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Chapter 2

Adjudication or Negotiation

Mediation as Non-modern Element in Conflict Resolution in the Nordic Countries

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Introduction

In European legal literature on developments of conflict resolution the narrative of so-called modern law is dominating. The narrative – partly inspired by the ideas of Max Weber – is referred to especially in discussions of the rationale but also of the legitimacy of current legal order(s). This is the law of the modern nation-state, where parliamentary legislation stands at the top of the hierarchy of legal sources. At the same time, the idea of man-made, positive law (and legal positivism) is important, and a quite clear division of labour is drawn between various legal actors (the legislator, the judiciary, and legal scholarship). The power of the courts and the legitimacy of adjudication are based on the status of the courts as state institutions, and on the idea of judgement as 'the judge's authoritative command' on the law applicable in the case concerned.[1]

It is easy to agree with this narrative, especially concerning the European continent and the era after the French Revolution – that of national state legislation. During this period, judges (who became state servants) have been obligated or assumed to 'follow' the law, while the university education of legal professionals has focused on training to interpret and apply national, positive law. This also constitutes a foundation narrative for 'no longer modern' law (late modern or postmodern law) discussed by many scholars today. Thus, we seem to be facing the 'weakening power of nation states', tendencies 'towards privatized

[1] See further Weber (1956: 405–12).

legal regulation', and towards alternatives to ordinary (court-based) dispute resolution such as mediation.[2]

Again, legal historians are interested in the characteristics of 'not-yet-modern' law. Scholars seem to agree at least that the so-called pre-modern period included many local and regional variations and was characterized by a plurality of legal orders. However, the main arenas for legal communication, for discussions on justice – injustice (*Recht – Unrecht*), i.e., law applicable in a certain case, were local court sessions. Hence, one can detect early courts or judiciary obtaining their authority from various sources of rule (*Herrschaft* according to Max Weber), but also those whose competences were based on a communitarian and consensual nature of conflict resolution. Concerning the latter, which are typical for the history of dispute resolution in the Nordic countries, the most crucial questions – having parallels with the late modern law period, that of the weak(ening) power of the sovereign state – are those of the legitimacy of conflict resolution and of the acceptance of law created by the pre-modern, non-state institutions. Indeed, it is not difficult to draw parallels with modern models of ADR (alternative dispute resolution), especially with the current mediation systems based on the voluntary and active participation – both in the procedure and as to the material outcome – of the parties themselves and of other members of the (interest) community.

Hence, in the following I will discuss questions related to 'non-modern' dispute resolution. Especially notions such as the dichotomies of conflict–cooperation and decision–negotiation which illuminate the relationship between adjudication and mediation will be dealt with. The main focus is on the history of conflict resolution in systems without any – or

[2] See the articles in Zekoll, Bälz and Amelung (2014) .

with weak – authoritative power above the conflicting parties. First, however, some general issues mainly highlighted by current trends of conflict resolution will be taken up.

From Court Litigation to Mediation

Today, a wide consensus exists as to the central role of the court system in guaranteeing individuals' access to justice. In the modern (Western) societies, the courts protect the rights and freedoms of citizens against arbitrary interference, but also ensure that they do not unlawfully interfere with the rights and freedoms of others. However, many other – public and private – institutions resolving disputes and providing legal services play an important role in the access to justice approach, too.[3] It can be observed, that the increasing use of alternative means of dispute resolution at least partly reflects the problems and low standards of court services and court proceedings. Actually, many have argued that the current Western adjudication system is in crisis. Courts' caseloads have been growing for a long time, but at the same time, the long duration and high cost of court proceedings have prevented individuals from getting justice through the courts. Thus, people have turned their attention to extrajudicial out-of-court alternatives.[4]

More generally, the status and role of ordinary court procedure in dispute resolution reflect the legitimacy and trust that courts enjoy among people in a particular society. Clearly, an increase in differentiation or fragmentation in society seems to weaken the position of the

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[3] See further Letto-Vanamo (2014).

[4] Arbitration has for a long time been a typical dispute resolution method in business relations. Cases are taken out of the courts and submitted to arbitration for the reason that court proceedings are perceived as too slow and devoid of expertise. The option of non-public proceedings plays an important role here, too.

(states) judiciary. Today, in our 'late-modern' society, it is quite difficult to speak of one idea of justice: Indeed, various meanings are attached to it. At the same time, justice as defined or guaranteed by the ordinary courts does not automatically enjoy acceptance among the members of society. The increasing importance of alternative dispute resolution (ADR) has in many comments been linked not only to problems of the court procedures but also to the 'privatization' of the law (with soft law, self-regulation, governance etc.), legal and cultural pluralism, social ruptures and so on.[5]

Also in the Nordic countries,[6] one can recognize the common European tendency away from court litigation towards privatized conflict resolution, especially by mediation that has become popular during this millennium.[7] There are – even in certain criminal law matters – various opportunities for 'amicable conflict solving' out of courts, organized by ecclesiastical and professional organizations but also by state and municipal authorities. In courts, again, more emphasis has been placed on alternative procedures, court-annexed mediation with a judge in the role of mediator helping the disputing parties to mutually satisfactory solution as the latest (and quite anachronistic) example. At the same time, the idea of 'procedural justice' has been stressed. Actually, one can speak of a client-centred approach, which emphasizes the parties' subjective experience of (procedural) justice[8] and the interaction between the judge and the parties. Thus, important aspects of the perception of justice today are not only the impartiality and the high professional standards of the judge but

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[5] See e.g. Menkel-Meadow (1996).

[6] See articles in Ervo and Nylund (2014).

[7] In 2006, court mediation was introduced to Finland, modelled on the experiments carried out in Norway and Denmark.

[8] See e.g. Ervasti, Kaijus (2007).

also an opportunity for the parties to 'participate' in the proceedings, and the manner in which they are treated during the court procedure.

In mediation[9] – whether it is organized by private institutions or by courts – parties are always the main actors. Mediation is voluntary and requires that the parties agree to it.[10] The purpose of mediation is to help the parties to find a solution that is acceptable to both/all of them. This means that the result of mediation may be based more on what is reasonable under the circumstances than on strict application of the law. Hence, parties' activity in discussions and ability to listen to each other are crucial for a successful mediation procedure. The mediator is in charge of the process, while the parties are in charge of the outcome: mutually satisfactory resolution of their conflict, and not an outcome that accords with the substantive law in force.[11] Actually, it can be maintained that the legitimacy of the mediation system and the acceptance of its outcomes rests on the active role – or the participation – of the conflicting parties. Nevertheless, they are not only the key actors in negotiating the content of the solution but at the same time actors of a formalistic procedure administrated by the mediator(s), which also promotes legitimation of the mediation system.

From Consensual to Authoritative Law

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[9] See e.g. Moore (2003).

[10] A main requirement is of course that mediation makes sense considering the claims presented by the parties.

[11] Thus, Nordic courts seem to have three different procedural options: traditional trials, concluding with a court decision; the promotion of settlement within civil proceedings; and court-annexed mediation. Promoting a compromise or settlement in civil matters is a traditional part of a judge's work.

A tension seems to exist between the ideal of material justice and a substantively correct judgement (based on the application of the law) on the one hand, and the ideal of 'negotiated law' and a pragmatically acceptable compromise on the other hand. The former can be understood as a fundament of the 'Ideal type' model of Western modern dispute resolution, and the latter as its counter conception. Interestingly, the tension or competition characterizes not only current legal developments but is observable in the history of conflict resolution, too. In the following, examples taken from Nordic legal history serve to illustrate the slow appearance of the ideal of material justice– or the slow disappearance of the consensual element – as the result of adjudication

For a long time, local assemblies were the main arenas for legal communication in the Nordic countries.[12] No big cities existed, and the trained legal profession was a phenomenon occurring only in the nineteenth century. In the rural areas, common – in modern terms, legal and administrative – affairs were dealt with by a local assembly, the *ting*.[13] The *ting* pertains specifically to the self-determination of peasant communities, where communication was oral and documents, or indeed writing, were hardly ever used, and where all affairs became public as soon as they were introduced in a *ting* session.[14] In addition, we know from Sweden and Finland that the *ting*, held twice or three times annually, were the main events of the year. As many people as possible wished to be present when their affairs, and those of their neighbours, were considered and conflicts regulated through practices that resemble modes of

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[12] See further Letto-Vanamo and Honkanen (2005).

[13] In the towns, administration of justice was a task for the town court.

[14] However, this is not to say that an early '*ting*-community' for considering common affairs and for disseminating information would have comprised every person in the locality. Instead, the early *ting* was composed solely of able-bodied, tax-paying males.

arbitration and mediation. Even as late as the beginning of the seventeenth century, it was usual for people to attend the *ting* in large numbers, arrive to the *ting* house, its yard or other nearby houses. At the same time, it was evident that being present made a difference: The judge/head of the assembly (*häradshövding*)[15] would put questions to the audience, for example on drawing boundaries between pieces of land or on the paternity of a child born out of wedlock; or would ask for their views on such matters as the severity of a criminal penalty or the form in which a penalty should be enforced.

For centuries, the cases in the *ting* sessions were either simple criminal cases or civil disputes relating to the use and ownership of land. Criminal law was act-oriented, with little regard to the motives of the offender. As late as in the sixteenth century, every misdeed was regulated through a 'price', which could be characterized as a combination of compensation and fine: It was divided between the (accusing) party, the judge (*häradshövding*, the head of judicial circuit) and the king. A bruise cost three marks, a wound six marks, and the price of manslaughter was for forty marks. In most cases, convictions were based on eyewitness reports or confessions. In the absence of a witness or confession, oath taking was the normal procedure. A person suspected and accused (by the plaintiff) of a given act (crime) was given the opportunity to deny any responsibility (and not to pay compensation/fines) by swearing an oath conformed by the so-called oath-helpers. Civil disputes concerned land, that is, the very basis of all economic activity. These disputes were normally decided with the support of

[15] Although precise information detailing the judge's role and functions is absent from the medieval laws, we can assume that the head of the assembly, called in Swedish *häradshövding*, chaired the *ting* sessions. Later, he seems to have been in charge of a judicial circuit, which consisted of several *ting* districts, that is, units where sessions were held.

'assayers', 'jurors' or other groups/panels of laymen, i.e., by reference to an act or opinion of the community.

It seems obvious that the participation of community representatives – usually proposed by the parties, and performing in various roles as oath-helpers, assayers, arbitrators, *nämnde*-men – in the decision making could legitimize also solutions adverse to the parties, and make it more likely that the decision would also be observed as 'good law'. Only later did the legitimacy of a judgment become linked to a command or the authority of a judge, and much later still to the authority of (positive) law and to the state judiciary – independent of the legislator and enforcement power – that applied it.

The competition between the 'old' traditional, consensual, negotiated law and the 'new' authoritative law can already be seen in the Nordic medieval laws. One of the most fascinating examples can be found in Article 17 of the Chapter of *Edsöre* in the Law of East Gothland (Östgötaland, ca. 1290).[16] The Article deals 1) with the earlier conflict resolution procedure involving ordeals; 2) with the current, prevailing procedure involving parties' oaths; and 3) with the newer procedure and its idea of examining the 'substantive truth' and making the king's decision on the legal sanction.

It is told in the Article, that earlier the 'guilt' or 'innocence' of the accused would have been determined by ordeal, involving holding a hot iron. Birger Jarl, however, had forbidden ordeal by iron, which was superseded by a new procedure: by a procedure at the king's assembly (*räfst* or *ting*) and with a physical and / or capital punishment. Before the penalty was imposed, the investigation and confirmation of the criminal act and of the (actual) killer first had to be made. This was done with the help of testimony or by the *nämnd.*

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[16] On the history of *Ösgötalagen* see the introduction by Holmbäck and Wessén (1933).

The accusers, however, had a choice between various "procedural forms," and between two kinds of outcomes: the death of the defendant and the compensation (for restoring peaceful relationship between the parties) of 40 marks. Then, the accused could avoid the 40 marks with his oath and the support of three times twelve oath-helpers, as the law stated:

> Now it may happen that a wife kills her husband or a husband his wife. Then he, if he does so, may be executed by the stake and she be stoned if she does so.
>
> Now they are suspected of this crime. It is then said by the law that they shall defend themselves by iron and ordeal, but since Birger Jarl has abolished the proof of hot iron it is so that if he who accuses asks for the law of the King he shall have the person accused caught and have the case investigated by reliable witnesses if reliable witnesses are to be found, and by force if he does not admit freely. If such is found that corroborates the truth thereof, or testimony, or if he himself confesses, the man shall be executed by the stake and the woman be stoned.
>
> If he who accuses will not ask for the law of the king but summons and seeks his right then he who is accused may with the oath of three times twelve men maintain that he did not do it; if he cannot produce the oath he shall pay 40 marks but not lose his life. (Collin and Schlyter 1830; my translation) [17]

The very original idea in cases of manslaughter of a local free man in East Gothland, as in other Swedish provinces, had been to allow the kinsmen of the victim to kill a culprit as

[17] See also Holmbäck and Wessén (1933: 39–40).

retaliation, but only if he was caught red-handed. If they caught him but did not want to kill him themselves, they had to transport him to the assembly (*ting*) and present 'evidence' against him (e.g. asking him to hold hot iron) against him. After that it was possible to behead him. If the culprit was not already in custody, he was to be summoned to the *ting* and sentenced. However, the kinsmen could make a choice for redress instead of killing. Then, the 'worth of a man' (40 marks) had to be paid.[18] The Article 17 also mentions another, a newer, way of settling disputes besides referring them to the traditional local *ting*: the accuser/s could choose to have the case dealt with by the so-called *konungens räfst*, a term for the king's involvement in dispute resolution, which encompassed the king's assembly (*ting)* with a panel of men (*nämd*) charged with (e real) investigating the crime.

It is possible to argue that the types of procedure depended on the desired outcome, the sanction, which could be either economic redress (in modern terms: first private compensation, later fine; in Swedish *saköre*) or the death (first revenge, later capital punishment) of the accused. Also according to the cited text, the accusers had a choice between procedural forms, but also a choice between redress of 40 marks and the death of the counterparty.

Actually, the procedure entailing 40 marks might be characterized as a type of arbitration or mediation, which would end in reconciliation (in modern mediation terms: in amicable solution). A decision involving 40 marks' was more a recommendation than an authoritative judgment. Still, the accused could avoid paying the 40 marks with swearing himself free: through oaths given by himself and by his three times twelve oath-helpers. If he did not manage to find as many as were required to guarantee his probity, he had to pay. But

[18] Of which the paternal kin had to pay two thirds and the maternal kin one third See Article 7 of the Chapter on Manslaughter in the Law of East Gothland.

he lost his life (through execution by the stake or stoning) only if the accuser had chosen to bring the case to the king's *räfst*. At the same time, the legitimizing basis of this 'painful' sanction – i.e., capital or corporal punishment – was different.[19]

Generally speaking, modern criminal law procedure is not consensual but authoritative. This was also true of the medieval and pre-modern court procedure, in which – in contrast to the early procedure involving compensation and/or fines and where the parties dominated the procedure – the defendant was subject to the acts of the (church's or king's) authority. In fact, we can argue that the death as a punishment appeared along with the involvement of the king in the legal/judicial sphere. This was a new type of retaliation, one that became 'legalized' by the king through the formalities of court procedure. Thus, the retaliation of violence and criminal behaviour became a (real) punishment decided by the court. At the same time, it became important to investigate the criminal act, to know the actual actor of the crime concerned.[20]

Legitimation trough Participation

Still, for a long time the sentence was formulated in an old '*ting*-community' way: it was impossible to let the king, or his officials, solely decide about the criminal. Help was needed from the panel of men called the *nämnd,* discussed in detail below. According to the Law of East Gothland, the death penalty was imposed by the king's *räfst*. Besides a king's official, the panel known as the king's *nämnd* was elected in the presence and with the consent of the parties from among law-knowing (*rätt-rådiga*) men, who were not the parties' relatives or

[19] See further Weitzel (1994); Gudian (1976).

[20] See for instance Härter (2005).

men who might be partial in other ways.[21] This panel investigated the wrongdoing and decided whether it was a crime against the king's peace (*edsörebrott*) – and thus whether the accused should be sentenced to death or freed.

Actually, references to the king's *ting* or *nämnd* (*konungs räfst*) and the articles of court procedure in cases breaching the king's peace belong to a newer and for a long time narrower layer of law. The category of *edsörebrott* included conflicts over landownership, so-called crimes of treason and other serious crimes, which violated the king's peace, of which killing a family member was one. However, whether the act qualified as a crime against the king's peace had to be determined by the king's *räfst*, which then enabled imposition of a sentence involving capital punishment.

The term '*nämnd*' as already used in this chapter belongs to the history of Swedish court procedure and dates back at least as far as the Middle Ages.[22] At first, these panels of men, drawn from among members of the *ting*-community, considered only given types of cases, but later one panel was appointed for the duration of the entire *ting*. At the same time, the composition of the panel became more established, so that some of its members also sat on the panel during the next sessions in the same *ting* district. It is also known that the

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[21] Articles 1 and 2 of the Chapter on Procedure (*Räfsta balkär*) in the Law of East Gothland.

[22] However, both the term itself and a modified version of the institution remain in use even today; According to the 1734 Code of Judicial Procedure, in force in Sweden until the 1940s and in Finland until the 1990s, a panel of seven laymen was on the court (of whom at least five had to be present); the laymen-panel had the authority to override the opinion of the professional judge, but only by unanimity. Since the twentieth-century reforms, they were markedly lay judges; they were given individual votes and subject to the authority of judges.

'*nämnde*-men' were normally selected from among the most respected and wealthiest farmers of the district.

Generally speaking, we can assume that one of the main functions of the *nämnd* was to represent the local community but also to participate in the settlement of disputes arising between members of the community. These men were aware of local affairs and knew the local people.[23] According to the Law of East Gothland the members of the king's *nämnd* swore an oath, but their main function was to pronounce the defendant innocent or guilty of an unlawful act. However, in medieval and early modern Swedish laws and court records we find *nämnde*-men performing several roles. They were not only 'jurors' (members of a 'jury')[24] but were also active in arbitrating and decision-making: they sat at the *ting* beside the judge (*härädshövding, domare*), and they even acted as judges 'in judging' (*döma*).[25] Simultaneously with the rise in status of local judges and their closer identification with the state judicial authority (in Sweden towards the end of the seventeenth century), the status of *nämde*-men diminished.

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[23] That was important because the head of the ting (*häradshövding*) was in charge of *ting* sessions of a *härad* (circuit) with several ting districts, and often, he was a nobleman living in Stockholm.

[24] At the same time, it is very difficult in early court procedure and conflict resolution to draw the line between fact and law – between material questions and legal questions. This is true also when later functions of the *nämnde*-men are analysed.

[25] But we have to tak into account that the early term *döma* had a non-legal, non-authoritative meaning. It had the sense of 'to mean' (to make a judgement), similar to the German *meinen* (also *urteilen*), Swedish *mena,* and *tuomjan* in the Finno-Ugric languages. See further: Kulturhistoriskt lexikon för nordisk medeltid 3.

Interestingly, the birth of the modern conflict solving system seems to be a process of many stages and layers. It might also be too simple to see medieval or early modern legal procedure as a battle on judicial power between a 'bad' state and 'good' local communities. Moreover, the acceptance of solutions came through the actual practices and procedures: through the formalities of dispute settlement but also through participation of the parties and of the *ting*-community through formal proof by oaths with twelve or multiples of twelve oath-helpers, or with truth-seeking or other functions provided by the *nämnd*e-men.[26] It is also possible to conclude that early Nordic law emerged mainly through judicial practices in local communities rather than through binding precedents or legislation in the modern sense. Thus, the Swedish pre-modern *lag* can be characterized as traditional law that seldom was stated/given. Above all, it is possible to talk of law that was factually applied, and law could also include customs and rites. Hence, this early law cannot be observed by reference to a (modern) system of abstract norms.

Procedural or Substantive Justice

Nevertheless, the early judgment (decision on law) can be labelled mainly as procedural.[27] It did not find or create any substantive legal condition, but it confirmed how to proceed further: for example, that the accused should swear an oath. And this procedural character did not change, although the sentence included the compensation the accused would have to pay if he did not succeed with the oath-giving. At the same time, the difference between norm (law) and fact was small, which is also true in cases where the *nämnd* was used. No authoritative norms (rules) as such forced parties to behave in a certain way. Still, convictions

[26] Including assayers and other groups and panels of men acting in dispute settlement.

[27] On medieval 'law-finding' see Kroeschell (1972).

on law – on what was right – guided people's lives in early times, too, and therefore their notion of conflict regulation, dispute settlement, arbitration or mediation.

Thus, the most crucial question is how law or opinions on law could be ascertained. People's ways of thinking in those days was concrete and depended on oral communication. This is also true in dispute settlement, in discussions on law. Legal communication happened in the places where law was dispensed, and the aim was that lost consensus should be recovered through concrete discussions and negotiations.[28] It is possible to maintain that no legal order or legal authority existed outside these judicial communications. One opinion on law was against another opinion on law, and outside the court sessions legal opinions were equal. To have an opinion enforced it should be shared; and to be imposed as a sentence (which was then the law in the particular case) it should pass a formal procedure: opinions should find each other and reach consensus. Thus, early (non-authoritative) law existed as consensus, the consensus was (re)created by the court procedure, and f the consensus was broken, the law also failed.

The intimate relationship between law and judicial (court) procedure was at least partly a corollary of oral communication, but it also grew from the non-authoritative nature of the law. Because the broken (consensus on) law had to be rebuilt through a certain procedure, the shared opinion of the community was important. Consensus, however, did not mean idyllic harmony. It emerged through negotiations, through participation in court sessions or in inspections. As long as dispute settlement involving state authorities was absent or exceptional, the *ting* sentence needed to obtain authority from forms and rituals, and from participation. Activity by the parties and their kinsmen was needed: the groups of twelve

[28] See further Weitzel (2000).

stood with the defendant at oath-giving, and the other panels (*nämnd*) assisted in procedural and substantive decision-making.[29]

Conclusions

This chapter was opened with references to dispute resolution by the state judiciary as the ordinary way of conflict resolution in modern Western societies. At the same time, a tendency away from courts was highlighted. Problems of court proceedings but also mistrust on courts and on justice produced by the court litigation, have promoted out-of-court alternatives. Again, the mistrust has been linked to legal and cultural fragmentation of societies, and to the weakening power of nation states and their laws.

One of the newest and popular alternatives to court adjudication in the Nordic countries is mediation, based on the voluntary and active participation of the conflicting parties, and aiming at a mutually satisfactory (amicable) outcome. Still, a procedure administrated by a mediator is needed. Also proceedings at courts have been reformed with emphasis on the parties' experience of the procedure. In some countries, also the judiciary is involved in mediation. Thus, a judge plays various roles, the traditional one of the deciding judge and the other of the negotiating mediator. Also in the former role, the interaction between the judge and the parties is important – although the outcome of the procedure must accord with the substantive law in force.

After current (postmodern) trends were noted, history of conflict resolution was discussed. Hence, a tension between 'old' and 'new' law, or consensual and authoritative law

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[29] Although law(s) could cast in written form, as was the case with the Law of East Gothland, the legitimacy of the court sentence did not rely on the written norms – even if the sentence had been similar to the text concerned.

in pre-modern court proceedings was highlighted with examples taken mainly from the Swedish (and Finnish) legal history, characterized by a slow appearance of modern dispute resolution. For a long time, consensual elements dominated conflict resolution and discussions on law especially in the rural areas. Hence, interesting parallels could be drawn between the two non-modern legal systems. For both the procedural dimension – comprising various modes of participation, negotiation, arbitration and mediation – is crucial. Still, history of the modern conflict solving system seems to be a process of many stages and layers. This might be said also on its future.

Nevertheless, the intimate relationship between early law and judicial (court) procedure was at least partly a corollary of oral communication, but it also grew from the non-authoritative nature of the law. The acceptance of solutions came through the legal/judicial procedure: through the formalities of dispute settlement but also through the participation of the parties and of the *ting*-community; with formal proof by oaths with twelve or multiples of twelve oath-helpers, or with truth-seeking or other functions provided by the *nämnd*e-men.

Again, the current idea of so-called procedural justice can be seen not only in discussions on mediation or other alternatives to court litigation but also in the concept of fair trial, based on Article 6 of the European Convection on Human Rights. A similar idea is also pronounced by procedures based on the concept of (European or global) governance. This can be understood as one of the consequences of the plurality of ideas on justice, and of the incompatibility of different ideas on foundations of law. Thus, the legitimacy or acceptance of an administrative act or of a court decision, or of the normative order concerned, is thought to be based on fair procedure or on participation of the parties in conflict resolution.

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