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Superior Courts in Early-Modern France, England and the Holy Roman Empire

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I. Introduction

1. The Issue: Supreme Jurisdiction as a Driving Force for Early-Modern Monarchies

In the registers of the *Parlement de Paris* there is the following entry dated 5th of December 1556 : « ... *la souveraineté est si étroitement conjointe avec la justice que séparée elle perdrait son nom et serait un corps sans âme.* » (Sovereignty is so closely joined up with justice that, if separated, it would be like a body without a soul). While the Pre-Bodin concept of sovereignty is not my topic; the absence of an abstract conception of comprehensive royal power should be noted here. Accordingly, there is no entry for the noun *souveraineté* in the 1549-French-Latin Dictionary. The adjective *souverain*, however, is explained as the final jurisdiction of a *parlement*. This concept of final jurisdiction as sovereign jurisdiction is the central issue of my paper: Does the development of supreme jurisdiction correspond to success in Early-Modern state-building process?

Three considerations guide us to this central issue: (a) For the effective administration of justice one needs a strong power to provide and secure access to courts. (b) Law in itself is not at the disposal of the sovereign. However as justice is a central ruler's duty, royal jurisdiction may have been an appropriate way to influence the development of law. (c) Feudal and ecclesiastical courts are natural rivals to royal courts. Therefore the genesis of supreme jurisdiction emerges alongside the struggle between monarchic centralism and feudal particularism.

This last assumption motivates the choice of the comparative historical systems France, England and the Holy Roman Empire, as the French History of courts begins with a variety of jurisdictions, the English history of courts is characterised by early centralisation, and the development of supreme jurisdiction in the Holy Roman Empire was weakened *ab initio* by the competition of the *Reichsgerichte* (imperial courts: *Imperial chamber court* = supreme court, *Reichshofrat* = royal council) and by the number of appeal privileges (*privilegia de non appellando*) granted to all major territories.

2. Method and Structure

A comparative history of European superior courts is a methodological challenge: Even the term for a supreme court does not have a fixed or universally agreed meaning. Therefore one has to draw the comparative objects very carefully, taking into account that some scholars plead for the uniqueness or even the incomparability of judicial institutions. Among those to be considered here are the French *parlements* and the jurisdiction of cassation of the *Conseil du Roi privé*, the English common law courts and the House of Lords as well as the Imperial Chamber Court (*Reichskammergericht*) and the Aulic Council (*Reichshofrat*) on the imperial level and the highest appellate courts (*Oberappellationsgerichte*) on the territorial level.

There are considerable differences regarding the personnel (number of judges; admission of serjeants) and structure (hierarchy of instances) and function. Whereas the *parlement de Paris* was the final court of appeal within its jurisdiction, the common law had not taken over appeals from the Roman-Canonical law, and the appeal jurisdiction of the *Reichsgerichte* was weakened by the mentioned *privilegia de non appellando*.

What all supreme courts have in common is their origins in the *curia regis*. The consequences out of these common origins may serve as suitable *tertium comparationis*: Their emergence from the *curia regis* provides the supreme courts with a kind of superior authority, which is realized by controlling inferior courts or by suppressing feudal and ecclesiastical courts. This superiority in turn encourages the emergence of judge-made law, which subsequently requires professionals trained to handle it. Professional and learned judges tend to be more self-confident, even against the monarch as fountain of justice. And so, professionalisation in the judiciary fosters a sort of rivalry between the supreme courts and the monarch.

After these introductory remarks I come to superior courts in France.

II. Superior Courts in Comparison

1. France

a) *Parlements*, in particular the *Parlement de Paris* and their Control of other Courts

aa. The *Parlement de Paris* developed between 1254 and 1260 under the reign of Louis IX, who detached the court sittings (*grand assises*) from the *section judiciaire* of his *curia regis* (*conseil royal*). The first registers of 1254 (named “Olim”) prove that law courts no longer followed the royal court, but were held independently of his presence.

Added to the initial competence as first instance court of peers, as early as in the early 13th century, was the function as a general court of appeal, which resulted in the *Parlement de Paris* becoming the court of justice for the whole realm. At the same time innumerable *Ordonnances* were enacted, laying down detailed rules for the organisation and procedure of the *Parlement*.

bb. Recourse to appeals was an exception in feudal monarchies: It was only valid in cases of refusal of jurisdiction (*appel de défaut de droit*) or in cases of bias (*appel de faux jugement*). With the reception of learned law and the replacement of the monarchy's feudal administrative structures, the hierarchy of instances was set up as such that a case would be taken by the *prévôtes* then by the *baillages* or *sénéchaussés* and finally by the *parlements*. This did not take the form of a revolution but of a synthesis between local customary law and Roman-Canonical law. As a result – during the 14th century at the latest – the royal jurisdiction dominated, and the feudal *justice seigneuriale* and ecclesiastical jurisdiction as *justice concédée* both became subordinate to royal jurisdiction.

cc. The centre of the French supreme jurisdiction remained the *Parlement de Paris*: Even after new *parlements* had been established, it claimed its supremacy as *cour capitale et souveraine du royaume*, first and foremost because its jurisdictional area covered half of France.

b) Legal Profession and Judge-Made Law

aa) The replacement of feudal judges by royal court officials goes hand in hand with a growing professionalism of the judging councillors (*maîtres*). In the middle of the 15th century, parliamentary jurists (*parlementaires*) like all royal officials were declared irremovable from their office. At the same time, the *Parlement* was clearly organised in the *Ordonnance ou Établissements pour la reformation de la justice* (Montils-les-Tours, April 15th 1453), which was valid until 1771. The cooptation of chairs, enacted thereby, provided the foundation for the distinctive political assertiveness of the *Parlement*. This was the origin of a stable social class of judges (*gens du Parlement, noblesse de robe*) with extensive privileges, a clearly defined career structure (Parisian colleges, the study of canonical law in Paris, the study of jurisprudence in Orléans), a consistent way of life and culture, and a closely interwoven social network.

bb) The judges were recruited from the advocacy at the *parlements*, which had gained in number and importance already during the 13th century due to the initial admission of attorneys. Professional prerequisites for judges or attorneys were vaguely formulated: An *ordonnance touchant les avocats* of 1344 only required selecting apt candidates and rebuffing inexperienced ones. So complaints about ignorant attorneys found in sources of the 15th century should not surprise us.

Nor should the recommendations of the *Ordonnance des parlements de Paris* surprise, for one thing, not to accept any mandates without thorough practical experience and, for another, to learn the *stilus curiae* and the *modus advocandi* of more experienced attorneys. It is impossible to say to what degree this resulted in an institutionalised practical training. A university education in Roman-Canonical law for judges as well as for attorneys did not exist before modern times. However, a chronological (and probably also causative) connection between the development of a distinctive legal profession and the evolution of supreme jurisdiction can be seen: It was the *Parlement de Paris* that brought about the monopoly of representation by inaugurated accredited advocates and so the need for advocates to be familiar with the *stilus curiae* and the *modus advocandi*.

cc) The authority of the *parlements* promoted the development of private law reports, the first of which are the *Quaestiones* by Jean Lecoq (also Le Coq) of the 14th century. In the 15th century there are only a few relevant collections, but in the 16th century a great number of law reports (*recueils d'arrêts*) were in circulation. Because the *parlements'* verdicts did not contain any reasoning, these *recueils* mostly only recount the legal argumentation of the parties from the point of view of the author and, despite the term *motifs*, do not allow for any reconstruction of judicial reasoning whatsoever. Because attorneys used the *recueils* as preparation for actual cases, they are also called sources of law (*source de droit*). It is hard to say to what extent these law reports also influenced the judges themselves, lacking as they did the legal reasoning of the judges. Nevertheless, French experts do speak of a *jurisprudence des arrêts*.

According to the unanimous opinion of scholars, official collections did not exist, register excerpts were issued solely for internal use by the law court. However, as my research in the national archives has confirmed, almost all of these excerpts show a royal printing privilege. This suggests that the compilations had only been printed after a royal official read and authorised them, which, in turn, proves the alleged non-official character of those excerpts wrong. The so-called *arrêts de règlement* (decrees/edicts) shall merely be mentioned here in passing, due to lack of time.

c) Rivalry with the monarch

aa) Rivalry regarding Legal Matters

As a body of the *Cour de roi*, the *Parlement de Paris* did not know any superordinate authority (hence the term *Cours souveraines*). Decisions, seen as decisions by the king himself, could not be attacked using regular remedies. The only acceptable option was the *proposition d'erreur* – common since the Middle Ages –, which provided the possibility of claiming errors that had been committed first of all in front of the king or his council and then in front of the *parlement* itself. A

parallel development during the 15th century was the so-called *requête civile*, an informal remedy which suppressed the *proposition d'erreur* by and by until 1667.

Further the monarch himself was able to intervene by means of evocation to bring cases from the parliament to his own council, the *Conseil du roi* (*Conseil privé du roi*), and to annul parliamentary decisions by virtue of royal prerogative, i.e. by the so-called *cassation*. The absence of a detailed arrangement for cassation allowed a considerable scope of discretion benefiting the *Conseil privé*. A first hint of a legal usage of the cassation can be found in art. 92 of the *ordonnance de Blois* of the year 1579. Mistakes in law made by the *parlements* can be claimed by cassation at the *Conseil privé du roi*. The *ordonnance* of 1667 (tit. I, art. 7) nullifies illegal decisions by the *parlements*, demanding, however, that the illegality of the contested decision be evident. The consequence is the subordination of the parliament under the royal council – as requested by Louis XIV.

A further field of rivalry between *Parlements* and the monarch was legislation.

bb) Rivalry regarding Political Issues

Having originated from the advisory circle of the *curia Regis*, the *Parlement de Paris* demanded control of royal legislation. *Ordonnances* and *edits* were only valid if and in so far as they had been registered and published by the *parlements*. This situation developed into the right to survey the yet to be registered royal decrees and, if necessary, to remonstrate. This right to remonstrate before registry (*droit de remontrance avant l'enregistrement*) grew to a political right of control to be exercised against royal legislation, which – at the peak of the *parlements'* resistance on the eve of the French Revolution – escalated to a refusal of registry and an obstruction of royal legislation turning the supreme courts into the strongest opponents of the crown during the 18th century.

On the other hand, the monarch was able to order the registration of decrees during a *lit de justice*, i.e. a sitting in his presence (lit. a bed of justice). Although the term *lit de justice* was common in the Middle Ages, the enforcement of royal legislation is a phenomenon of Early Modern History. Under the reign of François I (1494-1547) the *lit de justice* was extended to a specific demonstration of royal power; and from the middle of the 16th century, those sittings were increasingly used to implement royal decrees against *parlements'* opposition.

Already at that time resistance to that monarchical claim to power had begun to stir among the members of the *parlements*, but without much success. Resistance against the enforced registration of tax laws in 1648 caused the most serious government crisis of the 17th century (the so-called

Fronde), but resulted only in the abolition of the right to remonstrate (1667, 1673), which finally led to the abolition of the *lit de justice*.

All in all the remonstrations hardly ever had any substantial consequences. An author from the monarchical viewpoint minimised thus the enforcement of registry to a mere formality: « *Leur enregistrement dans les cours, à qui l'exécution est confiée, n'ajoute rien au pouvoir du législateur; c'en est seulement la promulgation et un acte d'obéissance indispensable dont les cours doivent tenir et tiennent sans doute à l'honneur de donner l'exemple aux autres sujets.* » Also, the claims of various presidents of the parlements that the king was bound by the law, went unheard. The *parlements* were praised in the 4th chapter of Montesquieu's book *Esprit des Lois* as custodians of the State's constitutional laws (*dépôt de lois*), which the monarch could neither change nor abolish. This estimation of parlement as a Constitutional Court (*conseil constitutionnel*) is, according to the presented sources, not justified.

2. England

a) Common Law Courts and their Control of other Courts

To explain the development of common law courts here, would be carrying coals to Newcastle. I am therefore confining myself to just a few facts which are necessary for the comparison to France and the Holy Roman Empire:

Quite differently from France (and other countries of the *ius commune*) common law in England did not include the right to appeal – appeals in the continental usage of the term were not established until the 19th century. In particular, the *writ of error* (a decree to allow appeals) has only a marginal similarity to the appeal itself. The *writ of error* led only to examining the records of a lower court; substantive legal matters could not be reviewed in this way. A thorough legal review by means of an appeal was only possible at courts whose procedural law was influenced by civil law (e.g. regarding decisions of ecclesiastical courts at the Court of Delegates). Besides that, a review of decisions made by the “English side” of Chancery (i.e. the equitable jurisdiction) was possible at the House of Lords. Both the “motions in banc” (i.e. motion in arrest of judgment, motion for judgement *non obstante veredicto* and motion for a new trial) and the “reservation of points of law” provided an opportunity to appeal to central courts before a final decision was taken.

b) Legal Profession and Judge-Made Law

Again the expert knowledge of the audience calls for restraint on my behalf in analysing the legal profession and judge-made law.

Similarly to developments in France, the common law courts were the origin of a legal profession in England. Chronologically it is comparable to the councillors' professionalisation at the *Parlement de Paris*. Since 1280 the teaching of law is tracable, and the inns of court became the *locus genii*.

The concept of *stare decisis* as a legally binding precept belongs to modern times. The judgment in *Mirehouse vs. Rennell* brings us to the year 1833. The "Abridgements", which emerged during the Tudor period, simplified the recourse to precedents and made it a more frequent occurrence. Coke's Reports (1600-1615) are often referred to as the origin of *stare decisis*, but, in my opinion, Sir Edward Coke does not yet use the word precedent as a technical term.

c) Rivalry with the Crown

aa) Common Lawyers

The rivalry between common law courts and the English Monarch is characterised by a few peculiarities. On the one hand, common law as established by the Westminster courts - as immortal custom - possesses a unique legitimacy and presents a crucial counterbalance to the royal prerogative, which not even Stuart absolutism was able to override. On the other hand, the relatively small number of common law judges – in comparison to the French *gens de robe* – leads to a markedly elitist status, - upheld to this day - which is reflected in a distinctive self-confidence on the part of the judges even with regard to the Crown. James H. Baker notes that judges often adjudicated in cases against the crown without having to fear any personal disadvantages. I, however, only found one example myself: Dimock's case. Also the common referral to the aforementioned Coke, Lord Chief Justice and leader of the common law opposition to Stuart absolutism, cannot serve as a general model, because Coke's fellow judges yielded to all conditions demanded by James I. Additionally, judges at the royal courts were deposable at will until the Act of Settlement, but no proof of a judge's dismissal can be found in the sources.

bb) Sovereignty of Parliamentary based on the idea of Parliament as the Highest Common Law Court

The decisive factor for the relationship between common law and royal prerogative is determined by the sovereignty of parliament which was achieved in 1689; or to put it another way: Parliament's claims for the ultimate authority to decide on the public good (e.g. Nineteen Propositions of 1st June 1642 and the Declaration of the Houses in Defence of the Militia Ordinance of 6th June 1642) were the key to resolving the constitutional controversies of the 17th

century. In those struggles, Parliament never questioned the idea of political balance, never undertook to vote down the royal veto in regard to legislation, and never endeavoured to introduce a concept of sovereignty similar to Rousseau's *volonté générale*. The parliamentary bill itself represents rather the idea of political balance. An act of Parliament served the weal of the King, and the weal of his subjects, - the Commonwealth. Yet Parliament justified its claim to sovereignty primarily on the ultimate authority to decide on the public good. In accordance with Coke's conception of common law based on reason and Locke's Natural Law theory 17th century-Common law was widely perceived as a body of law providing the most natural and just solution to any question of public good. It was not the Monarch's will that decided on the public good but common law. This position motivated Parliament's claim to be the highest court of common law: "*The High Court of Parliament is ... a court of judicature, enabled by the laws to adjudge and determine the rights and liberties of the kingdom, against such patents and grants of His Majesty as are prejudicial thereunto, although strengthened both by his personal command and by his Proclamation under the Great Seal.*"¹, in the words of the Declaration of the Houses in Defence of the Militia Ordinance. Further details seem redundant at the alma mater of William Prynne. But let me just add that the concept of Parliament as a court of law is at the heart of the Parliament's claim to sovereignty which was achieved in 1689 (Art. VIII Bill of Rights), because the Monarch could veto legislative acts, but he could not veto judgements. Thus Blackstone's well-known comment on parliamentary sovereignty³ is based on Coke's definition of the (absolute) jurisdiction of the High Court of Parliament.⁴

The superior courts in the Holy Roman Empire, as we shall see, have a completely different historical origin. Royal jurisdiction was hopelessly weakened from quite early on.

¹ Declaration of the Houses in Defence of the Militia Ordinance of 6th June 1642, in: The Constitutional Documents of the Puritan Revolution 1625-1660, Nr. 54, p. 254, 255 seq. Cf. as well The Votes of the Houses for Raising an Army of 12th July 1642, in: The Constitutional Documents of the Puritan Revolution 1625-1660, Nr. 56, p. 261.

³ William Blackstone, Commentaries on the Laws of England, vol. 1: Of the Rights of Persons, A Facsimile of the First Edition of Oxford 1765 (with an Introduction by Stanley N. Katz), Chicago/London 1979, Introduction, chap II: Of the Parliament, p. 156.

⁴ Edward Coke, The Fourth Part of the Institutes of the Laws of England concerning the Jurisdiction of Courts, in: The institutes of the law of England, second to fourth parts, ed. E. and R. Brooke, London 1797, Part IV, 36: : "*Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds. Of this court it is truly said: Si antiquitatem spectes, est vetustissima, si dignitatem, est honoratissima, si jurisdictionem, est capacissima.*"

3. The Holy Roman Empire: Superior Courts

a) The Imperial Chamber Court (*Reichskammergericht*)

The supreme jurisdiction for the Empire had its beginnings in the *Mainzer* imperial diet in 1235: Emperor Friedrich II created the *Reichshofgericht* as a personal court, presided over by the emperor himself with a body of *assessores* sitting in judgement. It ceased to act when the emperor was abroad and was dissolved upon his death. The court proved incapable of maintaining its prerogatives against the more powerful *domini terrae* or *Landesherren* and it lost its importance due to the *privilegia de non evocando* and the *privilegia de non appellando* in favour of territorial courts. No traces of the *Reichshofgericht* can be found after the mid of the 15th century. The *königliche Kammergericht* (tracable since 1415) met with a similar fate. It remained dependent of the emperor during the 15th century having no regular seat, no regular judges and no independent jurisdiction, it was rented out to *Reichsstände* for money and was finally merged into the *kaiserliches und Reichskammergericht*.

The Imperial chamber court was founded in 1495 as part of the Imperial Reform under Maximilian I, which the emperor only granted to the imperial princes because he needed their support in the war against Hungary. It is therefore no surprise that the reorganisation of the Imperial chamber court by the imperial estates, the only lasting success of the Imperial Reform, made the territorial princes, having left the empire dismembered and moribund, emerge all the stronger. The Imperial Chamber Court was distinguished from the old *Kammergericht* by the fact that it was not the personal court of the emperor, but the official court of the empire; it was paid for by the empire and was thus not dependent on the will or money of the emperor. In the death throes of medieval forms within the ageing Empire the Imperial chamber court and its *Ordnung* (rules) did produce one new unifying factor: the recognition of scholarly law (compare § 3 Imperial chamber court's rules (Ordinance) 1495). There was no longer any coherent German legal tradition to follow: uniform procedure and judicature could be created only by recourse to the *ius commune*. Under the paragraph mentioned above it is true that local law should be applied if pleaded before the court, in accordance with the theory of statutes. This could apply only where the local laws were written down, and writing them down presented an opportunity to romanise

them. The territorial state came at a price, and Germany paid it. It was by rationalising the administration of their principalities that the princes consolidated their power. The princes gained their lead over the estates in the 15th century because they alone possessed modern techniques of administration and law, and it was trained lawyers who ensured this monopoly.

aa) Jurisdiction of the Imperial chamber court

The reorganisation of the Imperial chamber court as the highest court of the estates reflected the imperial estates' opposition towards the emperor: The choice for the seat of the court was always based on keeping it away from the Habsburg's sphere of influence. First it resided at different places, then at Speyer (from 1527 to 1689), and later at Wetzlar. § 2 of the Imperial chamber court's rules of 1495 secures the imperial princes' right to appoint the majority of the court members. The emperor retained only the right to appoint of the chief justice (*Kammerrichter*), who had to be a high-ranking aristocrat, and of the two (later four) presidents of the courts senates as well as the right to nominate a small number of *assessore*s.⁸ The rest were nominated by the estates of the empire. Initially, one half of the *assessore*s who rendered decisions were to be "learned and qualified in the law" [i.e. Roman Law] and able "to give proper opinions in pending legal cases", that is laying out the case in an orderly manner, as only a jurist with his superior training could do. The other half, from the knighthood, should "also be learned in the law ... so far as available, but if not, then experienced and practised in the courts' procedure." This parity between learned judges and non-graduate gentry was the social compromise between the old leaders by right of birth and the new professionals, and this is the explanation for the estimation of the German law PhD (*Dr. iur*) as being an attribute of nobility. After 1555 it became necessary for the knights to be learned in Roman Law as well.

First and foremost the princes created the ordinance for the Imperial Chamber Court (Imperial chamber court's rules) as an instrument to protect the public peace within the empire (*Landfrieden*). This is in accordance with its competence in matters of *Landfriedensbruch* (breach of public peace) and for the regulation of *Austrägalverfahren* (arbitral procedure between territories within the realm). In addition, the province of the Imperial chamber court covers cases of arbitrary imprisonment, pleas related to the Treasury, violations of the emperor's decrees or laws passed by the Diet, property disputes between immediate vassals of the empire and finally suits

⁸ Am RKG galt die alte – funktionelle und ständische – Unterscheidung zwischen dem verfahrensleitenden sowie repräsentierenden Richter (Kammerrichter) und den Recht sprechenden Beisitzern (Assessores, aus denen heraus auch die Präsidenten hervorgingen).

against the latter, excepting criminal charges and matters relating to imperial fiefs, which went to the Aulic Council (the *Reichshofrat*).

Notwithstanding these facts, one should not forget the Imperial chamber court's function as appellate instance, which it held from the 15th century onwards. It managed to subject the weaker parts of the Empire to its jurisdiction. Proof for this can be found in law reports dealing with appeals from territorial courts to the Imperial chamber court. In fact the Imperial chamber court's rules of 1495 already proposes a modern view on the hierarchy of instances: „Item es sol kein appellacion angenomen werden, die nit gradatim gescheen were, das ist an das nechst ordenlich obergericht.“ Appeals by the *Austrägalgerichte* (arbitral courts dealing with inter-territorial law suits) were also allowed. Yet a detailed regularisation of appeal proceedings did not emerge until the Imperial chamber court's rules of 1555 (Part II, art. XXVIII ff.). The right to appeal in criminal cases was denied in § 95 of the *Augsburger Reichsabschied* of 1530 (edicts decided upon at the royal assembly at Augsburg), excepting the criminal cases in which basic procedural rules had been violated.

The appeal jurisdiction might cease at the borders of larger principalities which enjoyed the privileges of freedom from appeals (*privilegia de non appellando*), especially the territories of the electors. The territorial courts in the exempted principalities nevertheless followed the procedures of learned law. The Imperial chamber court served as the model on which the larger territories reconstituted their courts and procedure, often down to the most minor detail. The *privilegia de non appellando* enabled, and indeed obliged the principalities to maintain or set up their own jurisdiction. This is explicitly mentioned in the *Jüngster Reichsabschied* 1654, § 113. The privilege of freedom from appeals was generally obtained by the supreme court of a territory on its creation or renewal, as in Bavaria in 1625 and Brandenburg in 1586.

bb) Judge-Made Law, Law Reports and Legal Profession at the Imperial chamber court

Being an appellate court for the weaker territories and a role model for the stronger principalities the Imperial chamber court's decisions were of considerable importance for the development of law. Relevant collections of opinions and court decisions by Mynsinger (1563), Seiler (1572), Gail (1578), Gylmann (1601) and Meichsner (1601) were widely used and had a strong influence on legal practice.

Furthermore, certain imperial laws were understood as standards of competence for the Imperial chamber court in adjudicating matters – both in procedural and substantive aspects – and held to be generally binding when in doubt. The cameralistic jurists (*Kameralisten*) deduced – despite

terminological inconsistencies – that both the Imperial chamber court’s rules of 1555 (part II, art. XXXVI) and the imperial ordinance (*Reichsabschied*) of 1570 (§ 77) allowed the Imperial chamber court to establish generally binding legal rules. A majority of votes was sufficient. The Imperial chamber court however, was not allowed to reverse verdicts in *ius commune* or imperial law and its own decisions were only valid if they weren’t reversed by visitation or the *Reichstag*. In the *Jüngster Reichsabschied* of 1654 (§ 136), the imperial legislature ascribed a certain binding character to decisions made by individual senates within the Imperial chamber court to avoid contradictory decisions.

Identical arguments are adduced for the binding force of the *Conclusa pleni* on one hand and the *praeindicia* of individual senates on the other. One argument that always is mentioned is the principle of equality. Identical cases should not be adjudicated differently. The intention is to ensure equality in legislation and uniformity in decisions by the Imperial chamber court. Moreover, the judge’s function in the development of judge-made law plays a role. To sum up: The incompleteness of every act of legislation necessitates the concession of a certain influence to judge made law, and imperial legislation was very fragmentary. Practitioners regarded the published opinions of individual scholars and faculties as being as authoritative as decisions of the Imperial chamber court itself.

One should not, however, overestimate the importance of precedents of the Imperial chamber court: The compilation “*Des hochlöblichen Kayserlichen und Heiligen Römischen Raichs Cammer-Gerichts Gemeine Bescheide und andere Raths-Schlüsse, vom Jahr 1497 biß 1711 inclusive Wetzlar 1714*” contains only 239 decisions of minor significance. I was not able to find any decisions relating to substantive law. Presumably precedents only took effect in the area of procedure or constitution of the court.

In contrast to French parliamentary nobles (*gens de robe*) and the community of common lawyers the Imperial chamber court did not have a distinctive legal profession. This was prevented from the outset by the different social descent within the Imperial chamber court’s staff, of the judges and assessors on the one side, and the procurators and advocates on the other. Assessors developed a pronounced class consciousness, numbering only 20 and originating from the territorial or imperial aristocracy. The assessors’ separateness from procurators and advocates can be verified in the sources dating from 1700, marriages between the families of assessors and procurators were strictly barred.

cc) Rivalry with the Emperor

The Imperial chamber court suppressed any direct interference by the emperor (e.g. by dictum of power, the so-called *Machtspruch*). Yet legal possibilities existed to reverse decisions. Besides visitations, which were able to reverse the precedents of the imperial chamber court, the *Authentic Interpretation* (settled in art. V § 56 IPO of the *Osnabrücker Friedensvertrag* of 1648) was a useful instrument. The interpretation of an imperial law could be made subject to the *Reichstag*, although one has to admit that the *Reichstag* remained mostly inactive in the face of redresses. Supplications to the emperor could aim for revision of the imperial chamber court's decision. Furthermore, in all its business the Imperial chamber court suffered from its competition with the Aulic Council (the *Reichshofrat*).

On the other hand recent research has also brought to light that, particularly in the 18th century, the rulings of the Imperial chamber court anticipated in many ways the constitutional establishment of civil liberties. For instance, the inviolability of one's housing or freedom of trade were legally introduced into the empire by court rulings. Towards the end of the 18th century some contemporaries even compared the Imperial chamber court to the National Assembly in France.

b) The Aulic Council (*Reichshofrat*)

aa) Jurisdiction of the Aulic Council

The reorganisation of the Imperial chamber court in 1495 did not prevent the emperor from insisting on his own personal jurisdiction, and so he reorganised his court council (later called *Reichshofrat*) in 1498, as a rival to the Imperial chamber court, which the Diet had forced upon him. Originally (as stated in its ordinance, the *Hofordnung* of 1498) the Aulic Council functioned not only as a law court but also as a governmental and administrative body, primarily as an advisory body and council to the emperor in all imperial matters. Later ordinances (Aulic Council's rules) of 1559 and 1654 were similarly worded, confirming the Aulic Council to be an executive-judicial council for the Holy Roman Empire. The Aulic council was composed of a president, a vice-president, a vice-chancellor, and 18 councillors, who were all appointed and remunerated by the Emperor, with the exception of the vice-chancellor, who was appointed by the Elector of Mainz. Of the 18 councillors, six were Protestants, whose votes, when unanimous, were an effective veto, so that a religious parity was to some extent protected. The seat of the Aulic Council was at the imperial residence, i. e., in Vienna. Upon the death of the emperor, the Council was dissolved and had to be reinstated by his successor.

The Aulic Council claimed exclusive jurisdiction with respect to the Imperial chamber court in a few matters. In all feudal processes, in criminal matters in the immediate feudatories of the Emperor and in matters concerning the imperial government; but mostly both courts had a concurrent jurisdiction. This competition between the Aulic Council and the Imperial Chamber was settled by the priority-rule in the Treaty of Westphalia (so-called Prävention): Whichever court was addressed first had jurisdiction. The Aulic Council dominated in the number of cases taken at first instance; experts suggest that only 25-33 % of its cases dealt with appeals. Similar to the Imperial chamber court, this development at the Aulic Council probably results from the prevalence of the *privilegia de non appellando*.

bb) Professionalisation, Law Reports and Case Law (Judge-Made Law)

First of all the Aulic Council consisted only partially of “*gelährte personen*” (learned persons), of whom legal knowledge was required (Aulic Council’s rules of 1617). Closeness to the monarch seems to have been more important than legal education. As late as 1654 legal qualification, verified by an adequate exam, was a prerequisite for all members of the Aulic Council. Although for the subsequent period complaints about the lack of competence can be found, an academic degree or at the very least a longer course of studies at a university can be verified for most of the Aulic Councillors.

As with the *parlements* the Aulic Council did not intend the reasoning for its decisions to be made public. This applied particularly to the publication of the “*Relationes et Causas decidendi*”. Only towards the end of the 17th century – considerably later than at the Imperial chamber court – were the law reports of the Aulic Council officially published. The influence of these collections on decision-making is yet to be accounted for. Wolfgang Sellert deduces from the publisher’s aims – to give information about the work of the Aulic Council and to bring about the *stilus curiae* – that a substantial influence of these law reports is rather unlikely.

cc) Rivalry with the emperor

The emperor, as fountain of justice, or as “*allein obristes haupt und richter*” (sole head and judge) of the Aulic Council, always had the possibility to influence the council’s decisions. The Aulic Council itself fought against this imperial interference. The imperial princes succeeded in asserting the personal independence of the Aulic Councillors and, further on achieved the emperors’ renouncement of direct and indirect interference, the latter being to refrain from reversing the Aulic Council’s verdicts regarding common matters.

But this renouncement of subsequent revisions of the Aulic council's decisions did not apply for matters that "*ratio status und andere umstände mitsichbringen und erfordern*". In particular the so-called *vota ad imperatorem* helped to enforce the emperor's claims to power and his political interests. For instance tit. V § 18 of the Aulic Council's rules of 1645 states that in the case of an equal number of votes or in the case of an exceptionally important matter, this had to be brought before the emperor. The *votum ad imperatorem* was common practice in cases regarding constitutional law. Ultimately the emperor held a *votum decisivum* which was regarded by the imperial estates as mere *Kabinettsjustiz* (interference in the course of justice by a sovereign).

4. The Holy Roman Empire: Territorial Superior Courts

Because of the particular constitutional situation in the Holy Roman Empire, i.e. the dualism of territorial lords (*domini terrae* or *Landesherren*), and the emperor, territorial superior courts also play an important role in the history of German jurisdiction – especially in the territories where the authority of the imperial courts had been neutralised by means of *privilegia de non appellando* (except for cases of refusal of jurisdiction). The territorial lords' own striving for sovereignty manifests itself in their endeavour to acquire independent judicial supremacy. Some experts even talk about a "fight over appellate jurisdiction" in so far as appeals to the imperial courts were prohibited.

Due to lack of time I shall confine myself to discussing the Austrian territories. The Aulic Council's authority as final appellate court for the hereditary lands of the Habsburg Monarchy was replaced by territorial courts. In 1620 imperial legal matters were detached from those affecting the hereditary lands of the Habsburg Monarchy and a separate Austrian chancery (*Hofkanzlei*) was established, which also functioned as superior Austrian court. This development is a typical example of the emancipation of territorial superior courts from the imperial jurisdiction. In the mid 18th century the *Haugwitz' reforms* separated justice and political administration by means of departmentalisation; the *Hofkanzlei's* function as superior court was taken on by a New High Court for the Hereditary Lands (*Oberste Justizstelle*).

It would appear there was no such thing as precedent law. The instructions for the New High Court for the Hereditary Lands do not define clearly how to deal with precedents: The councils should neither rely blindly on precedents nor should they deliver contradictory judgements. The binding character of precedents was not recognised until 1822. Nevertheless the New High Court for the Hereditary Lands had an extraordinary influence on the evolvement of the Austrian

codification of civil law (*Zivilrechtskodifikation*), as its members were in charge of the code's drafting.

The *Justizstelle's* relationship to the sovereign is marked by an explicit dependency: Austrian monarchs retained their right to intervene. Dicta of power (*Machtsprüche*) were only officially disapproved of in the *Bürgerliches Gesetzbuch von Westgalizien* (the civil code of Western Galizia) and in the *Codex Theresianus* which dictated – accompanied by a strong regard for the exact wording of laws – enquiry at the *curia regis*, should doubts about the interpretation of a law emerge (I cpt. I § V no. 81 ff.). Similar wording can be found in § 437 of the *Allgemeine Gerichtsordnung* (general constitution of the court) of 1781 and in the *Josephinische Gesetzbuch* (Josephinian code of law, I § 26).

III. Conclusion

If we summarize the facts about the different countries just compared here, the key question of my paper, of whether the genesis of supreme jurisdiction corresponds to the Early-Modern state-building process, is to be answered in the affirmative. The foundation and exertion of supreme jurisdiction alone expresses the (monarchical) claim to be the advocate of common interests. The first aspect of comparison already illustrated this fact: Superior courts repressed or effectively controlled the lower courts, in particular those that were independent of the sovereign. Ecclesiastical and feudal jurisdiction were rivals to monarchical jurisprudence.

Supreme jurisdiction as an expression for the Early-Modern state-building process can also be observed in the second aspect of my comparison: judge-made law and the establishment of the legal profession. French experts link the concept of the nation to the self-confidence of parliamentary jurists. English academics unanimously emphasise that access to common and equal legal proceedings fostered the development of a sense of national identity.

The third aspect of comparison, rivalry with the monarch, emphasises the state-building function of the superior courts. The sovereignty of the English parliament, based on the idea of it being a court of law, leads to a control of royal prerogative and of the common law courts; French *parlements* were controlled by the *Conseil du roi*, their resistance to monarchical jurisdiction proving to be a precursor to the Revolution. The Imperial chamber court was influenced by the emperor and had to deal with the visitations and the instrument of *authentic interpretation* of imperial laws, even though immediate interferences by the emperor could be repressed. Decision-making at the Aulic Council was subject to the *vota ad imperatorem*. Control of justice comes with control of jurisdiction.

