Ulrike Müßig (borne Seif), professor at the University of Passau, is one of the leading legal historians in Europe which an be seen and read in her recent book *Reason and Fairness*. Throughout Europe, the exercise of justice rests on judicial independence by impartiality. In *Reason and Fairness* Ulrike Müßig reveals the links of ordinary judicial competences and procedural rationality, together with the complementarity of procedural and substantive justice, as the foundation for the 'rule of law' in court constitution, far earlier than the advent of liberal constitutionalism.

Introduction

1. **Research Issues (pp. 1-11)**

Ulrike Müßig's "Reason and Fairness" deals with the history of judicial competences and especially the functionality of ordinary competences. Judicial competence is rooted in the European idea that law creates order. Thomas Aquinas was the first to forge religious truths into rational arguments. His summa theologiae is said to have laid the foundations for a logos-based Roman Catholicism and the rationale of the medieval canon law. As a result, a legal approach to fairness developed, achieving greater prominence at various turning points in history. However, recent German history has challenged this approach by demonstrating the disjuncture between the letter of the law and its spirit. As such, the "Radbruch Formula", stating that extremely unjust law is not law, Gustav Radbruch introduced the concept of law being defined by a triad of justice, utility, and certainty.

The monograph covers an extensive time span from medieval canon law to the European Convention on Human Rights (12^{th} -21^{st} Century), which comprise vastly different judicial positions stemming from their respective legal traditions; yet the theme of judicial justice abounds through the centuries. The medieval canon law's complementarity of procedural and substantive justness as a legal emanation of the antique *suum cuique* (to each his own) links back to the Aristotelian demand that equals be treated equally. Today, it states the core element of European procedural laws as well as the initial wording of the Institutes of Justinian: "Justice is the persistent and constant will to give each one his right".

2. **State of the Arts and Methodological Challenges (pp. 11-27)**

Oftentimes, courts are considered mere institutions in a national constitutional structure. Publications based on this understanding are limited to a comparison from an institutional national perspective. The author, however, highlights that in view of European history, since European states and especially their legal systems have not developed autonomously, a transnational comparison is necessary. She therefore asserts an urgent need for "a new comparative understanding of judiciary as constituted power (…).", necessitating the implementation of a transdisciplinary study on the interface of history, law and legal history. In line with Ludwig Wittgenstein's notion of language marking the "frontier of its user's world"; institutions and guarantees must therefor be analysed in abstract manner rather than on the basis of their wording.

3. **Methods (pp. 27-29)**

The monograph follows the methodological principle of historic functionality. Thus, institutions and guarantees are not analysed individually but rather compared with respect to conflict situations or concrete problems. This approach is based on the premise that institutions should not be created in isolation, but should serve to provide solutions to concrete problems.

4. **Geographical and Temporal Scope (pp. 30-33)**

The subjects of investigation are the three countries of origin (England, France and Germany) of the Romanistic, the Anglo-Saxon and the German legal family, representing the European Union's different legal systems.

5. **Structure and Sources (pp. 33-37)**

First, an outline of the history of the legal systems in England, France and Germany as well as the influence of the Church promotes an understanding of the basis of the European legal

system. The presentation of the English and French legal systems then characterizes the contemporary European legal system, which is finally related to the European Council and the Convention on Human Rights.

Part 1: Legal History

1. **Church (pp. 41-66)**

The papal monarchy was the first absolute monarchy in the twelfth and thirteenth centuries, providing a considerable impetus in legal development, especially with regard to procedural law. In this respect, the judicial jurisdiction was the focus of the medieval canonists. Thus, a judgment passed in disregard of the jurisdiction of the courts was ineffective. Hence, jurisdiction as a procedural principle was the first procedural rule in which nullity as a legal consequence was expressly provided for by law. Over the course of time, it was extended to all procedural rules. Moreover, medieval canon law was the first to distinguish between procedural and substantive justice complementing one another. Canon law can thus be seen as the forerunner of procedural law. The Pope promoted a centralized development of law and the accompanying unification of substantive law. In this context, emphasis was increasingly placed on learned judges who were endowed with the power of self-decision, laying the groundwork for a centralized jurisdiction.

2. **France (pp. 67-119)**

Since the thirteenth century, the French king’s attempts to eliminate estate influence on judicial administration was a constant element in the development of the French judiciary. However, this was opposed by the protective rationale of estate and constitutional formulations, which coincided in the autonomy of the legal judge and the commissioner. During the fifteenth, sixteenth, and seventeenth century and the parliamentary complaints of the eighteenth century, the notion of the *juge naturel* increasingly confronted the special commissions and the extraordinary courts until it was clarified in the provisions of the organizational statute in 1790. With the constitutionalized reinvention of the royal judicial

sovereignty and the reimposition of the monarchical principle in the *Charte Constitutionnelle* (1814), the *juge naturel* was guaranteed by the ban of commissions and extraordinary courts. Disregarding the revolutionary abolition of the feudal privileges, these constitutional guarantees remained unchanged until 1848. Republican ideals of equality ("*everybody has the right to the same procedure before the same judge in the same trial*") contradicted the estate-based hierarchy of ordinary competences. All the same, the constitutions' wordings, legitimized by national or popular sovereignty, did not reflect any changes in the meaning of the idea of the natural judge or the legally assigned judge. In 1848, explicit constitutional guarantees of the legally competent judge disappeared in the constitutions. Neither the Second Empire nor the Third, Fourth and Fifth Republic had specific provision for the legal competence of the judge.

3. **England (pp. 120-176)**

Granting justice had been the central duty of medieval ruling. The instumentalization of justice and the judicial concentration in the crown were core factors in the early success of centralization within the English monarchy. The crown held major influence on the outcome of trials in the Star Chamber and interfered even more evidently in the extraordinary Court of High Commission. The control of these prerogative courts by means of extraordinary appeals (prerogative writs) channelled common-law opposition. The prerogative courts were criticized for passing arbitrary judgements and for adhering to royal proclamations as their extra-legal basis beyond common law and statute law. Edward Coke, a common-law judge, justified the precedence of common law over the monarchical prerogative by emphasizing the difference between "natural reason" of human beings (including the monarch) and "artificial reason" of common law judges. His argumentation demonstrates that legal professionalization was a vehicle for the independence of courts. This led to the supremacy of law, in which royal power was subject to law, and in turn demands of the abolition of extraordinary courts, which was enforced by Parliament in 1641. In English legal history, the supremacy of law assured the continuing existence of the ordinary jurisdiction through adherence to the law, whereby royal prerogative became exceptional. Other than in the rulings of the Court of Chancery (equity court), the monarch was banned from exercising judicial power and interfering with common law courts. In 1689, the Bill of Rights affirmed the legal bindings of monarchical power by common law, the idea being that the strictness

of common law would guarantee material independence of the common law courts. Personal independene of the judges was later assured in the Act of Settlement. After the Glorious Revolution and the overthrow of James II, the concept of parliamentary sovereignity predominantly led to Parliament´s self-conception as the Highest Court of Justice. Hence, Parliament claimed the supreme power of interpretation of laws. Nevertheless, it did not aim to abolish royal prerogative but rather served to mediate between royal prerogative and the subject's rights guaranteed under common law.

4. **Germany (pp. 177-281)**

In contrast to France and England, in Germany imperial power could never establish effective jurisdictional centralization, continuously contending with emerging territorial jurisdictions. This conflict between territories and the empire was decisive in the origins of the German *juge naturel.* The Peace of Westphalia in 1648 consolidated territorial judicial sovereignty. More and more permanent administrative institutions (like the Privy Council, the Financial Chambers, the Church Council, the Council of War and the manorial court) and a centralized chamber system were introduced, aiming at statal unification. The general state theory of the eighteenth century limited judicial matters to disputes between subjects. In the transition from power dictum criticism to the enlightened absolutist state of statutory law, the sovereign was still the bearer of undivided judicial sovereignty and highest judge, but the supremacy of reason-based normative telos could override his ruling will. So, in the Enlightened Absolutism, a reason-based normative telos emerged. After Napoleon, the goal was to form a new "empire" led by a hereditary monarch who cooperated with the people's representatives and respected laws. Instead, the great powers, including the "German" states of Austria and Prussia, created the "German Confederation", following the more traditional, restorative aim to guarantee peace, tranquillity and stability. Under the rule of the "Metternich system" the introduction of constitutions and modernization of their states was prohibited. The 1849 constitution of St. Paul's Curch changed this political thinking, introducing the idea of a civil society and a liberal state under the rule of law with the guarantee of legally competent judges. The constitution thus laid out a constitutional monarchy with a parliamentary orientation and was therefore particularly progressive. However, the appointed monarch Friedrich Wilhelm IV. was an anticonstitutionalist and prevented the constitution from coming into force. Yet, it served as a role model for the

Weimar Constitution and the foundation of the federal republic of Germany. In essence, it guaranteed every individual access to the competent judge and court. The competent judge was at the same time considered to be the just judge. However, the reservation of the law also included the primacy of the legislature over the executive, which made a separation of powers necessary. This was maintained in particular by the independence of the judges. As a reaction to National Socialism, which manipulated the law as well as the courts, internal requirements were imposed on judges and the organisation of the courts. Thus, both the judicial outer and inner sphere is now protected against manipulation in order to reflect and offset Germany's past.

Part 2: Country Reports: The Contemporary French and British Court System

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5. **Core Patterns of Ordinary Judiciary, Representative throughout the European Union (pp. 285-311)**

The core factors in the similar development of the EU member states' constitutions despite their different origins and contexts are recognizable in different constitutional regulations such as the competences and legalities of the courts. The commonalities transcend geopolitical, geographical and temporal boarders. While the "Old" Constitutions, characterized by a pre-twentieth-century liberal tradition, shaped the concept of the legally competent judge as a constitutional guarantee, the Mid-twentieth-century constitutions replaced an authoritarian or imperial rule with a new, liberal-democratic structure and "fundamental rights" which are subject to the courts. These mut again be distinguished from the post-Cold War constitutions of Eastern European Member States. The distinction between these contemporary European constitutions clarifies the diversity of historical differences throughout the Union. Conversely, it demonstrates a pan-European commitment to certain common principles. In order to analyse the contemporary British and French court systems, it is necessary to differentiate between the protective rationale in the court external and internal sphere.

6. **Protective Rationale of Ordinary Competence: the Court External Sphere (pp. 312-379)**

The court's protective rationale views the court as an organizational unit which is functionally ensured by internal and external judicial independence. In Britain, the fundamental understanding of court organization differentiates between the common law courts (e.g. High Court of Justice) with all-encompassing competence and the courts created by statute (e.g. specific County Courts), whose competence is limited and fixed by statutes. In contrast to continental EU constitutional principles, besides not being codified neither the principle of the rule of law nor the sovereignty of Parliament are a reservation to one another. The small senior judiciary and the interrelation with the bar constitute the two core pillars to the independence of every judge. Numerous precedents demonstrate the court's outstanding personal and functional independence from the government's wishes and sensitivities. In the absence of a written constitution, there is no guarantee against Parliament's intrusion into the judiciary as common law primary legislation cannot be challenged in court, while Parliament maintains the right to reverse a judicial decision by legislation. Yet, disengagement of judicial and political power was achieved by the convention of the UK Supreme Court in 2009 as a separation from the House of Lords, as judges had to decide an increasing number of cases with political implications. The Supreme Court now has the power to overrule laws that violate European Union law or the Convention on Human Rights, which previously fell under the House of Lord's prerogative. However, this power of intervention is only to be exercised in rare cases of general public interest so as not to undermine the sovereignty of democratically legitimised Parliament.

In France, by comparison, the right to a legally competent judge is a consequence of the general principle of equality before the law, without an explicit mention in the constitution. It prohibits the executive and legislative power from establishing a court on an *ad hoc* basis for a specific legal issue, but does not prevent the creation of a special jurisdiction for legal field with a different subject matter. For the executive the binding character of this unwritten constitutional guarantee is effected by the statutory reservation as expression of the rule of law. The court organization in France is subdivided into the ordinary jurisdiction and administrative jurisdiction. The judicial review of statutes is realized by the Constitutional Council, which is not designed as a supreme court, hierarchically superior to the other courts and without any individual access. As a common European tradition,

extraordinary courts derived from executive powers are rejected unless there is a statute for its creation and the executive acts within its margin of discretion.

7. **Protective Rationale of Objective, General Standards: the Court Internal Sphere (pp. 380-417)**

In the court's internal sphere, the guarantee of the legally competent judge contains the protection against an *ad hoc* staffing of the adjudicating body and against an *ad hoc* allocation of pending cases to the adjudicating bodies. The staffing and business distribution has to be predictable and pre-determined by objective, general standards. In the United Kingdom, the participating judges are not determined according to general rules, but specificly chosen by senior judges according to the principle of unitary judicial power rather than a subdivision into separate adjudicating bodies. For instance, the splitting of the High Court into three divisions conflicts with the concept of each judge being an adjucating body bestowed with the entire competence of the High Court. The *ad hoc* character of business distribution serves the effective use of personal subject knowledge and the strengths of individual judges in a certain case. This corresponds with the procedural governance of the judge and his special position of trust in the Enghlish trial. Inner court preliminary fixations would be deemed complicated rather than guarantors of justice.

On the contrary, in the contemporary French judicial system the internal protective content of the legally competent judge is derived from the general principle of equality. Both the adjudicating body and its business plan are precomposed and determined by statute. Thus, *ad hoc* creation of an adjucating body with judges chosen solely for certain cases is avoided. The composition of the bench is determined one year in advance by the court president upon the recommendation of the general assembly of judges, maintaining certain extent of flexibility in the judges' application. The business distribution is organized in a rational, objective and precise manner in order to elimate any risk of arbitrary manipulation. In Germany, this basic law is codified in Art. 101 Section 1 Sentence 2 of the constitution. The statute is applied extensively as it is subject to constitutional protection, which is above all influenced by Germany's unique historical experience. Therefore, in all European states the court's internal sphere of the principle of the legally comptent judge is violated if inner court decisions are based on arbitrary considerations.

Part 3: The Historic Comparison as Line of Arguments for the European Convention

8. **Legal History 'in front of Court' (pp. 421-471)**

An analysis of ECHR case law from a legal-historical perspective provides insight to the meaning of a court "established by law" under Art. 6 of the European Convention of Human Rights. As explained in the preamble of the Convention, key common constitutional traditions of the legally competent judge raised as a conflict-orientated protective rationale can be used as interpretive guidelines. This interpretation of the rule of law contributed to the direct access of individuals to court and furthermore led to the binding and compulsory character of ECHR judgments. Being established by "law" in the sense of Art. 6 ECHR requires authorization either by the constitution or by statutory law. Within the context of the ECHR, the term "tribunals" encompasses four characteristics. First, they are set up by virtue of statutory or equivalent law, meaning that the court itself – but also the rules concerning the court and the ruling of the judges – have to be based on law. Secondly, they exercise judicial functions independently under the exclusive legal commitment to adhere to the law, guaranteeing impartiality. Moreover, tribunals have to be subject to appellate jurisdiction and they have to be sovereign institutions for the administration of justice.

Regarding the court's external sphere, the guarantee to be heard by "a tribunal established by law" prohibits court appointments by discretion of the executive power and bans extraordinary courts. Again, this emphasises the right of a fair trial and judicial impartiality. The traditional understanding of the Convention bodies is that there is no protective rationale in the court's internal sphere as the aspects of the composition of adjudicating bodies and inner court interferences were assigned to the conventional categories of judicial impartiality and fair trial. This changed in 2000, when the verdict in *Buscarini/San Marino* established the recognition of the court's internal sphere under Art. 6 ECHR.

9. **Legal History as Mentor of Present and Future (pp. 472-500)**

In 2014, the European Court of Justice (ECJ) decided that EU member states could be

signatories to the ECHR (European Convention of Human Rights), but not the European Union as a whole. Together with the difficulties arising due to harmonized and uniform European law, this underlines the need for a convincing interpretation of the common European court traditions. In view of the fact that Union law is rooted in the legal systems of the member states it is not surprising that the common constitutional tradition correspond to the settled case law of the court (ECJ). The interpretation of Art. 6 Section 1 ECHR confirms the common European constitutional tradition of the predominance of the law. It is based on the tradition to avoid arbitrary interferences into the legally competent court and establishing legal competence and legitimacy by law. Whilst there is no common European tradition in respect to the internal protective dimension of Art. 6 ECHR, its necessity is undermined by the historical development of French, German and English law and was explicitly acknowledged by the ECHR (European Court of Human Rights) as a part of the guarantee of ”the tribunal established by law”. The legally competent judge has been of high importance throughout European legal history and remains an important issue which becomes apparent within the ECHR.

Conclusion (pp. 500-533)

Besides the personal and substantial independence of judges especially the functional independence is a core element of the obedience of judges only to the law. Müßig resumes that throughout the book the development can be seen that the judge´s fairness and impartiality has been freed from extra-legal influence. The rise of the self-adjudicating judge in the medieval clerical courts undermines the significance of ordinary competences. The origin in medieval canon law is remarkable due to the fact that in those days common belief was that law derived its obligation from above. It becomes clear that the heart of the European idea of judicial justice is that certainty can be created by law based on logical rationales. Another aspect in the history of ordinary competences and its impact on Europe´s founding stories is the determination to rationalise the administration of justice and to improve access to courts. The French means of acknowledging the right to the natural judge within the pantheon of human rights had an impact on the constitutionalization of the French legal system. Moreover, the struggle between law and prerogative also occurred in the English court system of the seventeenth century. This was when Edward Coke developed the idea of the supremacy of law, leading to the

independence of common law courts. Furthermore, the impact of academic intellectualization has been an aspect in the history of ordinary competences. The German triumph of legal professionalism had its peak in the "Begriffsjurisprudenz", which set the German path for constitutional positivism. Also Nazi manipulation of the courts had a noticeable impact on the German court organization. Recently the European Union is questioned in light of Brexit. The alleged incompatibility of British judicial independence with the answerability to the ECHR and CFR stands at odds with the European consensus on the idea of justice shown in this book. Müßig comes to the conclusion that legal differences (e.g. in procedures or the precise distinction of legal competence) are just local methods of working towards the application of justice. In the end the ordinary judge functions as the symbol of justice.

As the reader can see in this short review, this sophisticated book is a joy for anyone even the least bit interested in Europes's legal culture and landmarks. It is a fresh overview of the history of law in Europe, dealing with both civil and common law, from Roman times through to its codification – a stimulating, lucid, and imaginative read. The book belongs definitely on your shelf and in your lap.