



Procedural Justice in Continental & Anglo-Saxon Systems: Philosophical Comparative of Due Process & Rechtsstaat Principles

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Abstract: This study comparatively analyses the philosophical nature of procedural justice in the Continental (Civil Law) and Anglo-Saxon (Common Law) legal systems, centred on the fundamental principles of Due Process of Law and Rechtsstaat. The debate over the balance between state authority and individual rights underscores the importance of this study, as foundations rooted in legal theory and political philosophy differ across both traditions. The purpose of this research is to identify similarities, differences, and potential convergence in ensuring justice in the legal process. The methodology is an in-depth, comparative philosophical analysis that traces the intellectual foundations, historical evolution, and practical manifestations of the two concepts, beyond mere descriptive comparisons. The results show that, despite originating from different historical and philosophical paths, the Anglo-Saxon (Due Process of Law) and Continental (Rechtsstaat) legal traditions exhibit fundamental differences in their approaches to procedural justice. Ontologically, Due Process is rooted in empiricism and the essence of ex post individual protection through fair procedures, with epistemology grounded in case precedents. Meanwhile, ontologically, the Rechtsstaat is based on rationalism and the nature of a just and predictable state structure ex-ante through the codification of law, with epistemology derived from the systematisation of coherent law. Despite these differences, the two legal traditions are increasingly facing similar challenges in the global legal landscape, indicating the potential for shared learning and reform. The novelty of this research lies in an integrated philosophical and comparative approach that uncovers the normative foundations of legal procedures and contributes to understanding the convergence of procedural justice in the global era.

Keywords: Procedural Justice, Due Process, Rechtsstaat, Legal Philosophy, Comparative Legal Systems

A. Introduction

Justice is a key pillar in any legal system, and its procedural aspects play a crucial role in ensuring substantial justice. How a legal system provides justice in its process often depends on the legal traditions adhered to. The two great legal traditions, Anglo-Saxon (Common Law) and Continental (Civil Law), although they have different historical and philosophical roots, both seek to realise procedural justice. Understanding their approach is critical in an increasingly connected world, where legal systems often interact and influence each other.

Previous studies have extensively explored various aspects of comparative law¹, including criminal procedure², Ringnalda³ says, contract law⁴ and the general doctrine of the Rule of Law⁵ and Rechtsstaat⁶. The work of Damaska⁷ and Vogler⁸ offers a broad comparative perspective on the legal process and criminal justice system globally. In addition, scholars such as Karakamisheva-Jovanovska⁹ and Nedzel¹⁰ have specifically addressed the interactions and dichotomies between the Anglo-Saxon and Continental

¹ P. A. Lutsenko. "Comparative Analysis of Criminal Pretrial Procedures in Anglo-Saxon and Continental Legal Systems." 2023. <https://jurnauka-vipe.ru/article/1224/?lang=en>

² *Ibid.*

³ A. Ringnalda. "Convergence and Traditions of Criminal Procedure: Fair Truth Finding and the Changing Role of the Prosecutor in the Netherlands and England and Wales." Dissertation Doctoral, Utrecht University, 2015. <https://dspace.library.uu.nl/handle/1874/327328>

⁴ H. Amna. "Developing Pakistani Contract Law Regarding Gender Equality Issues: The Lessons of Comparative Contract Law Questions of Anglo-Saxon and Continental European Legal Systems." Disertasi Doktoral, University of Pécs (Hungary), 2022. <https://pea.lib.pte.hu/bitstream/handle/pea/34226/hassan-amna-phd-2022.pdf?sequence=1&isAllowed=y>

⁵ J. R. Silkenat, J. E. Hickey, dan P. Barenboim, ed. *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*. Vol. 38. Heidelberg: Springer, 2014. https://discovered.ed.ac.uk/discovery/fulldisplay?docid=alma9922831113502466&context=L&vid=44UOE_INST:44UOE_VU2&lang=en&search_scope=UoE&adaptor=Local%20Search%20Engine&tab=Eeverything&query=sub%2Cexact%2CRule%20of%20law

⁶ N. W. Barber. *The Rechtsstaat and the Rule of Law*. 2003. <https://www.jstor.org/stable/3650895>

⁷ M. R. Damaska. *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven: Yale University Press, 1986.

⁸ R. Vogler. *A World View of Criminal Justice*. Routledge, 2017. <https://www.routledge.com/A-World-View-of-Criminal-Justice/Vogler/p/book/9781138248946?srsId=AfmBOoqeTIGbSTfU1HufsSM8MEjtz5WGn9EqXRxlBzwgiooe-bSSoAdf>

⁹ T. Karakamisheva-Jovanovska. "A Covert or Open "Battle" Between the Three Legal Traditions in the EU (Rule of Law, Rechtsstaat and État de Droit)–Critical Assessments of the Anglo-Saxon Versus Continental Legal Tradition in Context of the EU Future." 2024. https://cbpe.pl/wp-content/uploads/2024/01/cbpe_eng3.pdf

¹⁰ N. E. Nedzel. "Fuller, Dworkin, Scientism, and Liberty: The Dichotomy between Continental and Common Law Traditions and Their Consequences." *Laws* 12, no. 3 (2023): 37. <https://www.gssrjournal.com/article/an-investigation-of-indias-and-pakistans-legal-systems-through-the-lens-of-rule-of-law>

traditions regarding fundamental legal concepts. Although these studies provide rich descriptive comparisons, comprehensive philosophical analyses that integrate the core principles of Due Process and Rechtsstaat and examine their implications for procedural justice remain poorly explored.

This lack of in-depth analysis creates a gap in our understanding of how these two great world legal traditions face the universal challenge of ensuring justice for individuals and society. Existing research tends to focus on structural and procedural differences but rarely addresses the epistemological and ontological foundations underlying them. Without a strong philosophical understanding, efforts at harmonisation or transfer of laws can be superficial and unsustainable, failing to address fundamental differences in how these systems view the relationship among the state, the individual, and the law itself.¹¹

The scientific excellence and novelty of this paper lie in its philosophical comparative analysis of the Due Process of Law and the Rechtsstaat. This research goes beyond simply delineating the differences by examining the jurisprudential philosophies underlying the different manifestations of procedural justice.¹² It aims to show how historical developments and philosophical tendencies have shaped these concepts, offering a deeper understanding of their strengths, limitations, and potential convergence in the era of globalisation. This study seeks to contribute to a sustainable academic discourse on legal transfer and harmonisation of legal principles in various jurisdictions.¹³

This philosophical approach allows us to identify the legal paradigms underlying both concepts. *Due Process*, which is firmly rooted in the Common Law tradition, reflects an evolving view of law through judicial precedent and the protection of individual rights from government intervention. The philosophy behind it is often associated with liberal thinking that emphasises personal autonomy and the limitation of state power, as seen in the works of thinkers such as John Locke on natural rights and the limitation of political power.¹⁴ The emphasis is on fair process as a means to achieve substantive justice on a case-by-case basis.

On the other hand, *the Rechtsstaat* reflects a Continental legal tradition that is more centred on rationality, systematisation, and the codification of law. This concept was strongly influenced by the thought of the German Enlightenment, especially Immanuel

¹¹ H. P. Glenn. *Legal Traditions of the World: Sustainable Diversity in Law*. Oxford: Oxford University Press, 2014.

¹² J. C. Botero. "The Three Faces of Justice: Legal Traditions, Legal Transplants, and Customary Justice in a Multicultural World." Disertasi Doktoral, 2013.
<https://repository.library.georgetown.edu/handle/10822/1047846>

¹³ P. De Cruz. *Comparative Law in a Changing World*. Taylor & Francis, 2024.

¹⁴ J. Locke dan P. Laslett. *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett*. Cambridge: Cambridge University Press, 1967.

Kant, who argued that the state should be governed by rational and universal law rather than the arbitrary will of the ruler. For Kant, individual freedom can be fully realised only in a state of law that guarantees legal certainty and equal treatment under the law.¹⁵ Therefore, *the Rechtsstaat* not only concerns justice in the process but also the legitimacy and legal structure of the entire state apparatus, ensuring that every state action has a transparent and predictable legal basis.¹⁶

This research has several primary objectives. First, we will delineate the philosophical foundations and historical evolution of *the Due Process of Law* in the Anglo-Saxon legal tradition. We will also delineate the intellectual and historical foundations of *the Rechtsstaat* in the Continental legal tradition. Furthermore, this study will conduct a comparative analysis on the philosophical basis and practical implications of *Due Process* and *Rechtsstaat* for procedural justice. Finally, we will identify areas of convergence and divergence between the two concepts and discuss their implications for future legal reform in a global context.

To achieve these goals, this article is compiled systematically. Part 1: Introduction; Part 2 will detail the *Due Process of Law* in the Common Law system, including its concept, historical evolution, and its dimensions in procedural justice. Part 3 will explore *the Rechtsstaat* in the Continental system, outlining its concepts, key characteristics, and procedural manifestations. Part 4 will provide a comprehensive philosophical comparative analysis of *Due Process* versus *Rechtsstaat*, including a discussion of convergence and challenges in the era of globalisation. Section 5 will present a case study of the implications of these principles in criminal and civil justice. Finally, Section 6 will present conclusions that summarise the findings and outline future research directions.

B. Method

This legal research employs a philosophical-normative methodology, focusing primarily on legal principles, concepts, and doctrines. The nature of this research is analytical and prescriptive, aiming not only to describe but also to critically analyse and evaluate the philosophical foundations of procedural justice in various legal traditions. This type of research is doctrinal, relying on the examination of primary and secondary legal materials. The main approach used is the comparative legal approach, which is essential for understanding the nuances between the Anglo-Saxon and Continental legal

¹⁵ I. Kant. "The Metaphysics of Morals." *Practical Philosophy. The Cambridge Edition of the Works of Immanuel Kant*, edited oleh M. J. Gregor, 353-604. Cambridge: Cambridge University Press, 1797. https://cbpe.pl/wp-content/uploads/2024/01/cbpe_eng3.pdf

¹⁶ S. Kirste. "Philosophical Foundations of the Principle of the Legal State (Rechtsstaat) and the Rule of Law." *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, 29-43. Cham: Springer International Publishing, 2014. <https://unizsalzburg.elsevierpure.com/en/publications/philosophical-foundation-of-the-principle-of-the-legal-state-rech-2>

systems.¹⁷ This comparative approach will involve a detailed analysis of the principles of Due Process of Law and Rechtsstaat, contrasting their historical developments, philosophical foundations, and practical applications in judicial processes.¹⁸ In particular, it will draw comparisons across areas such as pre-trial procedures, the roles of the judiciary and prosecutors, and fundamental procedural protections such as the burden of proof and the presumption of innocence.¹⁹ His primary data collection technique involves literature research, including extensive reviews of scientific books, journal articles, dissertations, and legal documents, both on legal philosophy theory and on the application of law.

C. Result & Discussion

This section is the most crucial section of your article. The analysis or results of the research should be clear and concise. The results should summarise (scientific) findings rather than provide data in great detail. Please highlight the differences between your results or findings and those of previous publications by other researchers.

The discussion section must be written consistently with the article structure, as follows:

1. Due Process of Law: Foundations of Procedural Justice in Common Law

The principle of Due Process of Law stands as the cornerstone of the Anglo-Saxon legal system, especially prominent in the United States, whose traces go back to Magna Carta. This concept fundamentally guarantees that no one should be deprived of their "life, liberty, or property" without fair and correct legal procedure. As carefully outlined by²⁰ the evolution of Due Process principles, there is an essential shift from mere adherence to procedural formalities toward a deeper emphasis on substantive justice. This means not only that the correct legal steps must be followed, but also that the procedures themselves must reflect the principles of justice. This inherent demand for justice serves as a critical examination of government power, protecting individuals' rights from arbitrary actions or state oppression.²¹ Philosophically, *Due Process* reflects the tradition of Anglo-Saxon empiricism and pragmatism. Law is not seen as a complete, pre-existing set of rules, but as a system constantly being built and refined through

¹⁷ M. Siems dan P. J. Yap, ed. *The Cambridge Handbook of Comparative Law*. Cambridge: Cambridge University Press, 2024. <https://www.mohrsiebeck.com/en/article/the-cambridge-handbook-of-comparative-law-cambridge-2024-101628rabelsz-2024-0051/>

¹⁸ Lutsenko, 2023, *op.cit.*

¹⁹ M. Abdullaeva. "Burden of Proof and Presumption of Innocence: A Comprehensive Review of These Fundamental Principles in Anglo-Saxon Criminal Justice Systems." *The American Journal of Political Science Law and Criminology* 6, no. 9 (2024): 155-59. <https://www.theamericanjournals.com/index.php/tajpslc/article/view/5519>

²⁰ C. Stewart. *The Evolution and Interpretation of Due Process of Law*. University of Dallas, 2005.

²¹ R. M. Allalyev. "Rule of law as a political and legal ideal in the Anglo-Saxon legal tradition." *Вестник Российского университета дружбы народов. Серия: Юридические науки* 27, no. 4 (2023): 859-70. <https://journals.rudn.ru/law/article/viewFile/36891/22795>

concrete experience and individual dispute resolution.²² This aligns with Jeremy Bentham and John Stuart Mill's thinking on utility and freedom, which emphasised the importance of fair procedures to prevent the abuse of power and to maximise public welfare while protecting the rights of minorities.²³ This principle often operates as a shield against government actions that violate fundamental rights, placing a heavy burden on the state to justify its intervention.

2. The Dimension of Procedural Justice in Due Process

Due Process mainly includes two critical dimensions:

- a. **Procedural Due Process:** This dimension requires that the procedures used in the legal process are fair and equitable. Its principles include the right to be heard by an impartial court, adequate and timely notice of the process, a real opportunity to defend oneself, and the right to appeal adverse judgments.²⁴ In the context of criminal justice, procedural due process is closely related to fundamental protections such as the burden of proof and the presumption of innocence, under which the state must prove guilt beyond a reasonable doubt.²⁵ In addition, it includes protection against double prosecution or *the ne bis in idem principle*, which prevents a person from being prosecuted or convicted twice for the same offence.²⁶
- b. **Substantive Due Process:** This broader dimension protects individuals' fundamental rights from arbitrary or unreasonable government actions, even when those actions are carried out through procedurally fair means. This ensures that the law itself is fair and does not violate fundamental rights, acting as a safeguard against the abuse of legislative power.

²² B. Z. Tamanaha. "A Concise Guide to the Rule of Law." *The Learning Legislator*, 19-32. Nomos Verlagsgesellschaft mbH & Co. KG, 2009. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051

²³ J. S. Mill. "On Liberty." *A Selection of His Works*, 1-147. London: Macmillan Education UK, 1859. https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/239/Mill_0223-32_EBk_v6.0.pdf

²⁴ S. I. Strong. "General Principles of Procedural Law and Procedural Jus Cogens." *Penn St. L. Rev.* 122 (2017): 347. <https://www.pennstatelawreview.org/wp-content/uploads/2018/03/Strong-final-print.pdf>

²⁵ Abdullaeva, 2024, *op.cit.*

²⁶ P. Mezei. "Not Twice for the Same': Double Jeopardy Protections Against Multiple Punishments: A Comparative Analysis of the Origins, Historical Development and Modern Application of the Ne Bis In Idem Principle." *Fair Trial and Judicial Independence: Hungarian Perspectives*, 197-219. Cham: Springer International Publishing, 2013. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347343

In the Common Law tradition, judges play an indispensable role in the development and interpretation of Due Process.²⁷ Through their rulings, they set a precedent that refined and expanded the scope of this procedural protection, constantly adapting the concept to new legal and social contexts.²⁸ The laws created by these judges significantly contribute to the dynamic and evolving nature of Due Process. The active role of judges in shaping *Due Process* reflects the Common Law's adaptive character. Each new case has the potential to develop or clarify the limitations of *Due Process*, enabling the legal system to respond to changes in society, technology, and values. This flexibility, however, can also lead to legal uncertainty, as interpretations of *Due Process* can shift over time and across jurisdictions. It is a philosophical compromise between strict legal certainty and the ability to adapt to changing realities, with judges as the main guardians of this balance.

3. Rechtsstaat: Pillars of Procedural Justice in the Continental System

The concept of the Rechtsstaat (literally, "state of law") is a fundamental principle in the Continental legal tradition, especially prominent in Germany. Although it shares the overarching goal of limiting state power and protecting citizens, the Rechtsstaat encompasses a broader philosophical framework than the Rule of Law, emphasising a state structure grounded in law and reason. As articulated by Silkenat, Hickey, & Barenboim²⁹ and Kirste³⁰, the Rechtsstaat represents the ideal that the state should be governed by law rather than the arbitrary will of individuals.

Philosophically, *the Rechtsstaat* was heavily influenced by German rationalism and idealism. It is a more holistic and normative concept than the Anglo-Saxon *Rule of Law*, which emphasises formality. *The rechtsstaat* not only demands compliance with the law, but also demands that the law itself must be rational, coherent, and fair. It is rooted in the idea that state power should be limited and directed by reasonable and just laws, a reflection of Enlightenment thought that places reason as the foundation of a valid social

²⁷ C. V. Giabardo. "Disobeying Courts' Orders-A Comparative Analysis of the Civil Contempt of Court Doctrine and of the Image of the Common Law Judge." *J. Civ. L. Stud.* 10 (2017): 35. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jcilst10&div=8&id=&page=>

²⁸ Y. Kryvytskyi. "Judicial Lawmaking and Judicial Reform: Theoretical and Practical Aspects of the Relationship." *Law Journal of the National Academy of Internal Affairs* 3, no. 14 (2024): 43-54. <https://lawjournal.com.ua/en/journals/tom-14-3-2024/sudova-pravotvorchist-i-sudova-reforma-teoretiko-praktichni-aspekty-vzayemozv-yazku>

²⁹ J. R. Silkenat, J. E. Hickey, dan P. Barenboim, 2014, *op.cit.*

³⁰ S. Kirste, 2014, *op.cit.*

order.³¹ Law is seen as an expression of rational public will, not merely a collection of judicial decisions.

4. Core Characteristics and Procedural Manifestations of the Rule of Law

The Rechtsstaat is characterised by several core principles that form its philosophical foundation. First, there is the Rule of Law, under which all state actions and citizens' behaviour must conform to established legal norms. Second, the principle of Separation of Powers is necessary, ensuring that legislative, executive, and judicial powers are separate and balanced to prevent concentration and abuse of authority. Third, the Protection of Fundamental Rights is an important pillar; Individual rights must be guaranteed and protected by the Constitution and laws, equipped with robust mechanisms for their enforcement. Finally, *the Rechtsstaat* emphasises the existence of Judicial Review of Administrative Actions, in which the legality of government administrative decisions is subject to independent judicial oversight, ensuring accountability and compliance with the law.³²

The concept of *the Rechtsstaat* is firmly rooted in Continental legal philosophy, which prioritises the codification and systematic organisation of law. The detailed and comprehensive nature of the law in Civil Law jurisdiction reflects the emphasis on these explicit written norms.³³ This emphasis on thorough, comprehensive codification reflects the philosophical belief that law should be accessible, predictable, and universally applicable. This is an attempt to reduce judicial discretion and ensure that citizens clearly understand their rights and obligations.

The rechtsstaat is procedurally manifested through several key characteristics that differ from the Common Law tradition. One of them is the existence of a Detailed and Codified Procedural Law. Both criminal and civil procedures are comprehensively regulated in the legal code, providing a high level of legal certainty and predictability.³⁴ This contrasts with the development of methods driven more by court decisions in the Common Law system.

In addition, there are different roles of the Public Prosecutor. In the Continental system, public prosecutors are usually seen as objective public officials, tasked with

³¹ C. E. Mecke. "The 'Rule of Law' and the 'Rechtsstaat': A Historical and Theoretical Approach from a German Perspective." *Studia Iuridica*, no. 79 (2019): 29-47. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311874

³² B. Sordi. "Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law." *Comparative Administrative Law*, 23-37. Edward Elgar Publishing, 2017. <https://dokumen.pub/the-oxford-handbook-of-comparative-administrative-law-9780198799986-0198799985.html>

³³ A. Engelmann. *A History of Continental Civil Procedure*. Vol. 7. Boston: Little, Brown, 1927.

³⁴ L. Cadet, B. Hess, dan M. R. Isidro. *Approaches to Procedural Law*. <https://lawcat.berkeley.edu/record/97897?ln=en>

seeking objective truth and ensuring justice, not just advocating for sentencing. This often involves an obligation to investigate incriminating and mitigating evidence.³⁵ Finally, the Inquisitorial Judge's Role is a distinctive characteristic; traditionally, Continental judges have played a more active, inquisitorial role in investigating the facts and guiding proceedings, in contrast to the more passive, adversarial role of judges in the Common Law system.³⁶ Although there is a visible trend of convergence, with some adversarial elements introduced into the Continental system, these fundamental differences remain. In this system, the role of judges is more that of an applicator of existing law rather than a lawmaker, although interpretation is undoubtedly necessary. This is consistent with the principle of strict separation of powers, where the legislature makes laws, the executive implements them, and the judiciary interprets them.³⁷ The philosophical implication of the judge's role as an applicator, rather than a lawmaker, is an emphasis on legal certainty and predictability. It aims to minimise potential inconsistencies arising from overly broad judicial interpretations, in line with *the Rechtsstaat's* ideal of ensuring that public power is exercised in a structured manner and in accordance with clearly established norms.

5. Philosophical Comparative Analysis: Due Process Versus the Rule of Law

Although *Due Process* and *Rechtsstaat* both aim to guarantee justice and limit state power, their philosophical origins and practical applications differ significantly. Understanding these differences is essential to appreciating the unique strengths and challenges of each tradition.

These fundamental differences can be seen as a reflection of different philosophical priorities. *Due Process* tends to prioritise the protection of individual rights *ex post facto*, meaning that these rights are affirmed and defended through the judicial process after an alleged violation occurs. It emphasises the idea of inherent individual rights that cannot be revoked without fair procedures. In contrast, *the Rechtsstaat* is more oriented towards establishing a legal system that *is ex ante* fair and predictable, in which state power is already regulated and limited by law before any action is taken. It is about the legal architecture that prevents abuse of power from the beginning.³⁸

This difference is manifested in several key aspects. The first is the origin and focus of both concepts. *Due Process* primarily arises from the need to protect individual liberty from arbitrary government actions, evolving gradually through judicial cases and constitutional interpretation. The focus is often on ensuring fairness in separate legal proceedings. In contrast, *the Rechtsstaat* derives from a strong tradition of public law,

³⁵ Ringnalda, 2015, *op.cit.*

³⁶ M. R. Damaska. *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven: Yale University Press, 1986.

³⁷ Marcinkowski, 2018, *op.cit.*

³⁸ Nedzel, 2023, *op.cit.*

emphasising a rational and legally legitimate state structure and ensuring that all state organs operate within the confines of codified law.³⁹

Furthermore, there are differences in the emphasis of each principle. *Due Process* tends to emphasise procedural fairness in specific litigation, focusing on the measures and protections afforded to parties to the dispute. However, *the Rechtsstaat* is broader in scope, encompassing the entire architecture of the state and its administration, ensuring that public power is exercised legitimately and predictably.⁴⁰ It is about the country becoming a country governed by law.

Finally, a significant difference emerges in the role of the judiciary. In the Common Law tradition, the judiciary plays a dynamic, often creative role in defining and expanding the scope of *Due Process* through case law and precedent. In contrast, in the Continental system, the role of the judiciary within the *framework of the Rechtsstaat* is more dominant in applying and interpreting codified laws.⁴¹ Although judicial interpretation indeed occurs, the primary source of legal authority remains the legislative code.

In the end, although *the Due Process* and *the Rechtsstaat* operate on different mechanisms and are rooted in contrasting philosophical assumptions regarding the relationship between the state and the individual, both fundamentally affirm the importance of state accountability before the law and the protection of citizens' procedural rights. The differences do not diminish the common goal of achieving justice in the legal process, but rather highlight the diversity of paths that the legal system can take to realize those ideals. Understanding these nuances is key to analysing potential convergence and challenges in today's global legal landscape.

6. Convergence and Challenges in the Era of Globalization

In the context of increasing globalisation, there is a trend of convergence between these two legal traditions.⁴² The Common Law system⁴³ is increasingly adopting more structured principles of administrative law, similar to those found in the Continental system, to manage the complexities of modern government. Simultaneously, the Continental system began to adopt stronger procedural protections for defendants, drawing on the adversarial model's emphasis on individual rights. The European Union, with its diverse membership encompassing both legal traditions, becomes an essential

³⁹ N. W. Barber, 2003, *op.cit.*

⁴⁰ Nedzel, 2023, *op.cit.*

⁴¹ Marcinkowski, 2018, *op.cit.*

⁴² D. M. Amann. "Harmonic Convergence? Constitutional Criminal Procedure in an International Context." *Globalization of Criminal Justice*, 3-68. Routledge, 2017. <https://www.taylorfrancis.com/chapters/edit/10.4324/9781315254081-2/harmonic-convergence-constitutional-criminal-procedure-international-context-diane-marie-amann>

⁴³ P. De Cruz. *Comparative Law in a Changing World*. Taylor & Francis, 2024.

arena for these interactions, often described as "battles" or, rather, as dynamic interactions between the Rule of Law, the *Rechtsstaat*, and the *État de droit*.⁴⁴

This convergence is often driven by global pressure to protect human rights and achieve universal standards of justice set by international legal instruments. For example, the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights effectively promote the elements of procedural justice found in both traditions, forcing member states to adopt higher standards in the protection of individual rights.⁴⁵ Nonetheless, implementing these standards often faces challenges due to differences in each country's legal infrastructure and legal culture.

However, significant challenges remain. Differences in legal positivism, the idea that law is different from morality,⁴⁶ and its interpretation can lead to different outcomes and ongoing debates.⁴⁷ In addition, other ways of understanding and applying courts and comparative law across jurisdictions continue to be obstacles to complete harmonisation.⁴⁸

The debate over legal positivism is particularly relevant here. In the *Rechtsstaat* tradition, although written law is emphasised, there is also the idea that law should be rational and ethical. In contrast, some more formalistic *interpretations of Due Process* may lean toward strict positivism, in which, as long as the procedure is followed, the outcome is considered legitimate regardless of substantial fairness. This creates the philosophical tension that underlies many comparative legal debates, especially in sensitive issues such as the right to privacy or social justice.⁴⁹ Although convergence trends offer hope for a more harmonious and equitable legal system globally, the profound philosophical differences between *Due Process* and *Rechtsstaat* continue to shape the challenging landscape. Overcoming these differences requires more than procedural adjustments; it demands a deeper understanding of the underlying normative assumptions and a

⁴⁴ T. Karakamisheva-Jovanovska. "A Covert or Open "Battle" Between the Three Legal Traditions in the EU (Rule of Law, *Rechtsstaat* and *État de Droit*)—Critical Assessments of the Anglo-Saxon Versus Continental Legal Tradition in Context of the EU Future." 2024. https://cbpe.pl/wp-content/uploads/2024/01/cbpe_eng3.pdf

⁴⁵ Amann, 2017, *op.cit.*

⁴⁶ Anggoro Yulianto, "Cybersecurity Policy and Its Implementation in Indonesia," *Law Research Review Quarterly* 7, no. 1 (2021): 69–82, <https://doi.org/https://doi.org/10.15294/lrrq.v7i1.43191> 70. (McDonald, 2001)

⁴⁷ A. Marmor. "The Rule of Law and Its Limits." *Law & Phil.* 23 (2004): 1. <https://www.jstor.org/stable/4150562>

⁴⁸ M. T. Andenæs dan D. Fairgrieve, ed. *Courts and Comparative Law*. Oxford: Oxford University Press (UK), 2015. https://www.jus.uio.no/ifp/forskning/prosjekter/finansmarket/arrangementer/andenasfairgrieve_courts_and_comparative_law.pdf

⁴⁹ S. Lagi. "Legal Positivism as a Limitation of the Rule of Law." *Faces of the Rule of Law in Europe*, 25–42. Vandenhoeck & Ruprecht Brill, 2024. https://books.google.co.id/books/about/Two_Treatises_of_Government.html?id=cGb9zgEACAAJ&redir_esc=y

commitment to dialogue across traditions to achieve the optimal balance between legal certainty, efficiency, and the protection of individual rights in the modern era.

7. Convergence and Challenges in the Era of Globalisation

a. Implications of Case Studies in Criminal Justice

Criminal justice is one of the most sensitive arenas in the legal system, where state interference with individual freedom reaches its peak. Therefore, ensuring procedural justice is very important. The philosophical difference between *Due Process* in the Anglo-Saxon tradition and *the Rechtsstaat* in the Continental tradition manifests itself in criminal procedure in distinctive ways, especially at the pre-trial and trial stages.

1) Philosophical Differences in Criminal Procedure

In Anglo-Saxon criminal justice, a strong emphasis on Due Process gives the defendant solid rights from the early stages of the criminal investigation. This includes the *right to remain silent*, the right to counsel, and strict supervision of evidence obtained, primarily through the *exclusionary rule*, which excludes illegally obtained evidence.⁵⁰ This adversarial approach fundamentally places the state (the prosecutor) and the defendant as opposing parties, with procedural safeguards designed to guarantee a fair fight. The burden of proof rests entirely on the state, and the defendant is presumed innocent until proven otherwise beyond *a reasonable doubt*, a fundamental principle underlined by Abdullaeva.⁵¹

This characteristic allows defendants to actively challenge the validity and relevance of the prosecution's evidence, as well as to prepare their defence by exercising their strict procedural rights. Judges in this system act as neutral referees, ensuring compliance with the rules of the game and fair procedures, without being actively involved in evidence collection. It reflects the fundamental belief that truth is best revealed through a competition of arguments and evidence presented by interested parties, where each side has an equal opportunity to test the opposing case. This system prioritises preventing abuse of state power over the efficiency of investigations, relying on parties' initiative to uncover all relevant facts.

Conversely, the Continental System, while upholding the *Rechtsstaat*, has historically given investigator judges or prosecutors a greater role in gathering evidence and shaping the factual narrative. This inquisitorial approach emphasises the state's duty to uncover objective truth or material truth. In this

⁵⁰ Lutsenko, 2023, *op.cit.*

⁵¹ Abdullaeva, 2024, *op.cit.*

model, judges are not only mediators but also active in the search for the truth through state-led investigations. Judges can proactively call witnesses, request documents, or appoint experts to ensure all relevant facts are revealed, a characteristic described in depth by Damaska.⁵² It is a manifestation of the belief that substantive truth is more important than strict procedural formalities, and that the state has an active role in achieving it in the interest of society.

However, modern reforms across Continental jurisdictions show a clear trend of convergence. There has been an increase in the adoption of more adversarial elements and the strengthening of the rights of the accused, especially in areas such as access to legal counsel and the ability to challenge evidence.⁵³ These reforms are often driven by international human rights standards, such as the European Convention on Human Rights, which encourage Continental countries to adapt their procedures to better align with the globally evolving standards of "fair trials." Ringnalda⁵⁴ notes this convergence, particularly in the roles of prosecutors and efforts for fair truth discovery in the Netherlands and the United Kingdom,⁵⁵ which reflect a growing recognition of the principles of a universally fair trial, even if the historical paths are different.

2) The Dynamics of Convergence and Eternal Difference

As a concrete example of this convergence, German Constitutional Court rulings on the rights of defendants often reflect progressive interpretations of *the Rechtsstaat*.⁵⁶ This interpretation results in protections equivalent to those of *Due Process* in the United States, especially regarding the right to be heard, the right to be silenced, and access to evidence. The German Constitutional Court has used *the principles of the Rechtsstaat*, such as the principles of proportionality and human dignity, to develop strong standards of protection of the rights of defendants, which are on par with the protections afforded by the Fifth and Sixth Amendments to the U.S. Constitution,⁵⁷ in the context of *judicial lawmaking*.

⁵² Damaska, 1986, *op.cit.*

⁵³ Amann, 2017, *op.cit.*

⁵⁴ Ringnalda, 2015, *op.cit.*

⁵⁵ R. Vogler. *A World View of Criminal Justice*. Routledge, 2017. <https://www.routledge.com/A-World-View-of-Criminal-Justice/Vogler/p/book/9781138248946?srsId=AfmBOoqeTIGbSTfU1HufsSM8MEjtz5WGn9EqXRxlBzwgiooe-bSSoAdf>

⁵⁶ D.P. Kommers. and R.A. Miller., "The Constitutional Jurisprudence of the Federal Republic of Germany, 3rd ed." (2012). Books. 88. https://scholarship.law.nd.edu/law_books/88

⁵⁷ Y. Kryvytskyi. "Judicial Lawmaking and Judicial Reform: Theoretical and Practical Aspects of the Relationship." *Law Journal of the National Academy of Internal Affairs* 3, no. 14 (2024): 43-54.

Nonetheless, fundamental differences remain, especially in the proactive role of judges in the investigative process. In the *Common Law system*, judges maintain a passive role as arbitrators between two opposing parties. They were not involved in the collection of pre-trial evidence; That role is entirely in the hands of the prosecutor and the defender. In contrast, in the Continental system, despite adversarial tendencies, judges can still take the initiative to direct investigations or request additional evidence, a feature that significantly distinguishes them.⁵⁸ Although *Kontz*⁵⁹ may be an old quote, the principles he raises about the passive role of judges in the Common Law system remain relevant to emphasise this contrast. This suggests that despite the convergent goals, namely ensuring justice for the accused and uncovering the truth, the procedural pathways to achieving them can differ significantly due to the philosophical assumptions underlying the role of the state and individuals in criminal proceedings.

This case study emphatically shows that although the Anglo-Saxon and Continental legal traditions have different historical paths and philosophical approaches to procedural justice, they now face similar global challenges. The convergence in strengthening defendants' rights and efforts to strike a balance between law enforcement efficiency and individual protection underscores the universal commitment to fair justice. However, fundamental differences in the role of judges, particularly in the investigative phase, remain a distinguishing feature. A deep understanding of these nuances is crucial for cross-border legal dialogue and ongoing reform of the system in the modern era, ensuring that procedural justice can be upheld amid the diversity of global legal traditions.

b. Implications of Case Studies in Civil Justice

1) Conceptual Differences in Procedural Justice Guarantees

In Anglo-Saxon civil courts, Due Process serves as the primary guarantee of fair litigation rights. This includes fundamental requirements such as a proper notice and a *meaningful opportunity to be heard*. This principle dictates that all parties involved in a dispute should have a fair chance to present their case, present evidence, and refute opposing arguments. Procedural fairness is highly emphasised here, ensuring that each individual has adequate protection against arbitrary actions. For example, the U.S. Supreme Court's decision in

<https://lawjournal.com.ua/en/journals/tom-14-3-2024/sudova-pravotvorchist-i-sudova-reforma-teoretiko-praktichni-aspekty-vzayemozv-yazku>

⁵⁸ W. Marcinkowski. "The Structure of English Judiciary from the Perspective of Continental Legal System." 2018. <https://ruj.uj.edu.pl/entities/publication/ce097ddb-eda1-4b5e-8147-b61438a4008a>

⁵⁹ H. Kontz. *Curso de administración moderna*, 8va edición, edit. MCGRAW Hill, México, (1987): 87.

*Mathews v. Eldridge*⁶⁰ established a three-factor framework for determining fair procedure, including considerations of the personal interests involved, the risk of error under existing methods, and the administrative costs of additional procedures. It shows how *Due Process* is tested and articulated through concrete cases, which then become binding precedents.⁶¹

The adversarial nature of *common law* civil proceedings is a direct manifestation of *due process*. This model empowers the parties to largely control the presentation of their evidence and arguments, with the judge acting as a neutral referee, ensuring the rules of the game are upheld and that both sides have an equal opportunity to present their case. The focus is on a contest between equal parties, where factual truth is expected to emerge from each party's presentation of the most convincing arguments and evidence.⁶² This reflects the belief that justice is best achieved through a balanced legal process, where the burden of proof and procedural initiative are primarily on the parties. The freedom of parties to strategise and present their cases is at the heart of this system, with judges generally not being proactive in gathering evidence or developing case theories.

In contrast, in the Continental system, the Rechtsstaat guarantees access to justice and transparency, albeit in different ways. While due process is also at the core, the most distinguishing characteristic is the role of judges, who have traditionally played a more active, inquisitorial role in guiding the process and clarifying issues. Judges in *the Civil Law* system are not only passively waiting for the parties to present evidence; they can and often independently seek proof to reach a fair outcome.⁶³ This inquisitorial tendency in civil proceedings is intended to ensure a thorough and fair settlement of disputes, rather than relying solely on the parties' presentations.

This principle of the Inquisitorial, as analysed by Damaska,⁶⁴ affirms that the state, through its judiciary, has a greater responsibility to uncover factual truths, not limited to what is presented by the parties. Judges can take the initiative to call witnesses, request documents, or appoint experts, all to achieve substantive justice. This approach is rooted in Enlightenment thought that emphasises rationality and the systematic organisation of law, in which

⁶⁰ J.L. Mashaw. The Supreme Court's due process calculus for administrative adjudication in *Mathews v. Eldridge*: Three factors in search of a theory of value. *The University of Chicago Law Review*, (1976): 28-59. <https://chicagounbound.uchicago.edu/uclrev/vol44/iss1/5/>

⁶¹ C. V. Giabardo. "Disobeying Courts' Orders-A Comparative Analysis of the Civil Contempt of Court Doctrine and of the Image of the Common Law Judge." *J. Civ. L. Stud.* 10 (2017): 35.

⁶² S.I. Strong, 2017, *op.cit.*

⁶³ C. Cavallini. 2024, *op.cit.*

⁶⁴ Damaska, 1986, *op.cit.*

Procedural law is designed to guide judges to the most correct and appropriate verdict.⁶⁵ Although there is a trend toward convergence in which some adversarial elements have been introduced into the Continental system, the essence of the proactive role of judges in ensuring truth and justice remains a hallmark of the *Rechtsstaat* in civil justice. Thus, the *Rechtsstaat* guarantees that the civil process is not only formally legitimate but also produces a correct and fair decision based on a comprehensive investigation of the facts by the judicial authorities.

2) Implications for Mediation and Alternative Dispute Resolution (ADR)

The philosophical differences between *Due Process* and *Rechtsstaat* are also evident in their approaches to mediation and alternative dispute resolution (ADR). ADR is an increasingly important mechanism for reducing the burden on the courts and providing a more flexible and efficient dispute-resolution avenue. However, how ADR is integrated and viewed differently across both legal traditions reveals fundamental differences in procedural justice philosophy.

In the *Common Law* system, with its emphasis on party autonomy and adversarial processes, ADR is often seen as an extension of the principle of party empowerment. Mediation, arbitration, and negotiation are usually voluntary and party-driven, with minimal judicial intervention. The philosophy behind it is that if the parties have the right to present their case in court, they should also have the freedom to choose a method for resolving the dispute outside court, without excessive state intervention. This aligns with the idea that *Due Process* gives individuals the right to resolve their own conflicts and that the courts serve as the last resort when alternative mechanisms fail. The emphasis on the outcome agreed upon by the parties reflects an appreciation of individuals' free will and ability to determine justice for themselves. The parties have complete control over the ADR process and outcome, and the courts are usually involved only to enforce settlement agreements or to certify an arbitration award, with apparent limitations on the scope of review.⁶⁶

In contrast, in the *Rechtsstaat* system, ADR is often integrated into a more structured legal framework and is usually led or supervised by the courts. While the goals of efficiency and peaceful dispute resolution remain, there is a stronger desire to ensure that the ADR process itself complies with the *principles*

⁶⁵ A. Engelmann. *A History of Continental Civil Procedure*. Vol. 7. Boston: Little, Brown, 1927.

⁶⁶ G.B. Born. The law governing international arbitration agreements: An international perspective. *SACJL*, 26, (2014): 814. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/sacj26§ion=46

of the *Rechtsstaat*, namely fairness, transparency, and compliance with the law.⁶⁷ The court may be more proactive in recommending, or even directing, the parties to try mediation as a mandatory step before full litigation. Arbitration, while popular, may be subject to greater judicial review or stricter formal requirements to ensure consistency with broader legal principles and to protect the public interest. This reflects a desire to ensure fairness and compliance with the law even outside of formal litigation. In the *Rechtsstaat*, accountability and the predictability of the law should not be sacrificed for efficiency alone, so judicial intervention or supervision is more acceptable to maintain the integrity of the legal system as a whole.

Ultimately, although both systems, guided by *Due Process* and *Rechtsstaat*, aim to provide effective dispute resolution and uphold fundamental principles of justice in civil matters, their paths and emphases differ philosophically. *Common Law* tends to empower individuals and afford ample room for parties' discretion. At the same time, *Civil Law*, through the lens of the *Rechtsstaat*, emphasises the overarching legal structure and the state's active role in ensuring substantive and procedural justice. Understanding these differences is critical for legal practitioners and policymakers operating in an increasingly connected global context. The convergence that occurs in the era of globalisation does not eliminate these fundamental differences, but instead demands adaptation and a better understanding of different paths to achieve the same goal of justice.

D. Conclusion

Based on philosophical and historical analysis, the Due Process of Law in the Anglo-Saxon tradition and the *Rechtsstaat* in the Continental tradition both serve as the foundations of crucial procedural justice, albeit with different approaches. Due Process, rooted in Magna Carta and the traditions of empiricism and Anglo-Saxon pragmatism, focuses on protecting individual rights from arbitrary government action through fair and equitable procedures. This can be seen in the emphasis on Procedural Due Process (right to be heard, adequate notice, opportunity to defend oneself, right to appeal) and Substantive Due Process (protection of fundamental rights from unreasonable government actions). The role of judges here is dynamic and creative, shaping case law through precedent. In contrast, the *Rechtsstaat*, which derives from the German traditions of rationalism and idealism, emphasises a state governed by rational, coherent, and just laws. The concept is more holistic, encompassing the Rule of Law, Separation of Powers, Protection of Fundamental Rights, and Judicial Review of Administrative Actions, with judges serving as enforcers of laws codified in detail.

⁶⁷ Cavallini, 2024, *op.cit.*

Although differing in its philosophical origins and procedural manifestations, Due Process emphasises the protection of *ex post facto individual rights* in litigation. At the same time, the Rechtsstaat focuses on a legal system that *is ex ante* fair and predictable. These two concepts show significant convergence in the era of globalisation. The impetus from international human rights standards, such as the European Convention on Human Rights, has prompted the Continental system to adopt stronger procedural protections for defendants, similar to the adversarial model. In contrast, the Common Law system also began to adopt more structured principles of administrative law. However, fundamental differences remain, especially in the Continental system's proactive role of judges in investigations compared to the Common Law's passive role. The challenges in complete harmonisation still revolve around differences in legal positivism and judicial interpretation. Still, the common goal of achieving justice in the legal process and protecting citizens' rights remains a universal commitment.

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Agam Ibnu Asa is an Indonesian academic with multidisciplinary expertise in philosophy and law. His extensive academic journey demonstrates a consistent linear progression in his philosophical studies. He completed his Bachelor's (S1), Master's (S2), and Doctoral (S3) degrees in Philosophy from the Faculty of Philosophy, Gadjah Mada University. His specialization specifically focused on Legal Philosophy, ensuring a deep and continuous theoretical and applied understanding within this discipline at every educational level. To complement this, he also earned a Bachelor of Law (S1) degree with a focus on Criminal Law from the Faculty of Law, Janabadra University.

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