of the fifteenth century)*, Brepols Turnhout – Belgium, 1994, 37. Upon this issue, E. MAZZACANE, *La “litis contestatio” nel processo civile canonico*, Napoli 1954, 19, 24, 26; R. SÖHM, *Die litis contestatio in ihrer Entwicklung vom frühen Mittelalter bis zur Gegenwart. Ein Beitrag zur Geschichte des Zivilprozesses*, München, 1914; ROSSI, *Procedimento civile (forme del)*, Dig. It., vol. X, 372.

²¹ A. MAZZEO, I «*Preparatoria iudicii*» nell’*ordo iudiciarius* del XIII secolo, in AA.VV., *L’Educazione giuridica*, a cura di A. GIULIANI e N. PICARDI, vol. VI – *Modelli storici della procedura continentale*, Tomo II – *Dall’ordo iudiciarius al codice di procedura civile*, Napoli 1994, by Università degli Studi di Perugia, 151, where the importance of the act is underlined from a subjective point of view, because it expressed the will of the parties to litigate (which should be later defined «*animus litigand*»).

²² A. MAZZEO, I «*Preparatoria iudicii*» nell’*ordo iudiciarius* del XIII secolo, in AA.VV., *L’Educazione giuridica*, a cura di A. GIULIANI e N. PICARDI, vol. VI – *Modelli storici della procedura continentale*, Tomo II – *Dall’ordo iudiciarius al codice di procedura civile*, Napoli 1994, by Università degli Studi di Perugia, p. 160. Subsequently the *litis contestatio*, in fact, “*nulla exceptio dilatoria postea obici potest (...) testes recipiantur, et ad diffinitivam sententiam procedatur, quod ante litem contestatam fieri non potest*” (TANCREDI, in PILLII, TANCREDI, GRATIAE, *Libri de iudiciorum ordine*, ed. Bergmann, Gottingae, 1842 (facsimile reprint Darmstadt, 1965), p. 200, p. 219

²³ A. GIULIANI, *Dalla litis contestatio al pleading system (riflessioni sui fondamenti del processo comune europeo)*, RDP 1993, p. 961, p. 963.



corresponds the configuration of the procedural dialogue in two phases appointed exactly to matter of fact (*preliminary phase*) and to matter of law (*judicial phase*)²⁴.

It has also been stated that another typical characters of the *ordo judicarius* were (i) that the judge and the parties were considered as staying on a same level (to express this concept, it has been used the phrase *isonomic order*) and, moreover, that in regard to the matter of fact the allegation of the facts of the case should be assigned exclusively to the parties (*judex non potest in facto supplere*), considering the substitution of the judge to the parties upon material facts as being illogical and unjust (“*illogica ed iniqua*”)²⁵; and (ii) that the research of the truth in judicial proceedings was not considered exclusively assigned to the judge, but, on the contrary, that the judge had to receive the assistance of the parties regarding to the matter of fact (that principle was named of the *division of the knowledge* and was intended as a remedy to the fallibility of the judge, determining the dominion of the parties to the material facts, and the dominion of the judge to the law²⁶).

This is why the development of the *preliminary phase* was substantially assigned to the parties, while in the *judicial phase* the attention was shifted on the judge and on the judgment²⁷. In fact, material facts were to be identified and presented by the parties, while ascertaining and applying the law was left to the judge (“*da mihi factum, dabo tibi jus*”).

In this perspective, it is also possible to argue that the principles described above impressed the role of the judge and of the parties in both procedural phases, in the sense that, being the matter of fact assigned to the parties, these ones had the main role during the whole *preliminary phase*, while the primary role was of the judge in the *judicial phase*²⁸.

Furthermore, the particular organization of the dialogue between the parties in the preliminary phase, resulting from the mechanism of allegations of facts through

²⁴ Upon the independence of the *preliminary phase* in respect of the *trial*, A.O. COMEZ, *L'Ordo judicarius in Ivo di Chartres*, in *L'Educazione Giuridica* a cura di A.GIULIANI e N. PICARDI, vol. II, Tomo II, Napoli 1994 by Università degli Studi di Perugia, p. 61.

²⁵ A. GIULIANI, *L'ordo judicarius medioevale (Riflessioni su un modello puro di ordine isonomico)*, in *Riv. Dir. Proc.* 1988, p. 600).

²⁶ Upon which is based the “*ragion pratica*” (A. GIULIANI, *L'ordo judicarius medioevale (Riflessioni su un modello puro di ordine isonomico)*, in *Riv. Dir. Proc.* 1988, p. 605, p. 607.

²⁷ The admission that the judge can act in researching the material facts of the case is considered as a modern idea and it has been argued that together to the rise of this idea, the *litis contestatio* has been going to decline, A. GIULIANI, *Il concetto di prova*, cit., p. 170, p. 226 s.

²⁸ “*Judicium describi potest legitima causae discussio, ac definitio inter litigantes coram iudicem. Judicium dicitur tum discussio, tum definitio; praecipuus judicii finis utique est causae definitio, sed iudex sententiam rite ferre non potest, nisi diligenti prius adhibita causae cognitione, atque discussione*” (THOM. MAURITIO RICHERI, *Universa civilis et criminalis Jurisprudencia*, Venetiis, 1841, III, 445, § 1566).



the *interrogationes ante litem contestatam*, corresponded to the principles of the argumentative logic, typical of the Middle Age²⁹.

In conclusion, the preliminary phase and the judicial phase were, according to the *ordo iudiciarius*, completely separated and independent (a) relating to the role of the judge and of the parties and their judicial activities; (b) relating the kind of judicial activities; and (c) relating to the purposes.

6. The course of the *preliminary phase*, as described above, was also coherent to the very particular notion of *fact*, which was typical of the Middle Age's common law proceedings.

In this perspective, rises in prominence the doctrine, which has enlightened that in the Medieval Age *facts* were then not intended in their natural and tangible consistency, as they were before the proceedings', but they were considered like they appeared in the proceedings, as the result of the confrontation between the parties (during the course of the preliminary phase) and of the proof (during the judicial phase). In this sense, the facts were *disclosed* in the proceedings, and –for the purpose of the proceedings and the judgment- they assumed the consistency which resulted from the dialogue between the parties³⁰: “*Lo scontro delle versioni diverse ha come risultato finale un terzo ipotetico fatto, formato dalle proposizioni negate che devono essere provate*”³¹.

More precisely, at least three procedural phases have been distinguished in which ‘*facts*’ were introduced, refined and verified, namely: a) the formulation of the *libellus*, by which the fact was introduced through the choice of the *actio*; b) the development of the *positiones* (or *interrogationes*), by which the fact was assumed as it resulted from the statements of both parties; c) the formulation of the *intentiones*, which were the articles of proof which had to be confirmed by the witnesses³².

Such a concept of *fact* should not be surprising. In fact, this corresponds to the epistemological models adopted by the compilers of the *ordines iudicarii*. It was, in

²⁹ Upon this matter, see the very interesting book of F. MACIOCE, *La lealtà – Una filosofia del comportamento processuale*, Torino, 2005.

³⁰ “*Affidare ad una ragione individuale – per quanto onniscente (poco importa se di un legislatore o di un giudice) – la ricerca del fatto è contro le istanze della ragione pratica, che è basata sulla divisione della conoscenza. Il contraddittorio insomma è un ineliminabile strumento di ricerca della verità in un settore legato – sia nella questione filosofica come nella controversia giuridica – a quella prova naturale costituita dalla testimonianza umana*”) A. GIULIANI, *L'ordo iudiciarius medioevale (Riflessioni su un modello puro di ordine isonomico)*, in Riv. Dir. Proc., 1988, p. 606 s.).

³¹ M. VALLERANI, *La giustizia pubblica medioevale*, cit., p. 87.

³² In this precise sense, it has been stated: “*almeno tre fasi del processo nelle quali il fatto viene presentato, ricostruito e verificato: la prima, nel libello all'inizio del procedimento, riguarda la scelta dell'actio da rivendicare; la seconda nelle positiones, contiene la ricostruzione del fatto presentata dalle parti in forma di dialogo; la terza nelle intentiones raccoglie articoli che le parti vogliono dimostrare e sui quali si redigono le domande da fare ai testi*” (M. VALLERANI, *La giustizia pubblica medioevale*, cit., p. 81). The analogy to the modern principle of the discovery, typical of the actual common law proceedings, is here very clear.



fact, alien to medieval thought that objective truth could be ascertained in legal proceedings. Instead they considered that such proceedings could establish at best a 'probable truth', based on matters constructed within this process, and made concrete in the judgment (so-called 'procedural truth')³³.

7. As stated above, the subdivision of the proceedings in various phases was coherent with the distinction between *fact* and *law* according to the *selective logic* typical of the *ordo* and seems also to correspond with the relation between *fact* and *law*, typical of the medieval system of law.

To complete the analysis, it is necessary also to consider that there in the medieval age the idea that the law was like a complex of pre-existing rules, which should be "revealed" whether by the legislator making the *lex*, or by the judge giving sentences, or by the doctrine of the jurists. In this precise sense, they say that in the Middle Age "*prevaleva la concezione del diritto come un complesso di regole che precede l'agire umano e che dunque era da "scoprire": da parte del legislatore in sede di emanazione della lex, del giudice in sede di giudizio e del giurista di scuola in sede di elaborazione dottrinale; e il corpus giustiniano conteneva essenzialmente, se non esclusivamente, i capisaldi delle direttrici cui attenersi*"³⁴.

On the other hand, the idea that the law is not an human product, but pre-exists in the nature, because it is innate to the human being, is typical of the neo-humanism and of the Natural Law: according to this idea, the law is not *made*, but *revealed* through the activities of the *princeps*, the judges, and the jurists. Even the inheritance of the classic Roman Law and, particularly, the rules ordered in the *Justinian Corpus Juris*, were not considered as an imperative, but merely as a starting point. And there was not a single source of law, but many: there were, in fact, both secular and ecclesiastic rules of law and, in concomitance with the formation of the roman-barbarian reigns, the idea that there could coexist different systems of law for the barbarians and for those living on the ground of the Roman Empire was established: so that the law was not intended to be territorial, but personal³⁵. In

³³ The notion of *truth*, intended as an *objective truth*, which must be verified in the proceedings according to scientific criteria, would appear later. It has been stated, in fact, that it is only in 1600 that the argumentative logic (typical of the Middle Ages) was shifted in scientific logic; and it has also been enlightened that it is by the application of the logic of Ramo to the proceedings' studies that happens "il momento di transizione da un modo di pensare orientato sul problema ad un modo di pensare sistematico, modellato sul sapere scientifico; e la procedura, da una disciplina che studia verità 'probabili', diviene, almeno tendenzialmente, una scienza delle verità 'assolute'" (N. PICARDI, *Processo civile (diritto moderno)*, Enc. Dir., Vol. XXXVI, Milano, 1987, p. 111).

³⁴ I. BIROCCHI, *Alla ricerca dell'ordine – Fonti e cultura giuridica nell'età moderna*, Torino 2002, p. 8.

³⁵ A. GAMBARO in A. GAMBARO – R. SACCO, *Sistemi giuridici comparati*, in *Trattato di diritto comparato* diretto da R. SACCO, 2° Ed., Torino, 2006, p. 252, n. 11: "Una legge territoriale si impone per sua natura su tutto lo spazio geografico soggetto ad una entità politica, la quale mediante le sue strutture di governo assume il compito di



addition to this was the *glosse* -which were the explications added by the *doctores* to the rules of the *Corpus juris*- and so the principles exposed in the treatises of the jurists were considered themselves as rules of law. And, at last, the judges could make law by passing judgments on the basis of rules of law specifically made for the single decided case³⁶.

In this context, “*solo se il caso era espressamente e chiaramente deciso dalla legge, non vi era spazio per l’attività interpretativa. Al di là di questo limite, cioè in presenza di un casus omissus o di un casus dubius, si apriva il campo dell’interpretatio della giurisprudenza, dottorale o giudiziale, che assumeva una funzione senz’altro creativa, In altri termini, si trattava di un’attività di produzione di norme e, quindi, di un fatto normativo, non di una semplice attività ermeneutica*”³⁷. This means that the Courts were not bound by pre-established schemes³⁸, and that, contributing to make the rules of law, they took part in the practice of the sovereignty³⁹.

istituire il diritto che deve valere nel paese. La scelta a favore della legge personale significa, invece, che ciascuna etnia stanziata su un territorio continua a vivere secondo la sua legge. Ma il riconoscimento che ciascuna etnia ha già una propria legge, implica che il soggetto politicamente sovrano effettua riguardo al diritto solo una attività di riconoscimento di ciò che preesiste alla sua autorità ed è pertanto indipendente da essa”.

³⁶ “L’ordinamento era vivo proprio in quanto attraverso l’interpretatio era possibile adeguarlo (...) e anche produrre ius novum”, says I. BIROCCHI, *Alla ricerca dell’ordine – Fonti e cultura giuridica nell’età moderna*, cit., p. 92, where the Author makes clear that, for the purpose of imposing limits on the discretion of the Courts, they were obliged both to adhere to the *communis opinio* (criterion, however, difficult to detect), and to follow the precedent, so that it was possible to pre-emptively know the rule of law “*costituendo la soluzione espressa in un precedente una legittima aspettativa di decisioni conformi, per casi analoghi, salva la presenza di una ragione ben ponderata che giustificasse il discostarsi da essa. Un segno di forza, perché, in fondo, la determinazione dei requisiti necessari per formare un giudizio consolidato era rimessa alla giurisprudenza degli stessi Tribunali (e se talora si affermò un termine decennale, talora si dichiarò addirittura che bastasse una sola pronuncia, mentre più spesso si accolse il principio che bastassero solo due giudicati conformi – le cosiddette binae iudicaturae – per creare il precedente). Inoltre il vincolo valeva per l’avvenire e dunque importava una sorta di trasformazione erga omnes dell’indirizzo giurisprudenziale accolto nel precedente”.*

³⁷ N. PICARDI, *Code louis, T. I Ordonnance civile 1667*, cit., *Introduzione*, p. XXVII s. Upon the contribution of the jurists in making law, in the medieval system of law, see A. GAMBARO in A. GAMBARO – R. SACCO, *Sistemi giuridici comparati*, nel *Trattato di diritto comparato* diretto da – R. SACCO, cit., 255 ss., p. 261-262). Here the Author describes the steps which made it possible for the jurists to acquire the authority which was necessary to become creators of the law, and also explains why the the interpretation of the rules included in the *Corpus juris* had become necessary because of the new needs arising in relation to the development of the society; therefore, the Author also points out that, once rules of law, the interpretations of the jurists could also be interpreted afterwards: “*ma questa interpretazione acquistando autorevolezza con il trascorrere del tempo e con il diffondersi della fama del suo autore, poteva essere oggetto a sua volta di interpretazione estensiva, sicché l’ininterrotta attività dei giuristi consentiva di percorrere traiettorie costruttive i cui esiti ultimi erano molto lontani dal significato del testo originale”.*

³⁸ I. BIROCCHI, *Alla ricerca dell’ordine–Fonti e cultura giuridica nell’età moderna*, cit., p. 34.

³⁹ I. BIROCCHI, *Alla ricerca dell’ordine–Fonti e cultura giuridica nell’età moderna*, cit., p. 93 s., where is described, as an example, a notable statement of the Consiglio Supremo of the Reign of Naples, pronounced in an appeal opposing a judgment of the Magna Curia della Vicaria, between a lady, Elena Carasola, and a notary, Francesco de Lungano: the Court of first instance had decided, in favor of the



In the absence of specific legal bonds, it is possible to affirm that the relation between *fact* and *law*, in that period, was based on the principle “*ex facto oritur jus*”.

8. In the described context, on the one hand, the judge was free to set the rule of law to apply to the specific case; on the other hand, the parties were not obliged to allege in the proceedings specific facts, included in any general scheme. In other words, this happened because, in a system of law which was not a system of positive law, there was not a pre-established *fattispecie astratta* (which is the situation described in the general rule of law, composed of specific constitutive facts generating the right) -and so- neither the party (at the beginning of the proceedings) nor the judge (at the moment of the judgment) had any particular bonds, respectively, about the facts to allege in the proceedings and about the rules to apply to the case.

The expectation of the claimant to win did not depend on the fact that the case was corresponding to the facts described in a (non-existent) pre-existing binding law; and the case itself was not exactly the one suggested in the *libellus* at the commencement of the proceedings, but the one resulting at the end of the preliminary phase. So it is possible to affirm that, in a sense, the *fattispecie* could only

notary, that the promise he had made was not binding. The rule of law applied was that a simple promise was ineffective: *ex nudo pacto actio non oritur*; but the word *promise* (“promessa”) was ambiguous, because it was possible that it concerned both a simple promise, and a binding promise (*stipulatio*). By the facts, it was ascertained that the promise had been done, and that, if it was not performed, the appellant had suffered damages, for which she could act the *actio de dolo*. In this case, the Court decided that, even if the *ius civile Romanorum* did not provide for the protection of a single promise, it was possible to recognize the existence of a natural obligation, which should be performed on the basis of an equity judgment of the Sovereign. In this case, the judgment should be made by the Emperor or by the Pope, because the power to practice an equity *interpretatio* was due only to them. Anyway, the Consiglio Supremo decided that itself could shift the Sovereign and decide the case on this basis: in the reign, the king exercised powers analogous to those of the emperor, according to the principle that *rex superiorem non recognoscens in regno suo est imperator*; and, according to the fact that the Consiglio Supremo represented the king in the reign, the Consiglio Supremo itself had the power to decide by equity (M. D’AFFLITTO, *Decisiones Sacri Regii Neapolitani Consilii*, Lugduni, ex officina haeredum S. Beraud, 1608 –published previously in 1509 -, dec. CXX, pp. 255-256. Upon this volume and on the fortune of the described decision of the Consiglio Supremo of the Regno of Napoli, see I. BIROCCHI, *Tra tradizione e nuova prassi giurisprudenziale: la questione dell’efficacia dei patti nella dottrina italiana dell’età moderna*, in *Towards a General Law of Contracts*, ed. by J. Barton, Berlin, Duncker & Humblot, 1990, 311 ss.; see also U. PETRONIO, *Senato (diritto intermedio)*, in Enc. Dir., vol. XLI, Torino 1989, p. 1159 s.; ID., *I Senati giudiziari*, in *Il Senato nella storia. Il Senato nel Medioevo e nella prima Età moderna*, Roma, Istituto Poligrafico e Zecca dello Stato, 1997, p. 401 s.). The idea of a sovereign State, as is understood nowadays, began to spread over in the 1500, on the basis of the intuitions of Machiavelli, and then developed during a period of more than a century and a half, until the works of Bodin and, afterwards, of Hobbes. But, pragmatically, also the fundamental laws of the States had a practice-customary origin, since the 18th century (about all this, I. BIROCCHI, *Alla ricerca dell’ordine – Fonti e cultura giuridica nell’età moderna*, cit., p. 96 ss.).



be concrete, material (i.e. 'concreta'), and that the preliminary phase had the function of a filter of the material facts of the case, i.e. the relevant facts.

As just explained, in fact, it was just through the mechanism of (*interrogationes* or) *positiones* that the concept of *relevancy* had been introduced, for the first time, in the proceedings⁴⁰. According to this, the relevant fact was the one which was "built" within the process, through the allegations -made by phrasing questions- of the parties: the relevant fact was not the one affirmed by the claimant (first fact), nor the one opposed by the defendant (second fact), but the one resulting from the comparison between the allegations of both parties (so called "third fact" hypothetical), through a kind of algebraic sum of positive facts (positive answers) and negative facts (negative answers)⁴¹.

So it is possible to state that the preliminary phase was not appointed to make a 'judgment' upon the facts, but to 'select' the relevant facts (i.e. the material facts) of the case.

9. Starting from the late Middle Ages, reform across all continental Europe led to an ever-increasing centralization of all powers and to the appearance of a sense of belonging among the persons living on a same territory; this represented the prodrome of the formation of the national States and of nationalism⁴². Along with these transformations was the gradual disappearance of the particular systems.

As the idea of centralization of all powers was becoming established, the principle of the separation of the legislative and the judicial powers took shape (and also that of the supremacy of the legislative). The first feed of this new organization of sovereign powers has been identified in some *ordonnances* -which Louis XIV, King of France, adopted at the end of 1600 in order to solve the sovereignty dispute which had arisen during the period from the 1653 to 1673, between the King and the Courts. The latter, according to the fact that, by their judgments, made the law, proclaimed themselves sovereign⁴³.

⁴⁰ A. GIULIANI, *The Influence of Rethoric on the Law of Evidence and Pleading*, in *Juridical Review*, 1962, p. 230.

⁴¹ A. GIULIANI, *op.loc.cit.*

⁴² "Siamo nell'ambito di una concezione secolare del diritto, tutta relativizzata attorno all'uomo riunito in comunità e specificamente in quella comunità che si costituisce in ordinamento sovrano. È nel Cinquecento, infatti, che tra i giuristi emerge il concetto di "patria" come comunità resa coesa alla finalità del bene comune e dal legame (il diritto) che unisce i singoli membri: si apparteneva ad una patria in quanto si sottostava al complesso normativo che definiva un certo ordinamento sia verso l'interno sia verso l'esterno" (I. BIROCCHI, *Alla ricerca dell'ordine – Fonti e cultura giuridica nell'Età moderna*, cit., p. 52).

⁴³ N. PICARDI, *Code louis, T. I Ordonnance civile 1667*, Milano 1996, *Introduzione*, p. XVI ss; p. XX ss.



The effort of the King was not successful⁴⁴; nevertheless his *ordonnances* held on to be some of the most important steps of the course, which would lead to the formation of the Civil Law system.

Among these, the *Ordonnance civile* of 1667 is particularly significant, which at the Title I, article 1, provided that the *ordonnance* and all the rules of law issued by the King “*soient gardées et observées par tout nous cours*”, and at the article 6 added “*sans contrevénir...dispenser ou en modérer les dispositions*”⁴⁵. These provisions are, in fact, intended to be the first sophisticated display, in a legislative act, of the principle of the “*l’obeissance que doit le Magistrat aux lois*”⁴⁶.

That is why the *Code Louis*, and, in general, the *Ordonnances* of King Louis XIV, introduce a new way to intend the law, and sign a breaking point with the judge made law, typical of the Middle Ages⁴⁷. We are, now, at the origin of the positive system of law, at the origin of the achievement of the principle that the law “constitutes”, not “describes” the rule⁴⁸.

A consequence of this new way of thinking was that the system of law, globally considered, was completely re-organized and, in particular, both the judgments of the

⁴⁴ N. PICARDI, *Code Louis*, T. I *Ordonnance civile 1667*, cit., p. LII.

⁴⁵ N. PICARDI, *Code Louis*, T. I *Ordonnance civile 1667*, cit., p. XVIII, XXVI, where the Author also reports the text of article 7, which prohibited the Courts from independent interpretation of the law, in an attempt by the King to bind the Courts to a strict respect of the law. Like Professor N. PICARDI states, by this provision the *Code Louis* attempts, on the one hand, to bring back from the dead the Justinian prohibition of *interpretatio*, recognizing that «*tam conditor quam interpret legum solus imperator*»; on the other hand, it anticipates the Enlightenment’s ideologies and the experiment of the *référé législatif* of the French Revolution.

⁴⁶ N. PICARDI, *Code Louis*, T. I *Ordonnance civile 1667*, cit., p. XVIII s.: “*Si tratta di norme che, seppure non prive di qualche precedente nelle antiche ordinanze, appaiono una prima, matura espressione sul piano legislativo, del principio «de l’obeissance que doit le Magistrat aux lois» (...). Si tratta, però, di un principio che non assumeva quel valore di garanzia – per il cittadino e per il giudice – che, successivamente rivestirà nel modello liberale ottocentesco e che conserva ancora nel costituzionalismo contemporaneo. All’epoca esso rappresentava, piuttosto, la rottura con i tradizionali principi politico-costituzionali. La soggezione del giudice alla legge andava, infatti, letta nel quadro di una ideologia che riconosceva al re la sovranità assoluta, non limitata nelle sue prerogative da alcun organo costituzionale. Il diritto veniva ormai ricondotto alla legge e la legge alla volontà del sovrano*”. And going on: “*Al re-giudice del costituzionalismo medioevale si sostituiva il re-legislatore: la iurisdictio finiva, conseguentemente, per perdere il significato originario di potere sovrano tout-court e, con la sua immagine del giudicare, era destinata a coprire una sfera di potere diverso dal potere di fare le leggi, potere quest’ultimo che diventa ormai il segno distintivo della sovranità*”.

⁴⁷ And so, as Professor PICARDI says, the French Revolution would not really initiate a new way to legislate, but only that the legislation should be attributed to the people (not to the King) (N. PICARDI, *Code Louis*, T. I *Ordonnance civile 1667*, cit., p. XLIX). On the other hand, these *ordonnances* appear “*imprégnées d’une philosophie antirhétorique sans communication et sans dialogue*” (A. GIULIANI, *Le rôle du «fait» dans la controverse (à propos du binôme «rétorique-procédure judiciaire»*), in *Archives du Philosophie du Droit*, 1995, p. 231).

⁴⁸ This new way to consider the law concerns also the fundamental law, the constitution, which is now a written paper (I. BIROCCHI, *Alla ricerca dell’ordine – Fonti e cultura giuridica nell’Età moderna*, cit., p. 546).



judges and the opinions of the jurists were no longer considered sources of law, according to the rise of the principle of the supremacy of the legislature.

In this context, the relation between the facts and the rules was also changed, because it was only the law that could determine which facts were material, i.e. which facts produce juridical effects⁴⁹. And, in a sense, it is possible to affirm that the relation between *fact* and *rule*, since it corresponded to the principle “*ex facto oritur ius*”, was now set up according to the principle “*ex iure oritur factum*”⁵⁰.

10. The question concerning the notion of fact, according to the positive system of law, is very complex and it is linked to that of the juridical relevancy of the fact.

In this perspective, rises in prominence the principle that a fact is relevant by the law only if it is provided in a pre-established rule of law as like the constitutive fact (or one of the constitutive facts) of the right, that is, as like the fact (or one of the facts) to which the law attributes any juridical effect⁵¹.

It has been observed that saying that the juridical relevancy depends on the provisions of the positive law, is just like saying that one fact exists according to the law only if it is legally material while a fact, to which the law does not attribute any legal effect, does not exist, it is a “non-fact”⁵². According to this opinion, the concrete fact, which is not considered by the law, is effective in its own order (nature

⁴⁹ “*La legge determina i fatti giuridicamente rilevanti: ossia a quali fatti devono seguire effetti giuridici?*” (so, exactly, A. GIULIANI, *Leibnitz e la teoria dei fatti relazionali*, Riv. Int. Fil. Dir., 1992, p. 265, who also points out that, in this new context, the juridical dimension predominates over the empiric one and determinates a (re)consideration of the notion of *fact*, because “*i fatti nel diritto sono fatti relazionali (in ordine ad ius) (...)* il fatto è voluto, creato dalla norma”).

⁵⁰ In fact, it has been observed that the transition from the medieval common law system to the system of positive law lays its rational fundamentum in the principles of Natural Law and, in particular, in the theory of the *relational facts* of Leibnitz: “*Leibnitz rifiuta non solo la contaminazione del diritto col fatto (implicita nella configurazione della controversia giuridica come questione retorica), ma anche la frattura tra fatto e diritto (sottintesa nella configurazione sillogistica del ragionamento giudiziario): a) la struttura retorica del giudizio giuridico è inaccettabile in quanto il «fatto» è ricostruito sulla base dei precari criteri della rilevanza della prova: una concezione argomentativa – legata ad una logica del conoscere attraverso testimonianze – porta alla rivalutazione della conoscenza sensoriale, assimilando il giudizio retorico-dialettico a quello storico; b) la struttura sillogistica appare insoddisfacente per la distinzione tra «questione di diritto» e «questione di fatto»: come un fatto inteso nella sua materialità può essere produttore di effetti giuridici? Dal «fatto» non si può passare al «diritto», in quanto nel momento empirico non si può trovare la ragione sufficiente della conseguenza giuridica?*” (A. GIULIANI, *Leibnitz e la teoria dei fatti relazionali*, cit., p. 264 s.).

⁵¹ Considering that in this system of law the juridical dimension prevails over the material one, it has been observed that once the material facts (here intended like concrete facts), both the human and the natural, are included in the formulation of the positive law, they become juridical acts (or facts) (N. BOBBIO, *Teoria della scienza giuridica*, Torino, s.d. (but 1949), 139 ss., spec. 143; N. IRTI, *Norme e fatti – saggi di teoria generale del diritto*, Milano 1984, p. 27, nota 100).

⁵² N. IRTI, *Norme e fatti – saggi di teoria generale del diritto*, cit., p. 58.



or history) but not by the law. Furthermore, it has been also pointed out that, because of the fact that the juridical relevancy involves the comparison between the concrete fact and the positive law (only if the concrete fact is included in the positive law, the same fact is a juridical fact and exists by the law), the juridical fact is a *noema*, whose effects are not a direct consequence of the fact, but are the consequence of an opinion, a judgment, in a logical procedure of analysis, identification and qualification. When this happens, the *natural fact*, the *historic fact* -that is, the fact that occurred in life- already disappears⁵³. And so, the *paradox* of the juridical judgment comes true, because the judgment about the existence of the fact involves the judgment about the existence of the positive law; and the judgment about the existence of the positive law involves the judgment about the existence of the fact⁵⁴.

From this perspective, then, it becomes impossible to separate *fact* and *law* and the problem of the relation between *quaestio facti* and *quaestio iuris* arises⁵⁵.

11. Together with the rise of the new notion of positive law all over continental Europe, a significant change had also been registered about the structure of the proceedings. This happened because the syllogism, as a criterion of configuration of the judicial reasoning, was replaced with mathematical, scientific criteria⁵⁶.

The original partition of the proceedings in separated phases, typical in the medieval *ordo*, had been replaced with a uniform, linear organization of all judicial

⁵³ N. IRTI, *Norme e fatti – saggi di teoria generale del diritto*, cit., pp. 48, 59, 60 s.

⁵⁴ N. IRTI, *Norme e fatti – saggi di teoria generale del diritto*, cit., p. 54 ss. (who says exactly: «il giudizio di esistenza del fatto presuppone il giudizio di esistenza del diritto: e il giudizio di esistenza della norma presuppone il giudizio di esistenza del fatto»; la forma del giudizio giuridico è la sussunzione (KANT); ed anche «gli effetti giuridici non dipendono dal fatto concreto, ma dall'operazione sussuntiva»).

⁵⁵ *Quaestio facti/quaestio iuris* represent a binomial, in which has been divided, in the modern proceedings, the judicial reasoning, according to the schemes of the syllogistic reasoning, afterwards replaced with the models of the scientific reasoning (N. PICARDI, *Processo (diritto moderno)*, Enc. Dir., vol. XXXVI, Milano 1987, p. 108 ss.).

⁵⁶ A. GIULIANI, *Leibnitz e la teoria dei fatti relazionali*, cit., pp 256 ss.; 265 ss., on the basis of the LEIBNITZ's criticism of the Aristotelian *exodon* («le vraisemblable est plus étendu: il faut le tirer de la nature des choses») (LEIBNITZ, *Specimen difficultatis in iure*, *Die Philosophische Schriften*, Berlin, 1882, VI, 1, p. 231; spec. Preface, p. 61): «L'introduzione del «calcolo» nel ragionamento giuridico implica la assimilazione della controversia giuridica al «casus» inteso more geometrico: «casus est antecedens propositionis hypotheticae». The Author points out that in the analogical application of this model, the *casus* becomes a *relational fact* «Applicando vero ad iurisprudentiam tale antecedens dicitur factum, consequens jus, et casus definietur factum in ordine ad jus». Professor GIULIANI also points out that E. WEIGEL (master of both Pufendorf and Leibnitz) was the first to try to apply the mathematical relations to ethics. In general about the Science of legislation in Leibnitz, A. GIULIANI, *Osservazioni introduttive*, in AA. VV. *Modelli di legislatore e scienza della legislazione*, in *L'Educazione giuridica*, VI, t. 1, 1988, p. 12.



activities. In this new structure of the proceedings, the preparatory phase disappeared, because it had become redundant within the new system, where the material facts were described in the positive law, and there was no need to provide specific rules of proceeding to set the case itself.

In the new system, the *litis contestatio* also dropped down, and the allegations of facts (once made during the course of the preparatory phase) were now included in the very first act of the proceedings, the *claim*, where the claimant assumed that those facts alleged are in compliance with the ones described in the positive law and, on this basis, claimed that the juridical effect provided by the law must be declared⁵⁷. At the same time, the order (not only logical, but also chronological) of treatment of the case had been reversed, and it has been argued that this prefigured the transition from the principle of *selection* (typical of the *isonomic* model of the proceedings), to the principle of *concentration* (typical of the *asymmetric* model of proceedings)⁵⁸.

12. The rise of the principle of concentration is typical of the proceedings of the positive law systems, and it impresses upon the role of the judge respect for the facts of the case. In fact, at one time the judge had been passive, in compliance with the principle which assigned exclusively to the parties the matter of facts of the case; now, instead, the judge had a new role in the proceedings because he had to try to understand what had *really* happened between the parties. In a sense, it has been observed that this implies the elusion of the principle that *iudex non potest in facto suppeire*, which -as argued above- was typical of the *ordo*⁵⁹.

On the other hand, the new linear structure of the proceedings, and, in particular, the removal of the preliminary phase had made the allegations of facts

⁵⁷ In this precise sense, A. CASTELLARI, *Volontà ed attività nel rapporto processuale civile*, in *Studi di Diritto Processuale Civile in onore di Giuseppe Chiovenda*, Padova 1927, p. 352: “Al posto della contestazione, atto preliminare e solenne, ora subentrò un’insieme di attività progressive e reciproche, mercè le quali le parti, via via che accudiscono alla causa, fra loro e col giudice, raccolgono gli elementi di fatto e di diritto, foggiano, completando e fissando sulla base dei medesimi i rispettivi assunti di difesa e di resistenza”; the judicial activities, once regulated according to the principle of selection, by virtue of which the individuation of the material facts and the judgment were made in separated phases, “ora costituiscono un operare continuato”, and “la causa gradatamente viene consolidandosi nei precisi termini che ciascuna delle parti ha concorso a determinare e nei quali essa chiede e persiste che venga conosciuta e decisa dal giudice”.

⁵⁸ The individuation of the *isonomic* model of proceedings (typical of the *ordo* according to the argumentative logic that was its own) and of the *asymmetrical* model of proceedings (which was typical of the proceedings in the positive system of law) is due to Professors N. PICARDI e A. GIULIANI (the theme is developed in various treatises: N. PICARDI, *Processo civile (diritto moderno)*, cit., p. 116; N. PICARDI - A. GIULIANI, *La responsabilità del giudice*, Milano, 1987).

⁵⁹ In this precise sense, it has been enlightened that the role of the judge, in this new context, changes “si trasforma, eludendo quel divieto di supplenza nella ricostruzione dei fatti che era il cardine basilare del processo accusatorio: ora il giudice può e deve «de facto supplere» cercando di capire cosa è stato fatto e chi lo ha fatto” (M. VALLERANI, *La giustizia pubblica medievale*, cit., p. 45).



disorderly. In this sense, it has been pointed out that the replacement of the principle of selection, typical of the *ordo*, involves a disorderly gridlock of irrelevant (immaterial) facts and makes any control of the evidential power of the judge impossible⁶⁰.

Seen from this angle, once the preventive control of the relevancy of the facts alleged by the parties abolished –which, in the selective logic of the *ordo*, happened during the preliminary phase- each fact came into the proceedings merely through the statements of the parties (included in their introductory acts).

The statement itself, in fact, implies the relevancy of the fact, according to the party's opinion, but this does not mean that they really are relevant: the alleged fact can, in fact, be relevant in the opinion of the party, but superfluous or immaterial in the opinion of the judge. Otherwise, as argued above, it is impossible, in a positive system of law, to separate the *quaestio facti* and the *quaestio iuris*, so that the relevancy of the facts can only be assumed by the party, at the beginning of the proceedings, and declared by the judge, at its end. The relevancy of the fact alleged becomes clear, indeed, only by the judgment, at the end of the proceedings.

Upon this basis, it is also possible to make clear why in this model of proceedings the judge has certain control on the facts of the case. This happens through the exercise of several judicial powers, just like that of admission of the proofs requested by the parties or that of the very judgment of the case. So it is possibile to agree that “*quaestio facti est in arbitrio iudicis*”⁶¹.

In a few words, it moved from a ‘procedure of selection of the facts’ (assigned to the parties), to the ‘judgment upon the facts’ (assigned to the judge).

13. In Italian civil proceedings, the allegation of the facts passes through a dialectic scheme, which develops due to the allegation of the facts constitutive of the claim on behalf of the claimant, and the allegation of opposing facts –capable of rejecting the claim (*exceptiones*), on behalf of the defendant. More precisely, the matter of fact is gradually defined through the allegations that each party includes in its own initial acts and in its defenses submitted during the first part of the proceedings.

The facts are, therefore, acquired as material facts of the case merely as they are alleged by the parties and, at the same time, they represent what the parties should prove (c.d. *thema probandum*). The judge can impress upon these facts by exercising his

⁶⁰ A. GIULIANI, *Dalla litis contestatio al pleading system (riflessioni sui fondamenti del processo comune europeo)*, RDP 1993, p. 956: “Il disconoscimento del ruolo selettivo della *quaestio iuris* rispetto alla *veritas facti* da un lato determina un disordinato ingorgo d’informazione irrilevante, e dall’altro lato rende incontrollabile sul piano logico la dilatazione dei poteri istruttori del giudice”. See also C. VAN CAENEGEM, *History of European Civil Procedure*, Tübingen, 1973, p. 32, p. 60 (*International Encyclopedia of Comparative Law*, vol. XVI, chapt. 2).

⁶¹ A. GIULIANI, *Dalla litis contestatio al pleading system*, cit., p. 967; ID., *Il concetto di prova*, cit., p. 216.



own evidential powers and, above all, by judgment regarding the admission of the proofs, which involves a legal assessment of their admissibility and relevancy.

During the first part of the proceedings, named '*trattazione*' (this is not a phase of the proceedings in the sense of the common law proceedings', but it must be noted that the law 26 November 1990, n. 353, introducing specific bar-terms for the allegations of the facts by each party, has in a sense logically separated the linear structure of the proceeding in different stages), each party can allege the facts considered relevant to the case. All these facts come to the judge as the matters of fact: so it is the judge who makes a selection, through judgment of admissibility and relevancy of the proofs, required by the parties upon those facts and, at the end of the proceedings, by the final judgment, which concerns both the facts and the law.

From this perspective, it can be said that, until the final judgment is made, the facts are received within the proceedings only in a hypothetical or provisional form. In this sense, it has been argued that the *epistemological status* of the facts alleged by the parties during the proceedings remains in doubt and that this kind of *status* would change only by the final judgment of the judge: "il loro status *epistemologico* è quello dell'incertezza, tipico delle ipotesi non ancora controllate. (...) nel corso del processo questo status è destinato a mutare in funzione dell'acquisizione di conoscenze sui fatti, ma solo con la decisione finale l'incertezza verrà rimossa in modo definitivo"⁶².

The judgment upon the facts arises, therefore, principally as an evidential judgment and it is possible to affirm that the judge, in a sense, contributes to the formation of the matter of fact of the case⁶³.

14. The subdivision of the proceedings between *preliminary phase* and *judicial phase*, which was typical of the *ordo*, is nowadays a characteristic of the common law proceedings. In general, common law proceedings have kept the characteristic of the original model concerning both the judiciary system⁶⁴, and the structural organization of the proceedings⁶⁵.

⁶² M. TARUFFO, *Elementi per un'analisi del giudizio di fatto*, Riv. Trim. Dir. e Proc. Civ., 1995, p. 789. It is possible to assume that this situation could be already changed, considering the *principle of non dispute*, which has been first declared and applied by the Corte di Cassazione, Sezioni Unite, 22 January 2002, n. 761; and then provided by the new text of art. 115 c.p.c., as resulting by the Law 16 June 2009, n. 69. According to this principle, in fact, the facts alleged by one party and not disputed by the other party, are considered proved as well. This means that, in a sense, the parties could have a certain control of the matter of fact.

⁶³ On the role of the judge in the formation of the matter of fact of the case, M. TARUFFO, *Elementi per un'analisi del giudizio di fatto*, cit., p. 792., p. 798 s.

⁶⁴ N. PICARDI, *La giurisdizione all'alba del terzo millennio*, Milano, 2007.

⁶⁵ A. GIULIANI, *Dalla litis contestatio al pleading system (riflessioni sui fondamenti del processo comune europeo)*, cit., p. 961. N. PICARDI, *Processo civile (diritto moderno)*, cit., p. 102: "alcuni scavi di storia del processo medievale hanno rilevato una sorprendente continuità fra processo comune e processo di Common Law".



Of note, the common law proceedings have kept the subdivision, typical of the medieval *ordo iudicarius*, between *preliminary phase (pre-trial)* and *judicial phase (trial)*, the first of which is appointed to the identification of the *material facts* of the case, and the second to the proof and the judgment. This formal distinction of the proceedings in two phases (which, as in the *ordo iudicarius*, corresponds to the functional distinction between *fact* and *law*) appears rather strengthened by the provision that each phase can be managed by different judges⁶⁶ or by that which reserve the judgment upon the facts to the jury and the statement of the law to the judge⁶⁷.

Furthermore, in general terms, it can be argued that the *pre-trial* phase of the common law proceedings, which is focused on the material facts of the case because it is appointed to individuate the matter of fact (*issue of fact*), and which also develops through a dialectic dialogue between the parties, is analogous to the *preliminary phase* of the medieval *ordo iudicarius*; and it can also be stated that the *trial* and the *judicial phase* of the *ordo iudicarius* are similar, in the sense that they are both appointed to clarify and decide the case according to the rule of law (*quaestio iuris, issue of law*)⁶⁸. Always in general terms, it is possible to affirm that, as in the *preliminary phase* of the medieval *ordo*, the judge has, in the *pre-trial phase*, a passive role⁶⁹, because he can not, in any way, intervene in the choice and in the order of presentation of the information to allege in the proceedings, which are reserved for the parties⁷⁰.

In specific regard with English civil procedure, it is convenient to specify that the *Civil Procedure Rules* of 1998 (best known as *Woolf Reform*) give to the judge

⁶⁶ A. GIULIANI, N. PICARDI, *L'Educazione giuridica – Modelli storici della procedura continentale*, Vol. VI, Tomo I – Profili filosofici, logici, istituzionali, Napoli 1994, by Università degli Studi di Perugia, *premessa*.

⁶⁷ R.W. MILLAR, *La “ficta confessio” come principio di allegazione nella procedura civile anglo-americana*, in *Studies in Honour of Giuseppe Chiovenda*, Padova 1927, p. 587.

⁶⁸ Sir JACK I. H. JACOB, *The Fabric of English Civil Justice*, London, Stevens & Sons, 1987, p. 87.

⁶⁹ In the sense that the dialectic organization of the judicial activities according to the principles of the rhetoric is typical of the adversarial proceedings of the common law systems, L. FERRAJOLI, *Derecho y razón*, 137 (“Gracias a su estrecho ligamen con la retórica, la ciencia jurídica procesal...incorpora por tal vía los valores democráticos y liberales, además de racionales y laicos, de la contraposición entre razones opuestas como método mayéutico de discusión y de investigación, la igualdad y el derecho a la calabra que excluyen verdades de autoridad y postulan la libertad y la paridad de los disputantes, la tolerancia de las hipótesis y argumentaciones en conflicto, y la relatividad y la provisionalidad de las pruebas y los juicios en el campo de las civiles cuestiones. Estos presupuestos humanistas fueron los que dieron origen y alimento – aun dentro de innumerables caídas y discontinuidades – a la estructura acusatoria del proceso penal clásico y la mayor parte de la garantías procesales: la carga de la prueba a cargo del acusador y la presunción de inocencia hasta prueba en contrario, el contradictorio entre las partes como método de búsqueda de la verdad..., los criterios de exclusión de las pruebas increíbles por la fuente o irrelevantes por el objeto, la libre convicción del Juez argumentada sin embargo iuxta alligata et probata”). “En definitiva, en la medida que los sistemas jurídicos incorporan el modelo adversarial se instaura un proceso entendido como una contienda o disputa entre dos adversarios que se desarrolla frente a un árbitro relativamente pasivo cuya principal obligación es llegar a un veredicto” (F. J. EZQUIAGA GANUZAS, *Iura novit curia y aplicación judicial del derecho*, Valladolid, 2000, p. 32).

⁷⁰ M. R. DAMASKA, *Il diritto delle prove alla deriva*, It. transl., Bologna 2003 (original ed.: *Evidence Law Adrift*, New Haven-London, Yale University Press, 1997), p. 130 s.



particular powers of *case management* (Rule 3), in order to achieve the *overriding objective* described in the Rule 1, which states “*Dealing with cases justly includes, as far as is practicable: (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate: (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases*” (CPR 1.1(2))⁷¹.

The assignment of this kind of powers to the judge represents a novelty in respect to the pre-CPR system of litigation, rooted in the adversarial or ‘*party-control*’ principle, which “*worked well if both parties were keen for the case to progress efficiently. That system, therefore, presupposed that the claimant was keen to pursue the action with reasonable speed and did not allow the litigation to become bogged down in interlocutory skirmishes and that the defendant refrained from attempting to sabotage the case’s progress by obstructive behaviour*”⁷². Because of these powers, the judge has now a new role in the proceedings, an active role⁷³.

In the purpose of this paper, it interests that, according to the ‘*party-control*’ principle, the parties and their lawyers controlled commencement and constitution of the action, especially the drawing up of *pleadings* to select material facts⁷⁴. In fact, in the *preliminary phase*, “*only material facts should be pleaded*”⁷⁵ and there was no way for the judge to intervene upon the pleading’s activity of the party.

According to the CPR, the material facts of the case are still alleged by pleadings, now named statement of claim⁷⁶, but the judge can exercise his/her powers

⁷¹ The CPR 1.4 (1) states: “*The Court must further the overriding objective by actively managing cases*”. In general upon the role of English judges’ *case management* powers, both before and after the Woolf Reform, S. GOLDSTEIN, *Giudici Manager e Giudici Conciliatori*, Riv. Trim. Dir. Proc. Civ., 2009, p. 985 ss.

⁷² N. ANDREWS, *English Civil Procedure – Fundamentals of the New Civil Justice System*, Oxford University Press, New York, 2003, p. 35.

⁷³ Upon this issue, R. TURNER, ‘*Actively*’: *the Word that Changed the Civil Courts*, in *The Civil Procedure Rules Ten Years On*, Ed. D. DWYER, Oxford University Press, New York, 2009, p. 77 ss.

⁷⁴ N. ANDREWS, *English Civil Procedure – Fundamentals of the New Civil Justice System*, cit., 2003, p. 35.

⁷⁵ According to RCS Ord. 18, r. 7, these are the principal rules for pleadings: “(a) pleadings should generally be confined to points of fact; however, raising a point of law is permitted under RSC ord. 18, r. 11 (namely, usually objections to a claim, made in defense, on a point of law); it should be noted that the latter rule is permissive, so that a point of law need not to be raised (RSC Ord. 18, r. 11); (b) only material facts should be pleaded (RCS Ord. 18, r. 7); (c) the pleading should refer to facts but not to the evidence which will be adduced to substantiate these allegations (Ibid.); (d) the pleading should be concise (Ibid., r. 7 (1))” (N. ANDREWS, *Principles of civil procedure*, London (Sweet & Maxwell), 1994, p. 107 s.).

⁷⁶ N. ANDREWS, *English Civil Procedure – Fundamentals of the New Civil Justice System*, cit., p. 33, n. 25. CPR 2.3.



of *case management* and, so, for example, struck out the issues which are clearly immaterial or deny an amendment of pleading.

Anyway, the method of allegation of the material facts by pleadings is the same, very similar to that of the *ordo judicarius* described above, considering that by the *pleas*, just like the *interrogationes*, the case comes out divided in many smaller elements (material facts), and that making *pleas*, just like making *interrogationes*, is a very formal and complex activity and requires a very high competence.

Furthermore, it can be argued that the notion of *fact* typical of the common law proceedings is similar to that of the *ordo*. Seen from this angle, this *fact* is not the one occurred in reality, but the one individuated in the proceedings, through the dialogue between the parties. This reflects the adoption of an argumentative logic, which purpose is not to verify a concrete truth pre-existing to the proceedings, but to identify the more coherent and persuasive argument⁷⁷.

In general, the common law systems (because of the fact that they have not been interested by the circumstances which have led, in continental Europe, to the formation of the positive law, and so, of the civil law systems) have kept the characteristics of the *jus commune*⁷⁸; and they are nowadays systems where the *rule of law*, which originates by the spontaneous following of the members of the community, rises by the judgments of the cases. As in the Middle Age, therefore, in the common law system the jurisprudence is fundamental in making law (so that it is also called *judge made law*)⁷⁹.

In fact, the common law judges do justice “according to all the circumstances of the case”: they must get the rule from the single case decided, and it is possible to affirm, then, that their activity is, in a sense, legislative⁸⁰.

⁷⁷ W. TWINING, *Lanyers' Stories*, in *Id.*, *Rethinking Evidence. Exploratory Essays*, Oxford, 1990, 219 ss.; LA RUE, *Stories versus Theories at the Cardozo Evidence Conference: It's just Another Metaphor To Me*, in 14 *Cardozo L. Rev.*, 1993, 122 ss.; PENNINGTON HASTIC, *A Cognitive theory of Juror Decision Making: The Story Model*, in 13 *Cardozo L. Rev.*, 1991, 519 ss.; LEMPERT, *Telling Tales in Court: Trial Procedure and the Story Model*, *ivi*, 559 ss, all cited by M. TARUFFO, *Elementi per un'analisi del giudizio di fatto*, *Riv. Trim. Dir. Proc. Civ.*, 1995, p. 787, nota 4.

⁷⁸ About this, see N. PICARDI, *La giurisdizione all'alba del terzo millennio*, Milano, 2007, p. 45 ss.

⁷⁹ On the nature of judge made law of the Common Law systems; on the relations between the Common Law systems and the *jus comune*; on the characteristics of the law made by the judges, there is much literature. It is possible to find a synthesis in A. CAVANNA, *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, Vol. 1, Milano, 1982 (rist. inalterata), p. 479 ss.; , A. GAMBARO in A. GAMBARO – R. SACCO, *Sistemi giuridici comparati*, nel *Trattato di diritto comparato* directed by R. SACCO, *cit.*, p. 150 s.

⁸⁰ N. DUXBURY, *The Nature and Authority of Precedent*, Cambridge University Press, Cambridge, 2008, p. 22.



This power of making the *rule* to apply to the case is limited only by the principle of the *stare decisis*⁸¹, by which the judge is bound to apply the rule declared in precedents concerning cases identical or analogous to that decided.

In any event, the common law judges “*are not sanctioned for declining to follow precedent, and so precedents do not constrain judges in the classical positivist sense*”⁸²; furthermore, they can avoid applying the precedent, by using the powers of *distinguishing* and *overruling*: by the first, it is possible to set aside the precedent on the basis that the case does not present identical facts⁸³; by the second the judges can declare a new *rule of law* in the case⁸⁴.

This means that the *rule of law* declared in the judgments is changeable and is not static: if in the *communis opinio*, as intended by the judge, the *rule of law* for the case has changed in respect to that expressed in the precedent, the case would be decided according to the new rule; and, on the other hand, if the case is analogous to that decided by the precedent, it is not sure that its rule would be applied⁸⁵.

⁸¹) This principle did not originate in the common law systems and it is difficult to establish precisely when the English Courts began to feel bound by the precedent. Some Authors suggest that it could have happened at the same time when the positivism rose in the continental Europe (N. DUXBURY, *The Nature and Authority of Precedent*, cit., p. 17 ss.).

⁸²) N. DUXBURY, *The Nature and Authority of Precedent*, cit., p. 14 ss.

⁸³) Even if this point appeared obvious, distinguishing case by case can be difficult because often it is difficult to precisely identify the *ratio decidendi* of the precedent and to distinguish this from the *obiter dicta*, above all, because the precedents are discursive. On the other hand, the notion itself of *ratio decidendi* is uncertain: “(...) *even though there was general agreement that the ratio decidendi is the binding part of a decision, there was little if any agreement about what the ratio decidendi is. Leaving aside the difficulties identified so far, nobody could say for sure whether the ratio decidendi is best characterized as the rule, the principle, or the reason embodied in a case, though there was little doubt that the principle of a case is not the same as either the reasons given in a judgment or the rule on which a court has relied*” (N. DUXBURY, *The Nature and Authority of Precedent*?, cit., p. 78; A. L. GOODHART, *Determining the Ratio Decidendi of a Case*”, in his *Essays in Jurisprudence and the Common Law*, Cambridge – Cambridge University Press, 1931, p. 1-26). Furthermore, it is possible to exercise the power of *distinguishing*, only if the difference between the precedent and the case is “*material*”, that is, concerning material facts of the case (always, N. DUXBURY, *The Nature and Authority of Precedent*, Cambridge University Press, 2008, p. 111 s., p. 113 s.). But also the individuation of the *material facts* can be problematic: referring to the judicial reasoning helps to identify which facts have been held to be “*material*” by the judge, “*But this is not the only round on which the reasons given by a judge in his opinion or his statement of the rule of law are of importance? For it is sometimes important to discover not just which facts were considered material but why they were considered material, and so we will look to the judicial reasoning in an effort to discover “what portions of the law were in the mind of the court when selection of material facts] was made”* (N. DUXBURY, *The Nature and Authority of Precedent*, cit., p. 84-85).

⁸⁴) N. DUXBURY, *The Nature and Authority of Precedent*, Cambridge University Press, 2008, p. 116 s.

⁸⁵) Jones v. Kaney, Supreme Court, *White Book* 2011.



In a sense, common law judges seem to have the same power of making the rule for the case, as those of the medieval age. Of course, they are not bound as the judges of civil law systems are.

15. As a result of the comparison of the discipline of allegations in civil law and in common law proceedings, the very high complexity of the theme emerges, which depends of the complexity of the notion of *fact* and on the complexity of its relations with the *law*. On the other hand, it has been noticed that this theme, even being central for judicial logic, has been absorbed in the problem of the relation between *quaestio facti/quaestio iuris*, and has been, in this way, eluded⁸⁶.

As exposed in this paper, the attention to the proceedings' model of the *ordo* has made it possible to bring to light a particular notion of *fact*, which appears similar to that of the common law proceedings, but very different from that which is typical of the civil law proceedings.

This difference emerges relating to many aspects (characteristics of the relation between fact and law, structure of the proceedings, way of allegations of facts in the proceedings), which have been studied. But perhaps, in general, it is possible to affirm that the difference reflects the different ways to identify a relation between the reality and the proceedings, the different way to find the judicial truth.

This is particularly the case in the distance between the idea that the proceedings' purpose is the verification of the reality, pursuing the achievement of a concrete, scientific, logic truth (an idea which is typical of the civil law proceedings); and the idea that the "true" truth, the facts that "really" happened cannot be ascertained in the proceedings, because the human facts, once occurred, can only be represented and escape scientific methods of investigation (an idea which is typical of the *ordo* and which seems also typical of the common law proceedings, both using an argumentative logic).

But also the most rigorous scientific method of proof does not come to an univocal result, universally valid, because the result itself depends on the scientific method concretely applied which, in turn, depends on the scientific theory which has conceived that method. As a consequence, applying different methods to the same facts (based on different scientific theories) can lead to different results⁸⁷.

⁸⁶ A. GIULIANI, *Liebnitz e la teoria dei fatti relazionali*, Riv. Int. Fil. Dir., 1992, 255, nota 3; ID., *Il concetto di prova*, Milano 1971, p. 223 ("quaestio facti est in arbitrio iudicis").

⁸⁷ "(...) nel pensiero postpositivista è stato posto in luce come le osservazioni empiriche siano comunque influenzate da tutta una serie di assunti teorici presupposti, che costituiscono l'orizzonte entro il quale si muove lo scienziato. Si è mostrato infatti che, per poter pervenire all'adozione o alla verifica di una certa teoria, per mettere in relazione una teoria scientifica con i fenomeni empirici, è necessario che, prima della ricerca empirica, siano adottate tutta una serie di decisioni preliminari tra gli scienziati; che siano adottati convenzionalmente – ancorché implicitamente – gli assiomi relativi al quadro teorico entro il quale muovere la ricerca, alla determinazione del campo da descrivere (cioè alla



This renewed consciousness is the basis of the reappraisal of the argumentative techniques of the rhetoric, not only in the human sciences, but in those of scientific character as well ⁸⁸.

*selezione, tra i dati osservati, di quelli idonei a essere assunti a base di una generalizzazione e di quelli inidonei), al metodo di osservazione dei dati empirici, ai criteri di valutazione del grado di attendibilità di tali dati, alla determinazione del grado di probabilità iniziale della ipotesi, etc. Sono tutte queste decisioni preliminari a porre le basi perché la relazione «fatti empirici – teoria scientifica» possa essere instaurata. Si è riconosciuto, perciò, che nel mondo scientifico, come in qualsiasi altro campo, ogni dialogo, ogni argomentare, presuppone una cornice di premesse, un insieme di fattori ammessi convenzionalmente, una serie di assunzioni semplificanti, «idealizzanti», che limitano la capacità degli enunciati fattuali di rappresentare la realtà empirica «per quella che è» e ne consentono invece solo una rappresentazione per così dire «caricaturale». Ne deriva, non solo che possono darsi rappresentazioni alternative dello stesso dato empirico quando muti il quadro di riferimento teorico, ma anche che, quando si tratta di decidere quale sia la teoria scientifica (c.d. «teoria esplicativa») più controllata empiricamente tra due diverse, può farsi riferimento all'esito del controllo empirico soltanto quando le due teorie si collocano all'interno dello stesso quadro teorico presupposto (c.d. «teoria interpretativa»); se, invece, le due teorie scientifiche sono associate a presupposti teorici diversi, è chiaro che la scelta implica una opzione teorica a monte, che non può essere compiuta solo sul piano empirico» (L. LOMBARDO, *La scienza e il giudice nella ricostruzione del fatto*, Riv. Dir. Proc. 2007, p. 39-40).*

⁸⁸ L. LOMBARDO, *La scienza e il giudice nella ricostruzione del fatto*, Riv. Dir. Proc., 2007, p. 41, testo e nota 27, dove i richiami a KUHN, *La struttura delle rivoluzioni scientifiche* (1962), 4° ed., trad. it., Torino 1978; PLEBE EMANUELE, *Manuale di retorica*, Roma – Bari 1988; PERA, *Scienza e retorica*, Roma – Bari 1991, p. 85 ss.; A. GIULIANI, *Il concetto di prova. Contributo alla logica giuridica*, Milano 1961; Id., voce *Logica del diritto*: b) *Teoria dell'argomentazione*, Enc. Dir., Milano 1975, 13 ss.; F. CAVALLA, *A proposito della ricerca della verità nel processo*, in *Verifiche*, 1984, p. 469 ss.; ID. *La prospettiva processuale del diritto. Saggio sul pensiero di Enrico Opocher*, Padova, 1991.