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Comparative Historical Reasoning on the Fair Trial Guarantee of the ECHR

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1. Introduction

One of the most familiar tenets in modern law is the right to a fair trial.[1] For this, Art. 6 of the European Convention on Human Rights (ECHR) guarantees a fair hearing "by an independent, impartial tribunal established by law."[2] Examining representative court histories throughout Europe reveals the idea of the legally competent judge to have evolved far earlier than the liberal idea of the rule of law, together with nuanced involvements of the inner and outer court sphere. Should lawyers understand the protective rationale of the fair trial guarantee in Art. 6 Section 1 Sentence 1 ECHR on the basis of historical findings? What is history's legitimation for the Convention's interpretation?

2. Specific Challenges and Profits of Legal Historical Comparisons

The Preamble of the ECHR explicitly refers to the European states as "likeminded and hav[ing] a common heritage of political traditions, ideals, freedom and the rule of law". The Conventional organs could regularly be heard to refer to the 'common heritage' of European court history, designating the institutionalization of rule-based dispute settlement.[3] 'Common heritage',

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[1] Parts of the following contribution are inspired by the third part of the author's monograph *Reason and Fairness: Constituting Justice in Europe, from Medieval Canon Law to ECHR*, "Legal History Library", Vol 27, Leiden 2019, p. 472ff., p. 501ff. For Art. 6 ECHR lastly M. Sunnqvist, *Impartiality and Independence of Judges: The Development in European Case Law*, in *Nordic Journal of European Law*, 5-1/2022, p. 67ff.

[2] The official English (and French) version of Art. 6 Section 1 Sentence 1 ECHR guarantees that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." (*Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle*).

[3] Cf. ECtHR 9 October 1979 (*Airey v. Ireland*) 6289/73 32-A, 12-13, para. 24: "[the] Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective"; ECtHR 25 April 1978 (*Tyrer v. The United Kingdom*) 5856/72, 31 26-A, para. 30: "the Convention is a living instrument", i.e. the interpretation has to take into account the respective circumstances of the time.

nevertheless, does not allow the comparison of historical traditions as such, regardless of their juridical contexts.[4] Too many superficial similarities are tempting 'false friends'. Even the ideas of judges and justice differ widely between different legal systems, as a mere cursory glance at France, Great Britain and Germany may illustrate.

As befitting a country that continues to borrow from the revolutionary egalitarian dislike of the *Ancien Régime* privileges of the *gens du robe*, the French are cautious to trust their judges, whereas the British venerate their judges as trustworthy guardians of common law liberties since time immemorial. The Germans, on the other hand, seem to trust their judges through the proxy of regulation; reliance is placed on the inner court abstract-general predictability of the legal process that is intended to guide judges to a correctly rendered decision. In addition, French arguments on justice tend towards philosophical rather than legal categories, English lawyers use procedural technicalities to pursue substantive justice, and the German discourse about justice is so heavily influenced by the twenty century nightmares that an assiduous eagerness to avoid any legal return of National Socialist unjustice outshines the relevance of earlier centuries to the current legal understanding.[5]

The appropriate comparative level for recognizing the 'common heritage' has to look behind the scenes. The appropriate comparative tools are the historic *protective rationales.* For the fair trial guarantee in Art. 6 ECHR, this means as follows: protective rationales of legal instruments and institutions can be recognised in conflicts, in protests and resistance against injustices. If one compares the confrontations and clashes in the judicial histories of France, Britain, and Germany throughout the centuries, one underlying theme was a common protest against extraordinary courts and *ad hoc* judicial commissions. The linkage between ordinary competences and legal adherence of the judicial decision-making is a common given in all procedural codes, following the canon law complementarity between procedural and substantive justness. The legally competent judge was raised as plea against any interferences with the outcome of the trial through the *ad hoc* allocation of cases or impositions of particular judges. Ordinary judicial competences stood not only for institutional independence of the judiciary, but especially for the predictability of the decision adhering only to the rules of the law. Any abrogation of ordinary procedural legal competence was to be feared for opening the gates to arbitrary intervention in the courts. This arbitrariness was chiefly expressed through the person of the commissioner as extraordinary judge, be it in front of the English prerogative courts, the French judicial commissions, or the German Federal Central Authority against demagogues, who assumed the authority to make individual decisions by circumventing the binding character of legal rules or statutes.

This protective rationale of the court established by law-element of Art. 6 ECHR has medieval roots, down to the Medieval Canon *ordo iudiciarius* as Common Cradle of European Procedural Laws and Court Organization.

2.1. The Equation of 'fair' and 'legal' and 'rational' in the Medieval Canon ordinabiliter habitum

Since the medieval canon determination that only a judgement *ordinabiliter habitum* is held as judgement, the equation of 'fair' and 'legal' and the equation of 'legal' and 'rational' are integral components of European ideas of justice. The medieval canon procedural code, the *ordo iudiciarius*, occasionally known as *ordo constituendi iudicium* or *ordo iudicii*, provoked the understanding of procedural requirements as the parties' defence against unjust judgement. The result of this was a revolutionary turn that removed 'fair attitude' from the sphere of pure ethics and brought it under rationally determinable legal categories. The forging together of judicial competences with

[4] Cf. recently H. Mohnhaupt, *Reisen, vergleichen, erkennen. Zu Praktiken juristischer Erkenntnis durch Komparatistik*, in "Festschrift für Thomas Simon zum 65. Geburtstag. Land, Policey, Verfassung", edited by G. Kohl, C. Neschwara̧, T. Olechowski, J. Pauser, l. Reiter-Zatloukal, M. Vec, Wien 2020, p. 191ff.

[5] Cf. the recent discussions about natural law in Gustav Radbruch, "Erwiderungen", in *JZ*, 2017, pp. 451-62. Instructive in this regard, J. Rückert, *Unrecht durch Recht*, Tübingen 2018, reviewed by U. Müßig in *Giornale di Storia costituzionale* 43-2/2022.

procedural rationality and its related complementarity of procedural and substantive justice laid the foundation for the 'rule of law' practice in Renaissance Europe, far earlier than the advent of liberal constitutionalism of the nineteenth century. On the shattered European continent devastated by the religious clashes of the Reformation period, the regularities of ordinary judicial competences became indispensable. More than ever before, the parties' trust in justice not only done but seen to be done relied on the consistent application of court competences.

How did procedural requirements and their core element, the judicial competence, become legally binding rules? When did they start to matter for the judicial decision-making process in substance? As early as the sixth century, the papal letter of Gregory I, adopted as C.2 q.1 c.7. in Gratian's *Decretum*, set the path for understanding procedural requirements as legal defences. The *ipso iure* nullity for the verdict by a non-competent judge, formulated therein,[6] was disseminated as a consequence of the success of Gratian's *concordia discordantium canonum* within a legal church (*Rechtskirche*) emerging as global player in the twelfth century. Judicial competences became central for the establishment of papal authority by means of jurisdiction: first, the expansion of clerical jurisdiction *ratione rerum* or *ratione personarum* and the introduction of the Roman rescript trial led the papal powerhouse into rivalry with secular holders of judicial sovereignty. Second, the *privilegium fori*, the privileged access to clerical jurisdiction,[7] played a crucial political role in the power struggle over episcopal appointments during the Investiture Controversy. Tying legal consequences to the breach of judicial competences (nullity of the verdict by a non-competent judge) marked a transition beyond the mere territorial legistic conception of jurisdiction. The legal definition of the imperial majesty as supreme jurisdiction in a given realm (*majestas est summa jurisdictio in suo territorio*) at Roncaglia in 1158 still relied on this territorial idea. The fact that the distinctiveness of the imperial majesty has been explained by means of the law is what really mattered for a common European heritage.

The legal definition of imperial authority as supreme jurisdiction within a territory was inspired by the jurisdictional power of the medieval papacy, which had legally harmonized the entire Church structure through the medium of decretals. As law itself was never at the disposal of the sovereign – whether this sovereign was the pope, the emperor, or any king – jurisdiction (and especially *supreme* jurisdiction) seemed to be the gateway to rule over the law. This made jurisdiction, courts' business, judicial competences, and access to court a core element of the rulers' efforts to concentrating power in their hands. Within this story of courts and competences, the canonists' terminology of 'appropriate court' (*forum proprium*) and 'his judge' (*suus iudex*) in the *ordines iudiciarii* beginning with Étienne de Tournai up to Hostiensis had a very special impact. They pushed the European-wide rise of courts towards a legal obligatory system of delineated jurisdictions, not by attaching the jurisdiction to the attributes of the judge, but to the attributes of the person who sought justice; that is, the privileged status of the cleric. Not long afterwards, the *liber extra* affirmed in X 2.1.4 judicial competence as the core element of procedural justness: any secular judgement against a cleric was void.

The decisive legal move by means of papal decretals, whereby judicial competences started to have an impact on the judicial decision process in substance, came with Pope Innocent's III decretal. Adopted in the *Liber Extra* as X 1.4.3., this papal letter to the bishop Wolfger of Passau declared unlearned adjudicators to be non-competent judges, thereby voiding their verdicts. This ban of the institutional dualism of judge and adjudicator for all clerical jurisdiction gave birth to the later *iura novit curia*, which was to cross the Alps in the form of the learned *utriumque ius*, as consolidated by the commentating masterminds of the fourteenth century, Bartolus de Sassoferrata and Baldus de Ubaldis. Key to this was the 'Triad' within the canon law commentaries (Liber Extra X 1.4.3, X 2.1.4 and Gratian Decretum C.2 q.1 c.7), the importance of which this monograph has revealed for the first time. The decretalist annotations to the papal decretal, addressed first to Wolfger of Passau and then

[6] As *ex tunc,* C. 2 q. 1 c. 7. § 9.
[7] C. 11 q.1 c. 49.

adopted as universal rule in X 1.4.3, forged the need for procedural correctness (C.2 q.1 c.7) together with the nullity of judgements due to the lack of judicial competence (X 2.1.4).

This laid the groundwork for the complementarity of procedural (*iustitia ex ordine*) and substantive justice (*iustitia ex animo*) as accepted medieval legal knowledge. As soon as the ordinary judge in clerical courts discharged the unlearned jurors (X 1.4.3) and assumed the role of self-adjudicating scholarly judge (*selbsturteilender Richter*), he and he alone represented the connection between obedience to the legal procedural order and the submission of the substantive decision-making process only to the law. The consolidation of the Triad (X 1.4.3, X 2.1.4 and C.2 q.1 c.7) between *Glossa ordinaria* and *Speculum iudiciale* mirrowed the rise of the episcopal judicial alter ego (*officialis*) as the first professional jurist to come into existence, proliferating learned standards of decision-making, according to Roman-canonical law at the procedural level and to canonical law at the substantive level, while referring to Roman law in a subsidiary capacity. His self-adjudicating competence, built upon legal training, was the vehicle for an early church-wide pre-reception of learned law and the triumph of written forms of procedure. All over Europe, the emergence of ordinary judges is a phenomenon since the thirteenth century.

A 'new' legal certainty resulted from this development, contrasting with the political dependency of feudal counsellors. Legal certainty – the idea that certainty can be created by law if law is based on logical and comprehensible rationales – exists at the heart of the European idea(l) of judicial justice, whereby fair is legal is rational, in the same way that just is ordinary is scholarly.

Further protective rationales of ordinary judicial competences have been forged in later centuries. Against the absolutist commitment to streamline the administration of justice another protective rationale of the fair trial guarantee emerged: the functional independence of ordinary judges.

2.2. Functional Independence vs. Subjection to Instructions

Since the early days of the central state and early French absolutism, royal commissioners – precursors to the intendants of the *Ancien Régime* – were ordered to circumvent and eliminate any non-monarchical (especially noble) influence on the judiciary, as was present in the feudal and peers' courts. As was the case with the *chambres de justice* against the Huguenots during the sixteenth century, these commissions were called upon on an *ad hoc* basis to preside over particular cases, tasked with obtaining a specific outcome. Moreover, they were most often composed of the political enemies of the defendant. Their direct assignment by virtue of monarchical judicial sovereignty (in the *lettre patente de commission*) interfered with the ordinary competences of the estate-administered judgeships. The extraordinary commissions, specifically tailored to and dependent on royal instructions, were therefore an embodiment of the political will of the monarch to streamline justice towards himself. They clashed with the well-acquired rights concerning judicial offices, which in Bodin's words were 'held [by the ranks] as possession and ownership',[8] by noble, clerical, and bourgeois autonomies.

On the contrary, the ordinary judicial office provided any holder whosoever with functional independence by means of legally described and predetermined competences. The latter were not open to arbitrary disposition by the sovereign. Therefore, Ordinary judicial offices were independent from the will of the sovereign.

What lay at the heart of the judicial officers' independence from the will of the sovereign was the law. Wilful legislation could result in the sovereign using his power to deliver an unjust order. By distinguishing law as an expression of equity (*droit*) from law as an order of the sovereign using power (*loi*), the secular and denominationally indifferent sovereignty concept of Bodin managed to fill the legitimatory gap. The 'godlike' category to have mercy, which equity stands for, resulted in a kind of 're-baptized' human legislation. Natural and divine law (*droit*) added an essential aspect to the

[8] J. Bodin, *République*, liv. I chap. VIII, 157. Furthermore, Bodin relates the independence of the judicial office to a 'borrowed thing' (*chose empruntée*). J. Bodin, *République*, liv. III chap. II, 378.

history of ordinary competences as one of Europe's founding stories: even if he were able and powerful enough to interfere with the order of competences (*ordre judiciaire*), the sovereign should not do so. 'If not justified by a just and reasonable cause', such an infringement would be against natural and divine law (*droit*).[9] Transforming the former theological derivation of human law from the godly provenance of governance into the secularized context of early absolutism, the political dualism between the estate classes (*États*) and the crown mirrored the natural order of the social strata of clergy, nobility, and commoners, the origins of which could not be derived from the crown, especially given the nucleus of the royal domain in the Île de France. It was therefore perfectly obvious that there was a need to find natural law arguments for the existence of the ranks and their well-established rights to judicial offices (as Bodin has anticipated). An unintended consequence of this natural law argumentation was that it happened to fill in the transcendental gap due to secularly defined sovereignty as wilful lawmaking authority. In other words, if -- as Bodin had argued -- monarchical sovereignty is defined legally as being the supreme legislative power, this in turn serves as a substitute for the discredited sacral legitimization of kings. Equitable and natural legal limits on monarchical judicial sovereignty motivated the class protest against monarchical centralization via judicial commissioners as common theme of the *ordonnances* from the fifteenth century onwards.

Both argumentative lines against the monarchical judicial commissions fall together in the specific French terminology of the 'natural judge' (*juge naturel*). The legally determined judicial office is equated with the protective role of the natural judge as an emanation of the natural law. This included the further protective aspect of local accessibility of justice within the local entities, where even the most absolutist ruler was dependent from the cooperation of noble power elites. The natural judge was the the judge competent as entrusted by the local noblemen. Consequently, through its focus on the natural judge, French judicial history between the fifteenth and seventeenth centuries throws a new light on the fact that French absolutism was not as truly absolute as it is commonly assumed.[10]

Further on, the genesis of the functional independence of common law courts varies from the French foundations, but the protective rationale of the Common Law Reasonableness as the 'Law of the Land Itself' coincides with the continental strives for functional independence due to judicial professionalization.

2.3. The Linguistic Congruency of Law and Reason

Under the Tudor monarchs and, later, the Stuarts, the instrumentalization of the Star Chamber and Court of High Commission in line with the vested interests of monarchical power matched the national ecclesiastical affirmation of unlimited superiority and independence from Rome. Due to their commission system and monarchical encroachments on their trials, the legitimacy of the decisions rendered by the Star Chamber or High Commission were both questioned by lawyers, and held suspect by the public at large, owing to being directly dependent on the will of the monarch and adhering to royal proclamations as their extra-legal basis, beyond common law and statute. Both prerogative courts became synonymous terms for judicial arbitrariness and were therefore abolished upon the advent of the Long Parliament in 1641. The control of these prerogative courts by means of extraordinary appeals (prerogative writs) channelled the common law-opposition against the Stuart absolutism. The supremacy of the common law (supremacy of law), much like the arguments brought forth by the estates and the *parlements* in France, subverted an absolute monarchical prerogative. Similarly, Locke's natural law of justice laid down in the two treatises of government is justified by natural law, only the argumentations of what constituted nature diverged. English judges adjudicate in accordance with the law of the land, as they are bound by their oaths. With their professional self-confidence as common law judges – a confidence further bolstered by the common law's authority as

[9] J. Bodin, *République*, liv. I chap. VIII, 155-7.
[10] U. Müßig, 'Absolutism', in S. N. Katz (ed.), *The Oxford International Encyclopedia of Legal History*, Oxford/New York u.a. 2009, 6-9.

custom since time immemorial, and a sworn obligation to adhere to the common law and its old liberties – judges could find the strength to perform the duties of their office. This was even the case when these judges found themselves under monarchical pressure, such as experienced by Sir Edward Coke and his fellow judicial 'combatants' in their intractable struggles with Lord Chancellor Ellesmere.

What is to be found at the heart of the prerogative writs of the Court of King's Bench is the claim that the royal prerogative had to respect the common law. What does this mean? Is there a continuation between the Bractonian law that "makes the king"[11] and the Lockean "Fundamental Law of Nature and Government" as the basis to decide on the public good?

Uniquely for the English case, the common law judges' competences to deliver judgement in accord with the law of the land went without any theoretical justification beyond the reasonableness of the precedents or the common law as a whole, in other words the law of the land itself. This comes to the heart of the reason conception of common law. Continental legal thinking assumed the obligation of human law to rest on reason or justice. The fear that men could not agree on what was reasonable or just motivated the increasing trust in the authority of the lawmaker rather than relying on the reason or justice imminent to the law. Unlike the continental hierarchisation of law shifted towards authority, the English relied continuously on the linguistic congruency between law and reason since the earliest case law journals (the so-called year books from the thirteenth century onwards). The Norman legal terminology that utilized Latin and ancient French already formulated the linguistic equation of the law (*ley = law*) and reason (*reason, resoun*). In *Mandeville's Travels* of the fourteenth century, or a century later in *The Folower to the Donet*, 'reason' and 'justice' appeared synonymously. Flowing into Coke's terminology of 'artificial reason', guiding his argumentation in the *Prohibitions del Roy* (1607),[12] English lawyers discussed the natural obligation of their law without worrying that they might thereby undermine its obligation or their judges' duty to decide in accordance with it: the legitimation of the common law by means of judicial reasonableness corresponds to the authority of the general custom developed and amended through the ages.

By declaring 'artificial reason' as the collective judicial knowledge English judges simultaneously defended their distinctive law and more systematically aligned it with a general conception. From this point on, the rule of law could only be the rule of *common* law, irreversible after the 1689 constitutionalization of the Lockean "paramount law", which reaffirmed the justice substance of common law liberties. The opposition between common law, which defended liberty, and prerogative, which provided for monarchical discretion, is fundamental to Locke's differentiation between legislative and executive power. During the clashes with the prerogative courts, common law judges ordinarily assumed that they served the function of protecting the common law liberties by doing their duty – by deciding the cases, namely the *Prohibitions del Roy* (1607), the *Case of Proclamations* (1611) and the *Case of the Five Knights* (1627) in accordance with the law of the land. All these leading cases revolved around the royal prerogative's adherence to the law and the monarch's exclusion from the personal exercise of the judicial power. The mastermind of the common law judges, Sir Edward Coke, justified the precedence of common law over the monarchical prerogative with the differentiation between 'natural reason' of human beings (including the monarch) and 'artificial reason' (of the common law judges only, excluding the monarch). From this, Coke developed the supremacy of law. This held royal power, on principle, subject to the law, with discretion being the exception. The detailed analysis of Coke's argumentation in *Prohibitions del Roy*, to deny the monarch the personal use of the judicial sovereignty, makes it obvious that Coke considered the judges' duty as a near-godlike service of the common good and welfare. The king may in principle not adjudicate directly by himself or by means of a dependent commissioner but may only grant justice through the common law judges as ordinary judges, because the latter were able to serve the common good as condensed in

[11] H. Bracton, *De Legibus et Consuetudinibus Angliae*, vol. II, *Rex non habet parem*.

[12] "are not to be decided by natural reason but by artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it": *Prohibitions del Roy* (1607, Mich. 5 Jacobi 1) 12 Co.Rep. 64, 77 ER 1343, *per* Edward Coke, *C.J.*

the collective wisdom of precedence since time immemorial; such a judicial standing combines the human category 'law of the land' with a divine-alike obligation and justification. Thereby the judicial duty to decide in accordance with human law enjoyed an authority that stood far above what could ordinarily be attributed to intellectual human mechanisms. Judges thus could find in their duty a combination of the human and the divine that allowed them to do what would otherwise seem improbable – not least when they bar the monarch from exercising directly his judicial sovereignty.

The artificial reason of the common law – the superiority of the collective judicial wisdom to handle writs, precedents, and the technicalities in proceedings – was the platform to develop the prerogative's legal restriction in 1689. In *Prohibitions del Roy*, Coke justified the precedence of law over the monarchical prerogative by the technical reason of law, 'which requires long study and experience, before that a man can attain to the cognizance of it.' His argumentation aimed at proving that legal professionalization was a vehicle for the independence of courts. Thus justified, the subjection of the judicial sovereignty and all prerogative courts under the law, together with the particularity of the common law, held its ground against any academic style rationality of legal reasoning and judicial statements as usual in Continental court systems.

In addition, a specific line of historical foundations of judicial functional independence can be found in the German connection between professionalism in law and territorial consolidation of the principalities, the later *Länder*. This has been accompanied by the peculiarity of the enlightened German absolutism in the territories, that the whole political order was alleged to be axiomatically derived from monarchical sovereignty.

2.4.. More Legal Intellectualism, more Justice

In the *Reich*, law and prerogative were on a different playing field from that of the English and French monarchies. While the English followed a path of centralization, first and foremost realized in law courts emerging in the corners of Westminster, and the French agglomerated royal power via judicial commissions, the German imperial power never had the chance to establish effective centralization by means of jurisdiction. Rather, the rivalry of imperial and territorial jurisdictions was the decisive conflict line. This 'fight over appellate jurisdiction' in front of the Imperial Chamber Court points to another aspect to the history of ordinary competences and of their functionality as one of Europe's founding stories: the impact of (academic) intellectualization. Intellectualization in the German legal scholarship of the sixteenth and seventeenth century is more than legal professionalism exercised by learned judges. The latter's university training to apply written law in a logical interpretative manner has overcome the oral customary law finding experience of unlearned *Schöffen* whose adjudicating authority was only based on their social authority in local societies. The intellectualization (beyond legal professionalism) meant the very specific coordination of the rationality (*ratio*) of law and (princely) sovereignty (*auctoritas*) not only by the practitioners of the *usus modernus* of the learned law (*pandectarum*), but especially by the adepts of natural religion (Pufendorf, Thomasius, and particularly Christian Wolff).

This coincided with the parallelism between the German triumph of legal professionalism and the rise of the territorial princely states. As opposed to its English and French counterparts, the state formation in seventeenth-century Germany succeeded at the level of the territories, and the princely state emerged with the consolidation of territorial judicial sovereignty after 1648. The strive for jurisdictional unity in German territories motivated the earliest German statements of 'the stracke Lauff der Justiz'. The reaffirmation of the appellate privileges in the *Instrumentum pacis osnaburgensis*[13] sought the perfection of the territorial sovereignty against the imperial confederation (*Reichsverband*). The defence mechanism against interferences from the imperial courts (Imperial Chamber Court, Aulic Chamber) propelled the centralization of the territorial judicial administration.

[13] Article V § 56 IPO, *Sammlung der Reichs-Abschiede*, part III, 589.

Within this context of the yet-to-be-streamlined territorial jurisdiction and the yet-to-be-established territorial administration, the function of the legally trained princely advisors was not to question the territorial sovereignty, but to vindicate it by relentless deduction of all rights as dependent on the sovereign's (enlightened) will.

The German struggle for the legally competent judge proved to be more a question of state organization than of justice; treatises over jurisdictional conflicts dealt with the validity of territorial exemptions or appeal privileges, and judicial competences were not analyzed in relation to the status, quality, or rank of people seeking justice. Such an academic objectivity analyzes appellate privileges not in regard to any intention to protect the competences of the individual judge or a person's right to gain access to that judge. It only concentrates on the preservation of the territorial jurisdiction against attacks from the imperial level. The permanent jurisdictional conflicts between imperial courts' competences and the territories' quest for autonomy for their courts made the courts' organization a core element of the establishment of the absolutist territorial state. In such a competitive context, judicial administration was central to political survival for territories within the *Reich*; it was not seen simply as a question of justice to be done and seen to be done. Rather, the 'German' ordinary judge was discussed as an objective matter of the state theory, not as an individual request for justice. This leads to the Germans' acknowledgement of legal intellectualism, but leaves them without any legal patriotism. Whereas an English citizen regarded and regards 'his or her' common law as part of the common heritage, the German contemporary saw (and may still see) the intellectual gains of legal scholars as something rather unrelated to him, to which he or she refers either trustingly or *nolens volens*.

The architect of the legal intellectualism by comprehensive legal derivations was Christian Wolff, for whom estate judicial rights only existed as *Freyheitsbegnadigungen* ('acts of grace and liberty') that could be revoked at any time. [14] Such a naming as privileges due to grace and liberty allows rights only as derivated, which means only granted ones, excluding any a priori existence of rights. Rules of natural law were to be construed as statements about the duties of man and citizen; territorial prince and subject were related by reciprocal duties 'for the advancement of the common good and the happiness of the subject'.[15] Far beyond the general principles of Grotius and Pufendorf, Wolff's doctrine of duties 'invited' natural morality into positive legislation for the sake of the compactly structured society, as of the later General Prussian Code. From Wolff's moral philosophy onwards, the estate rights of judicial offices could not exist as inherently guaranteed, but only as dependent on the will of the ruler. Accordingly, ordinary judicial competences never gained or lost any independence against the overall claim for power by the absolute sovereign. Rather, the judges were held to be the "arbitrators appointed by the overlord."[16] The very title of the Wolffian *Jus naturae methodo scientifica pertractatum* indicates his *more geometrico* anchoring of law in the closed system of strict deduction from higher axioms. The *Begriffsjuriprudenz*[17] that this godfathered is the peak of intellectualization through the nineteenth century pandectists, from Puchta via Windscheid to Andreas von Thur, author of the *Allgemeiner Teil* of the German Private Law (BGB). Though often criticized, the *Begriffsjurisprudenz* set the German path for constitutional positivism. It was the logical application of abstract principles and general concepts that offered the 'code' for the Enlightened absolutist subjection of the territorial sovereign's will to the natural law, effectuated by

[14] S. von Pufendorf, *De jure naturae et gentium libri octo* (1744) lib. 3, cap. 2, § 9; C. Wolff, *Grundsätze des Natur- und Völkerrechts worin alle Verbindlichkeiten und alle Rechte aus der Natur des Menschen in einem beständigen Zusammenhange hergeleitet werden* (1754, reprint Scriptor 1980) § 1047; Id., *Jus naturae methodo scientifica pertractatum* (1764) part 8, § 873.

[15] C. Wolff, *Vernünftige Gedanken von dem gesellschaftlichen Leben der Menschen und insonderheit dem gemeinen Wesen "Deutsche Politik"*, ed. Hasso Hofmann (C H Beck 2004) §230, §232, 180-1.

[16] C. Wolff, *Grundsätze*, cit., § 1029, pp. 741-2.

[17] The name was coined by Rudolph von Jhering in his *Scherz und Ernst in der Jurisprudenz. Eine Weihnachtsgabe* (Breitkopf und Härtel 1884) 337 – reprinted as R. von Jhering, *Scherz und Ernst in der Jurisprudenz*, ed. Max Leitner (Linde 2009). Cf. in general Jan Schröder, 'Begriffsjurisprudenz', in Erler and Kaufmann (eds), *Handwörterbuch zur deutschen Rechtsgeschichte* vol. I, Col. 500–2.

legislation as the reason-based normative telos.[18] The modern German trust in the abstract general predetermination of adjudicating (including substituting) judges would not be explainable without such an intellectualization of the 'nature' of a right. The same is true for the sleepwalking blindness 1933, that the purely theoretical order for application of law 'allowed' the Nazi catastrophe to cloak itself in a lawful vesture.[19] The ambiguity of understanding justice to be positively blind has been realised in the most terrible way and there was nothing that the programmatic Article 105 of the Imperial Constitution of 11 August 1919 could do against it.

The ECHR is part of the post war sensibility to 'make [this] not only unthinkable but materially impossible'[20] – both on the national and the supranational level. The ECHR guarantees read as normative solutions to concrete problems[21] correspond in this aspect with the foundations of justice as the virtuous, fair, and rightful behaviour towards other human beings – a common thread extending between the philosophies of Aristotle all the way to Kant.[22]

3. Interpreting the Convention and its Art. 6 according to the Legal Historical Findings

3.1. What does 'established by law' in Art. 6 ECHR mean?

a. What matters for 'established by law' is where the rule establishing the court originates from, the form it has, as well as its disclosure. Taking into account the common heritage of the antonym 'ordinary judge' and 'commissioner', parliamentary statutes represent the abstract and general predetermination in contrast to *ad hoc* arbitrary case-by-case treatment,[23] and therefore fall undisputedly within the term 'law' in the conventional sense.[24]

b. With regard to the preeminent estate idea of the extra-statutory justice of natural law, intrinsic to all French calls for the natural judge until 1848, it is questionable whether the historic comparison allows the treaty-autonomous and uniform interpretation to comprise executive orders within the term 'law' of Art. 6 ECHR.[25] It was the repetitive antonymy with the commissioner that still formed

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[18] This enabled the shift from doctrine based on authority to doctrine based on reason.

[19] D. Willoweit, *Deutsche Verfassungsgeschichte,* p. 339ff., recitals 10 and 11.

[20] Schuman Declaration, 9 May 1950.

[21] H.-J. Cremer, *Regeln der Konventionsinterpretation*, in O. Dörr, R. Grote, and T. Marauhn (eds.), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, Tübingen 2013, vol. I, Kapitel 1-19, p. 220.

[22] Aristotle, *Nicomachean Ethics*, Book II, chap. 7, 1107a, 142: "We must, however, not only make this general statement, but also apply it to the individual facts. For among statements about conduct those which are general apply more widely, but those which are particular are more genuine, since conduct has to do with individual cases, and our statements must harmonize with the facts in these cases." Kant, *Metaphysische Anfangsgründe* 30: "Right is therefore the sum of the conditions under which the choice of one can be united with the choice of one can be united with the choice of another in accordance with a universal law of freedom." Cf. also the English translation: Kant, *The Metaphysics of Morals*, p. 24.

[23] M. Kloepfer, *Der Vorbehalt des Gesetzes im Wandel*, in *JZ*, 1984, p. 694; F. Rottmann, *Der Vorbehalt des Gesetzes und die grundrechtlichen Gesetzesvorbehalte*, in *EuGRZ*, 1985, p. 294; Inter-American Court of Human Rights, Advisory Opinion OC-6/86 of 9 May 1986, "The word 'laws' in article 30 of the American Convention on Human Rights", para. 22.

[24] ECtHR 7 December 1976 (*Handyside v. The United Kingdom*) 5493/72, 24-A, 21, para. 44: the basis of intervention was the *Obscene Publications Act 1959/1964*. ECtHR 6 September 1978 (*Klass and others v. Federal Republic of Germany*) 5029/71, 28-A, 22, para. 43: subject of the complaint was the so-called 'G 10 Act' regarding restrictions on the secrecy of correspondence. ECtHR 2 August 1984 (*Malone* v. *The United Kingdom*) 8691/79 82-A, 15, para. 29: basis of intervention was the *Post Office Act 1969*. ECtHR 21 February 1986 (*James and others v. The United Kingdom*) 8793/79 98-A, 21, para. 19: basis of intervention was the *Leasehold Reform Act 1967*. ECtHR 8 July 1986 (*Lithgow and others v. The United Kingdom*) 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, 102-A, 13, para. 9: basis of intervention was the *Aircraft and Shipbuilding Industries Act 1977*. ECtHR 24 October 1986 (*AGOSI v. The United Kingdom*) 9118/80, 108-A, 9, para. 16: *Customs and Excise Act 1952*. ECtHR 24 May 1988 (*Müller and others v. Switzerland*) 10737/84 133-A, 15-16, para. 20: Swiss Criminal Code. ECtHR 25 March 1985 (*Barthold* v. *Federal Republic of Germany*) 8734/79, 90-A, 21, para. 46: *Hamburger Tierärztekammergesetz*.

[25] H. Guradze, *Die Europäische Menschenrechtskonvention: Kommentar*, München, 1986, pp. 26, 117; H.-U. Evers, *Der Schutz des Privatlebens und das Grundrecht auf Datenschutz in Österreich*, in *EuGRZ* 1984, p. 287; U. Hoffmann-Remy, *Grundrechtseinschränkung* 39; I. L. Bosshard, *Die Meinungsäußerungsfreiheit gemäß Art. 10 EMRK unter Berücksichtigung der*

the judge "which the law assigned" in the republican constitutions, without reflecting any change of meaning in the law as legislative product of equal participation as opposed to executive orders. In England, the concept of immortality, which held common law to be unalterable as an ancient body of law, took precedence over the royal prerogative, thereby establishing the legal adherence of the prerogative the rule and the discretion of the prerogative the exception. The common law courts' protection from monarchical interferences was not based on the institutionalization of a granting of the law but on the general consensus of early times. Thus, the common protective rationale could not comprise the granting of certain courts for those seeking justice but the legal ban for the prerogative not to arbitrarily set-up extraordinary courts. For the German legal reservation in court administration arbitrary courts are not only set up from outside the judiciary. Any inner court irregularities of the allocation of cases and the composition of benches may amount to an attackable lack of judicial competence.

Comparing not the configuration of the guarantees as such, but looking at their protective rationale, all historical examples were orientated to exclude arbitrariness. As long as there was no direct legislative right of the executive power, but rather a precise statutory authorization, executive orders fall within the term 'law' of Art. 6 ECHR.[26] This was held by the ECtHR in the cases of *Golder*[27] and *Silver*.[28] Accordingly, a court "established by law" (*par loi*) can also be set up by means of an executive order based on the constitution[29] or a statute.[30] The statutory basis of authorization for executive orders has to be sufficiently precise as to its criteria.[31] This call for certainty of the authorizing statute is a consequence of the ban of arbitrariness.[32] Without authorization in the form of a parliamentary statute or by means of the constitution, the executive power may not – by means of an order – create a court 'established by law' in the sense of Art. 6 Section 1 Sentence 1 ECHR; normative acts of the executive power, enacted without a constitutional or parliamentary legal basis, are not 'law' in the sense of the ECHR and its fair trial guarantee. In both the cases of *Moldavia* (2006) and *Azerbaijan* (2010) the ECtHR repeated the former Commission's statement in *Zand* v. *Austria* (1978)[33] "that the judicial organization in a democratic society does not depend on the discretion of

neueren Entscheide und der neuen Medien, Bruxelles, 1990, p. 104; S. Trechsel, *Die Garantie der persönlichen Freiheit*, in *EuGRZ*, 1980, p. 519.

[26] H. Guradze, *Menschenrechtskonvention*, cit., pp. 26, 117; H.-U., Evers, *Der Schutz des Privatlebens*, cit., p. 287; U. Hoffmann-Remy, *Grundrechtseinschränkung*, cit., p. 39; L. Bosshard, *Meinungsäußerungsfreiheit*, cit., p. 104; S. Trechsel, *Die Garantie der persönlichen Freiheit*, cit., p. 519.

[27] ECtHR 21 February 1975 (*Golder* v. *The United Kingdom*) 4451/70, 18-A, 9 et seq., paras. 17, 21-22, para. 45; ECtHR 25 March 1983 (*Silver and others v. The United Kingdom*) 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 61-A, 12, para. 25.

[28] ECtHR 25 March 1983 (*Silver and others v. The United Kingdom*) 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 61-A.

[29] ECtHR 1 October 1982 (*Piersack v. Belgium*) 8692/79, 53-A, 16, para. 33: Art. 98 of the Constitution of Belgium. ECommHR Report from 2 October 1990 (*Muyldermans v. Belgium*) 12217/86, 214-B, 14 para. 59: Art. 116 of the Constitution of Belgium. ECtHR 23 June 1981 (*Le Compte/Van Leuven/De Meyere v. Belgium*) 6878/75, 7238/75, 6878/75, 7238/75, 43-A, 24, para. 56. ECommHR, Decision from 10 October 1980 (*X. and Y. v. Ireland*), 8299/78, paras. 17ff.

[30] ECommHR, Decision according to the admissibility of the Complaint from 18 March 1963 (*X v. Federal Republic of Germany*) 1216/61, 11 CD 7. ECommHR Report from 12 October 1978 (*Zand*/*Austria*) 7360/76, paras. 69ff.

[31] ECtHR 21 February 1975 (*Golder v. The United Kingdom*) 4451/70, 18-A, 18, paras. 35ff., concerning the *Prison Act 1952*. Another special requirement concerning the transmission of the power to legislate from the Parliament to an executive party has not been formulated by the ECtHR in its case law so far.

[32] ECtHR 26 April 1979 (*Sunday Times* v. *The United Kingdom*) 6538/74 30-A, 31, para. 49; ECtHR 25 March 1983 (*Silver and others v. The United Kingdom*) 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 61-A, 33-34, para. 88; ECtHR 2 August 1984 (*Malone* v. *The United Kingdom*) 8691/79 82-A, 31-32, para. 66; ECtHR 25 March 1985 (*Barthold* v. *Federal Republic of Germany*) 8734/79, 90-A, 21, para. 45; ECtHR 8 July 1986 (*Lithgow and others v. The United Kingdom*) 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, 102-A, 44-45, para. 110; ECtHR 24 March 1988 (*Olsson v. Sweden*) 10465/83, 130-A, 30, para. 61; ECtHR 24 May 1988 (*Müller and others v. Switzerland*) 10737/84 133-A, 20, para. 29; ECtHR 24 September 1992 (*Herczegfalvy v. Austria*) 10533/83, 244-A, 27, para. 89.

[33] ECommHR Report 12 October 1978 (*Zand* v. *Austria*) 7360/76, cit.

the executive, but that it is regulated by law emanating from Parliament."[34] The wording of this ruling, in which it was determined that the statutory authorization of the minister of justice to set up labour courts if needed[35] was compatible with Art. 6 Section 1 Sentence 1 ECHR,[36] is reminiscent of that formulated by Feuerbach in 1830; it also coincides with the rule of law stipulated in the Preamble of the ECHR.

What is at stake by testing the scope of the conventional term of 'law' in Art. 6 ECHR is the confidence that courts enjoy in the public of a democratic society. Therefore, the court criterion 'established by law' is not restricted to statutory provisions that concern the creation and competence of a court but comprises all national provisions which, if violated by the participation of a judge, would render the judgement illegal.[37]

c. Taking into account the common law courts and their historical triad of King's Bench, Exchequer, and Common Pleas being based on custom, it is evident that unwritten customary law may also be sufficient for the 'law' requirement of Art. 6 ECHR. So far, the statutory quality of judge-made law has only been decided by the ECtHR for the British common law.[38] In the case of the *Sunday Times* (1979), the ECtHR justified the statutory quality of the judge-made rule of contempt of court by its inner state-effects on a common law-state.[39] In this instance, the British newspaper *The Sunday Times* was prevented by an injunction issued by Attorney-General Samuel Silkin (later Baron Silkin of Dulwich) from reporting on the origins of the crisis of thalidomide-caused birth defects. This injunction was issued on the grounds that litigation was ongoing, and the planned *Sunday Times* articles would constitute contempt of court; this ignored the fact that other papers had reported similarly without legal consequence, and a debate on the issue had already taken place in Parliament, whose records were available to the public. The initial attempts by the newspaper to have the injunction lifted failed, whereupon the case was escalated to the ECtHR on the grounds that the actions of Silkin and the government breached the right to freedom of expression. A further element of the complaint questioned whether the common law concept of contempt of court had been 'provided by law', in the context of the European Convention of Human Rights. The ECtHR

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[34] ECtHR 11 July 2006 (*Guro v. Moldavia*) 36455/02, para. 34; ECtHR 22 April 2010 (*Fatullaye v. Azerbaijan*) 40984/07, para. 144.

[35] *§ 6 (1) Austrian Statute on Labour Courts*, öBGBl. 1946/170: Labour courts are created by regulation by the Federal Ministry of Justice in accordance with the concerned Federal Ministry as far as necessary. The regulation determines the location and districts of the labour courts. § 2f *Austrian Statute on the Labor and Social Courts* (ASSG), öBGBl (Bundesgesetzblatt österreich), 1985, p. 104.

[36] ECommHR Report of 12 October 1978 (*Zand v. Austrian*) 7360/76, para. 70: "The fact that section 6 (1) of the Austrian Labour Court Act leaves the creation of the individual Labour Courts to delegated legislation of the Minister does not give rise to objection because the scope of the Minister's discretion under the above provision of the Labour Court Act to create these courts 'according to need' *('Nach Bedarf')* is not excessive. As the Government has pointed out this clause implies a certain, albeit vague, limitation of the Minister's discretion by establishing a legal obligation to create a court where there is a local need for it, and to abolish it where such need no longer exists." The statement of the examination by the national Austrian courts follows. Finally, (para. 73), the Report of the Commission negates a violation of Art. 6 Section 1 ECHR: "The Commission therefore is of the opinion that the Salzburg Labour Court has been 'established by law' as required by Article 6 (1) of the Convention."

[37] ECtHR 30 May 2013 (*Zeynalov* v. *Azerbaijan*) 31848/07, paras. 19, 132 in regard to the applicant's complaints that he had not been tried by a 'tribunal established by law', because the term of office of the Yasamal District Court judges had expired prior to his trial, and that, in both sets of criminal proceedings, the domestic courts were not independent from the executive. In recital 138 the Court held that a situation where the same judge examines the questions of both civil liability and criminal liability arising from the same facts does not necessarily affect the judge's impartiality and in paras. 145-6. the Court accepted the extension of a judge's term of office was regulated by a law emanating from Parliament.

[38] ECtHR 26 April 1979 (*Sunday Times* v. *The United Kingdom*) 6538/74 30-A, in EuGRZ, 1979, p. 386; ECtHR 22 October 1981 (*Dudgeon v. The United Kingdom*) 7525/76, 45-A, in *EuGRZ*, 1983, p. 488; *Human Rights Law Journal* (HRLJ), 1981, p. 362; ECtHR 20 November 1989 (*Markt Intern Verlag GmbH & Klaus Beermann v. Federal Republic of Germany*) 10572/83, 165-A.

[39] ECtHR 26 April 1979 (*Sunday Times* v. *The United Kingdom*) 6538/74 30-A, 30, para. 47: "It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not prescribed by law on the sole ground that it is enunciated in legislation: this would deprive a common law-State which is Party to the Convention of the Protection of Art. 10 § 2 and strike at the very roots of that State's legal system."

observed that the word 'law' in the ECHR expression 'provided by law' covered not only statute but also the common law. Its reasoning concentrated on the questioned vagueness of the common law contempt of court; the latter's establishment by precedents was held sufficient in adequate accessibility for citizens and in foreseeability, disregarding the Law Lords ultimately applying different principles but arriving at the same result. Though the ECtHR ultimately found in favour of the *Sunday Times* with reference to freedom of speech, its ruling also affirmed that British common law was situated within the European conception of law as a whole.

The *ratio decidendi* of the leading decision *Sunday Times,* though, does not allow for generalizations. The ECtHR did not refer to judge-made law in general but used the terminology of common law throughout. Furthermore, the judgement did not contain any elaborations on the question of whether the judge made law of the common law provided a legal basis for an interference into the ECHR guarantees. Moreover, the *non liquet* of the Commission in the case *Rassemblement jurassien* was an argument against the generalizing acknowledgement of judge-made law (including that of continental Europe) as law as intended under the ECHR. It explicitly deemed an answer unnecessary to the question whether a measure based on an undisputed case law principle had a legal basis of intervention.[40] Rather, the convention bodies of the old controlling mechanism seemed to be of the opinion that the acknowledgement of the law quality of the common law as it could be found in the *Sunday Times* judgement was not be extended to the continental European judge-made law.[41] This split assessment of judge-made law in common law and civil law jurisdictions challenges the treaty-autonomous understanding. Nevertheless, it can be found in all ECHR guarantees. This is due to the constitutional traditions of Great Britain; Parliamentary sovereignty, which developed from the court conception of Parliament, does not prevent the qualification of English judge-made law as 'law' in the ECHR. Hence, in the context of Art. 6 Section 1 Sentence 1 ECHR, not only were the English courts set up by statute considered 'tribunals established by law', but also the common law jurisdiction as a whole, with its historical continuity (concept of immortality), satisfied the statutory requirement. The exclusion of continental European judge-made law from the scope of Art. 6 ECHR corresponds with the continental constitutional tradition of the supremacy of parliamentary law and the acknowledgement of supplementary law creating the function of the judge.[42] Furthermore, with regard to the form and disclosure, the ECtHR held for the common law jurisdiction in *Sunday Times* v. *The United Kingdom* 'that the word law in the expression prescribed by law covers not only statute but also unwritten law.'[43] In this precedence, however, the ECtHR made it very clear for continental jurisdictions that the written form and disclosure are characteristics of the 'law' as it is understood and recognized by the ECHR.[44]

3.2. What Does 'Tribunal' in Art. 6 ECHR Mean?

Both the authentic English and French versions of Art. 6 Section 1 Sentence 1 ECHR make use of the word 'tribunal.' This technical term is not only understood in the formal sense, but also

[40] Decision of the Commission from 10 October 1979 (*Rassemblement Jurassien and Unite Jurassiene/Switzerland*) 8191/78, Recital 6.

[41] This was the opinion of Stefan Trechsel, who participated as a Member of the European Commission on Human Rights: S. Trechsel, *Die Garantie der persönlichen Freiheit*, cit., p. 519.

[42] In lieu of many: H. Coing, "Einleitung", in J. von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen*, vol. I: *Allgemeiner Teil* (11th edn.), Frankfurt am Main, 1957, Recital 197ff.

[43] ECtHR 26 April 1979 (*Sunday Times* v. *The United Kingdom*) 6538/74 30-A, 30, para. 47, in *EuGRZ*, 1979, p. 386.

[44] ECtHR 26 April 1979 (*Sunday Times* v. *The United Kingdom*) 6538/74 30-A, 31, para. 49; ECtHR Report from 18 May 1977 (*Sunday Times*) 6538/74 B-28, 11, 65, para. 203; ECtHR 25 March 1983 (*Silver and others v.The United Kingdom*) 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 61-A, 33, para. 87; ECtHR 2 August 1984 (*Malone* v.*The United Kingdom*) 8691/79 82-A, 31-32, para. 66; ECtHR 25 March 1985 (*Barthold* v. *Federal Republic of Germany*) 8734/79, 90-A, 22, para. 48; ECtHR 8 July 1986 (*Lithgow and others v. The United Kingdom*) 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, 102-A, 47, para. 110; ECtHR 28 March 1990 (*Groppera Radio AG and others v. Switzerland*) 10890/84, 173-A, 26, para. 68; ECtHR 22 May 1990 (*Autronic AG v. Switzerland*) 12726/87, 178-A, 37, para. 57.

according to substantive criteria, drawn from the comparative historical synopsis of different national jurisdictions.[45] Partially, the Convention itself determines substantive criteria of the term 'tribunal'; as common fundamental features (*traits fondamentaux communs*),[46] Art. 6 Section 1 Sentence 1 ECHR requires explicitly the legal foundation ('established by law'*/établi par la loi*), the independence (independent*/indépendant*) and the impartiality (impartial */ impartial*).[47]

Consequently, tribunals, as understood in the treaty-context of the ECHR, can be defined as follows:

a. they are set up by virtue of statutory or equivalent law;
b. they exercise judicial functions under the exclusive legal commitment to adhere only to the law;[48]
c. subject to appellate jurisdiction, they definitively decide on civil law claims and obligations or criminal charges within their legal competences and by means of legally assigned procedures;[49] and
d. they are sovereign institutions for the administration of justice.

Referring back to the medieval canon law complementarity of justness in procedure and substance, 'set up by virtue of statutory or equivalent law' not only means that the court is based on the law, but rather that the rules that concern the court also have to be complied with, and that the judge only decides according to the law.[50] The substantive obligatory legal character of the judicial decision, the irrelevance of external facts outside litigation, and the predictability of the judicial decision exclusively adhering to the rules of the law is what was personified in the ordinary judge, especially in his common antonymy to the extraordinary commissioner, mandated on a case-by-case basis. This guiding standing of an ordinary judge does not exclude the acceptance of special courts for professionals, including military courts for the armed forces, as tribunals established by law. Rather, it sets the standards for the statutorily fixed competence as the antithesis to the commissioner. If any statutorily extension of military courts to civilians risks a commissionary appearance, open for biased influences, the conventional protection in Art. 6 Section 1 Sentence 1 ECHR prevails; compelling reasons and precise legal determination were held as the minimum requirement not met in the statutory extension of the Greek military courts to civilians accused of 'subversive acts' under the Regime of the Colonels between 1967 and 1974. The argued infringements of the court standards in Art. 6 ECHR, that the appellant Scandinavian brought forward in the *Second Case of Greece*[51] in front of the former Commission of Human Rights, had not been decided finally, as the petition proceedings were halted in 1977 due to the release of the political detainees and the legal remedies for remuneration available for victims of political

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[45] See also H. Walter, *Der gerichtliche Rechtsschutz des Einzelnen gegenüber der vollziehenden Gewalt im Rechts- und Verfassungssystem*, in *Gerichtsschutz gegen die Exekutive*, vol. III, 7-19; ECtHR July 9, 2013 (*Di Giovanni v. Italy*) 51160/06, para. 52.

[46] H.-H. Kühne, *Art. 6 EMRK, D. Allgemeine Verfahrensgarantien*, in K. Pabel and S. Schmahl (eds.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention, mit einschlägigen Texten und Dokumenten*, Cologne, 2016, Art. 6 EMRK Recital 287.

[47] ECtHR 29 April 1988 (*Belilos v. Switzerland*) 10328/83, para. 64; ECtHR 4 April 2013 (*Julius Kloiber Schlachthof GmbH and others* v. *Austria*) 21565/07, 21572/07, 21575/07, 21580/07, para. 28. The adjectives of the authentic version of the Convention are kept in brackets. According to ECtHR 9 July 2013, cit. (*Di Giovanni v. Italy*) 51160/06, para. 52, it is necessary for adjudicating bodies that are not part of the ordinary jurisdiction either to fulfil the requirements of Art. 6 Section 1 ECHR, or else that their decisions are fully reviewable by an ordinary court that itself adheres to the guaranties of Art. 6 Section 1 ECHR.

[48] Cf. also Art. 5 Section 3 ECHR ("judge or other officer authorised by law to exercise judicial power and shall be entitled to trial") in ECtHR 4 December 1979 (*Schiesser* v. *Switzerland*) 7710/76, 34-A; in *EuGRZ*, 1980, p. 202 and in ECtHR 26 May 1988 (*Pauwels* v. *Belgium*) 10208/82, 135-A; in *EuGRZ*, 1986, p. 661; neutrality of international judges ECtHR 18 July 2013 (*Maktouf and Damjanović* v. *Bosnia and Herzegovina*) 2312/08, 34179/08, paras. 49ff.

[49] ECtHR 4 April 2013 (*Julius Kloiber Schlachthof GmbH and others* v. *Austria*) 21565/07, 21572/07, 21575/07, 21580/07, para. 28.

[50] ECtHR 30 May 2013 (*Zeynalov* v. *Azerbaijan*) 31848/07, para. 21; ECtHR 17 December 2013 (*Jeniţa Mocanu* v. *Romania*) 11770/08, para. 37.

[51] The Second Greek Case, Application 4448/70, *Denmark, Norway, Sweden v. Greece*, Report from the Commission, adopted on 4 October 1976 (http://hudoc.echr.coe.int/webservices/content/pdf/001-95638).

persecution under the Junta courts. Nevertheless, the argumentation in the *Second Case of Greece* is an exemplary demonstration that the decisive element of trust in the substantive obligatory legal character of the judicial decision rests on the exclusive adherence to the rules of the law behind the conventional requirement to be set up by virtue of statutory or equivalent law. As the historic development lines had made clear, the regularities of the ordinary competences were the basis of trust in the judiciary. The references in the French parliamentary remonstrances to the subjects' faith in justice, the English maxim 'that justice is seen to be done', and the anxiety of the Enlightened German reformers for the subjects' trust in paternalistic care – likewise for the addressees of power dicta and the parties to judgments – were the convincing proofs of this protective rationale.

4. Conclusion

Interpreting the ECHR according to the comparative historical findings could rely on similar concepts of what constitutes 'fair', 'equitable', and 'reasonable' (that is, what constitutes 'justice'), developed parallel to one another throughout Europe, in spite of borders and local variations. Beginning with early canon law, legal practitioners and theorists sought ways to ensure objective evaluation and judgement of cases brought before courts. In the early modern period, monarchical and executive interference in judicial processes, be that in the instances of the French commissions, the English Star Chamber and Court of High Commission, or imperial prerogatives in the territories of the Holy Roman Empire, led legal thinkers to steer responsible jurisprudence away from such intrusions.

This is not to say that Europe's legal history is a history of homogeneity and commonality. Far from it: Europe's individual legal systems have evolved because of individual historical circumstances. Consequently, concepts of how justice is served differ from state to state and people to people. Yet difference should not be mistaken for incompatibility. The fact that Germany is *different* from the United Kingdom, or that judges in English Assizes perform different functions to those in the French *tribunaux administratifs*, in no way suggests that French law is irreconcilable with British and German law (and vice-versa). On the contrary, these differences are merely local methods of working towards and safeguarding the law's ultimate, shared objective: the application of fair, equitable, and reasonable behaviour, or, in short, the application of justice. In this, there is no lack of commonality, but rather an ideal universal to all European countries, which centres on a set of principles common to all of them. Justice is independent, protected from arbitrary intervention, and it must not simply be done but must also be *seen* to be done. The guarantee of this is to be found in the institution of the legally competent judge. To this end, Europe is a positive force, and its strength – indeed, its *identity* – is derived from the common spiritual values that are both enshrined in and governed by law.

Judicial independence, and the promise of a party's right to the correct, legally competent judge, are the mainstays of European conceptions of justice. As this paper has shown, this is not simply a commonality between France, Germany, and Britain, but the foundation of the European Convention for Human Rights. While these guarantees have often been tested, their continuation throughout Europe demonstrates their binding and common character. In this regard, recent laws passed in Poland and Hungary, aiming to strip the courts of their political independence, are dangerous precedents but, crucially, they are conspicuously out of step with the European pattern of behaviour that has evolved and prevailed across centuries. Even if the contemporary British conservative governments discuss withdrawing the Human Rights Act as the national implementation of the ECHR, the fair trial guarantee and its historical genesis are the apt lever to demonstrate that European commonality goes far beyond the English channel. True, Europe is united through a concept of justice, but that justice is constructed in similar ways by disparate systems, creating a

universality that Churchill envisaged when he spoke to the Council of Europe in 1948.[52] It is important to understand the historical provenance of these ideas, and to recognize the uniqueness of the historical contingencies at play in their creation.

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Abstract

L'indipendenza giudiziale e il diritto della parte ad avere un giudice corretto e giuridicamente competente sono i pilastri della concezione europea della giustizia. Al centro di quest'ultima si trova l'equazione tra "giusto" e "legale" e l'equazione tra "legale" e "razionale" fin dal diritto processuale canonico. La specifica fiducia europea nella certezza del diritto deriva dall'eredità storica dell'indipendenza funzionale del giudiziario nel continente, integrata dalla congruenza linguistica inglese di Law and Reason (Legge e Ragione) durante le lotte costituzionali contro l'assolutismo degli Stuart.

Parole chiave: giusto processo, comparazione storica, canone medievale *ordinabiliter habitum*

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Judicial independence, and the promise of a party's right to the correct, legally competent judge, are the mainstays of European conceptions of justice. At the latter's heart lies the equation of 'fair' and 'legal' and the equation of 'legal' and 'rational' since the medieval canon procedural code. The specific European trust in legal certainty results from the historical provenance of the judiciary functional independence on the continent, to be complemented by the English linguistic congruency of Law and Reason during the constitutional struggles with Stuart absolutism.

Key words: fair trial, historical comparison, medieval canon *ordinabiliter habitum*

[52] On 7 May 1948 at the Ridderzaal, in the Hague.