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Alexander Krey (Frankfurt am Main):

# Lay Dispute Resolution Strategies in the Late Middle Ages

If one considers judicial culture, or the culture of dispute resolution, it is worth taking a concrete look at the „German legal<sup>1</sup> proceedings” of the late Middle Ages. An important question with regard to judicial culture, or perhaps rather the “culture of making judgements” when referring to lay jurisdiction in the late Middle Ages, concerns the extent to which judicial dispute resolution mechanisms were made use of. Karin Nehlsen von Stryk reminded us a few years ago that “...the widely used practice of regulating legal issues of some importance by using arbitration and settlement proceedings, [could] no less result in us raising doubts about whether we assume a far too high concentration of such legal disputes in the courts for the Middle Ages (here once again the victim of unconsidered premises of our time)”.<sup>2</sup> Ultimately, it is therefore necessary to once again take a look at the collection of written records which are relatively extensive for this period of the Late Middle Ages. In this article, provocative theses about “judicial culture” will be developed with the help of the Ingelheim *Haderbuch* (court records)<sup>3</sup> from 1476 – 1484<sup>4</sup>, a source which has not yet been fully exploited<sup>5</sup>. The Ingelheim *Hadergericht*

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- 1 The term „German law“ is in no way unproblematic and its definition in research is contentious (comp. A. Cordes, Deutsches Recht, in: A.Cordes, H.Lück, D.Werklmüller, C.Bertelsmeier-Kierst and R. Schmidt-Wiegand (ed.), Handwörterbuch zur deutschen Rechtsgeschichte, vol. 1, 2 ed., Berlin, 2008, Sp. 1003 – 1007). In Jürgen Weitzel it can be understood as legal norms without their own legal system which arose primarily through consensus in legal practice (J. Weitzel, Deutsches Recht, in: Lexikon des Mittelalters, vol. 3, Stuttgart 1999, col. 777-781, here col. 779 f.). In the following it is used primarily to name lay jurisdiction in the old Reich.
  - 2 K. Nehlsen-von Stryk, On the „term justice“ in legal historical German studies, in: *Ius Commune* 17 (1990), p. 189-222, here p. 220.
  - 3 Adalbert Erler (A. Erler, Die Ingelheimer Haderbücher, in: K. Bussmann u. N. Grass (ed.), Festschrift für Karl Haff zum 70. Geburtstag, Innsbruck 1950, p. 51-61, here p. 55) and Gunter Gudian (G. Gudian, Ingelheimer Recht im 15. Jahrhundert, Aalen 1968, p. 6) viewed the Haderbuch as largely uninteresting for the field of legal history, which is why solely isolated evaluations took place. Even older literature only took marginal note of the court books.
  - 4 After losses in the Second World War we are currently left with 18 lay court books (named Haderbücher), of the 33 which there are evidence for from the low courts of the three main areas of Ingelheim’s imperial territory who were staffed by the same figures as the famous Ingelheim Oberhof (high court). On written records comp. M. Blattmann, Beobachtungen zum Schrifteinsatz in einem deutschen Niedergericht um 1400. die Ingelheimer Haderbücher, in: S. Lepsius u. T. Wetzstein (ed.), Als die Welt in die Akten kam. Prozeßschriftgut im europäischen Mittelalter, Frankfurt am Main 2008, p. 51-91, here p. 57.
  - 5 StadtA Ingelheim, Haderbuch Ober-Ingelheim 1476 - 1484. Stefan Grothoff and Regina Schäfer helped the author by providing him with the manuscript of the transcript.

(Dispute Court) was attended by 14 primarily aristocratic lay judges from the joint collegiate of lay judges for the three main areas.<sup>6</sup> They gathered together up to 6 times every week (of which up to three times in Ober-Ingelheim, where the lay judges also held their meetings concerning the high court) under the leadership of the local mayor who was also a lay judge.<sup>7</sup>

With regard to the ‚judicial culture‘ in Ober-Ingelheim in the 15th century it is immediately apparent that in many legal cases advocates were involved in the trial, who were commissioned by one of the parties. The court book makes formulaic note of this: A „*hat sich v(er)dingt*“ B „*das wo(r)t zuthu(n) unnd hat sin und(er)dinge v(er)bott alß recht ist*“.<sup>8</sup> The parties by no means always made use of their services and were not obliged to do so. Rather, they hired them primarily in complicated disputes and they could therefore in a single day present one case to the court themselves and then have an advocate present another.<sup>9</sup> Vastly different parties made use of an advocate: villagers, lay judges and officials. It is also striking, that individual names come up with significant frequency in the context of the commission of advocates, which allows the assumption that up to four people were simultaneously employed as, at the very least a semi-professional, if not a professional group of elite advocates working in the courts.<sup>10</sup> We are not aware of any prior legal training, we do have evidence however that there were attempts to avoid having these advocates working for the opposing party in the trial. In one case it is apparent, that the advocate made the assurance prior to the trial „*dasz wort wider yne nit zuthun und darumb genome habe und daz nit helt*“<sup>11</sup>. What can be said about the ‚judicial culture‘ of the Ingelheim court proceedings on the basis of these findings? We can see a form of professionalisation within a justice system led by a group of lay persons in which a group of advocates worked in a professional capacity, at least in the more complicated cases. Of

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6 Comp. to the judicial situation in Ingelheim: A. Krey, Die spätmittelalterliche Rechts- und Gerichtslandschaft des Ingelheimer Reichsgrundes, in: F. J. Felten, H. Müller u. R. Schäfer (ed.), Die Ingelheimer Haderbücher, Ingelheim 2010 (being published).

7 M. Blattmann, Protokollführung in römisch-kanonischen und deutschrechtlichen Gerichtsverfahren im 13. und 14. Jahrhundert, in: S. Esders (ed.), Rechtsverständnis und Konfliktbewältigung. Gerichtliche und außergerichtliche Strategien im Mittelalter, Köln, 2007, p. 141–164, here p. 156.

8 E.g. Haderbuch 1476-1484, f. 171r.

9 E.g. on one day *Johan Slyddorn* firstly presents his case directly and then allows an advocate to speak for him (Haderbuch 1476-1484, f. 8v).

10 Antz Duppengießer (Haderbuch 1476-1485, f.3), Henne von Eltville (Haderbuch 1476-1485, f. 3), Drubein (Haderbuch 1476-1485, f. 15) und Hans Snider (Haderbuch 1476-1485, f. 3) are mentioned at first. In 1478 Johann Erk appears for the first time in the Haderbuch - he probably replaces Drubein who is no longer mentioned (Haderbuch 1476-1485, f. 82). From 1479 Henne Rudiger can be found (Haderbuch 1476-1485, f. 103v).

11 Haderbuch 1476-1484, f. 224r.

course, they were not lawyers in the modern sense, they were essentially oral advocates. We can assume however that they had a well-developed knowledge of the law or at least of legal practice in court which was beneficial in the execution of those complicated court cases and which made advocates helpful to the opposing party, which sought to be avoided by the other party.

To pre-empt the question, it seems that at the same time the process was, in some parts, oriented towards settlement. In many entries the so-called *Verbotung* can be found. On the basis of the protocols of Ingelheim's high court, Peter Eigen, a student of Adalbert Erler, developed the theory in the 1960s that *Verbotung* must have been a legal act, in which the lay judges could be compelled by a fee to carefully memorise an event and to repeat it later orally on demand.<sup>12</sup> In this way, the parties could smooth the way for admission of evidence to the court. The subject matter of the *Verbotung* here could have been anything which the parties viewed as particularly significant, regardless of whether this was the behaviour of the parties, the court or of other people involved.<sup>13</sup> According to this reading, the *Verbotung* was also in some respects a memorized legal performance intended for the oral submission and subsequent admission of evidence to the court. In the Ober-Ingelheim Haderbuch which we are considering here, the *Verbotung* can take on at least three forms: 1. as an act of governance by the mayor, 2. as a joint act by both parties and. 3. as a one-sided act by one of the parties or advocates<sup>14</sup> The *Verbotung* is recorded following various steps in procedure. It would come after a transfer of a case to the fully staffed court,<sup>15</sup> a setting of a date,<sup>16</sup> testimony<sup>17</sup> or a *Verbotung* of the ruling takes place.<sup>18</sup> There are hardly any entries, in which you cannot find at least one *Verbotung* mentioned. Of particular interest for this debate is the joint *Verbotung*, in particular the common occurrence, that there is a *Verbotung* of a ruling (generally a preliminary ruling) and it is recorded in the protocols with the formula "*Das haint sie beide v(er)bot*".<sup>19</sup> According to the theory, this

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12 P. Eigen, *Die Verbotung in den Urteilen des Ingelheimer Oberhofes*. Aaalen 1966, p. 21; also compare R. Zwerenz, *Der Rechtswortschatz der Urteile des Ingelheimer Oberhofes*, Diss. jur. Gießen 1988, p. 126.

13 Eigen, *Verbotung* (note 12), p. 22.

14 Comp. with R. Schäfer, *Frieden durch Recht. Die Funktionen des Gerichts für die Gemeinde*, in: K. Andermann (ed.), *Dorf und Gemeinde* (in preparation).

15 E.g. Haderbuch 1476-1485, f. 83: „*Das ist gelengt ad socios. Das haint sie beide verbot.*“

16 E.g. Haderbuch 1476-1484, f. 110 v: „*Des ist yme tag gestalt an das nehste gericht. Das haint sie beide verbot.*“

17 E.g. Haderbuch 1476-1484, f. 84 r only one party in favour of the *Verbotung*: „*Die sage hait Scher(er)hen(ne) verbot.*“

18 E.g. Haderbuch 1476-1484, f. 84: „*Das ortel haint sie beide verbot.*“

19 Haderbuch 1476-1484, f. 24 v.

entry of the *Verbotung* does not only imply the entry in the court book and its public announcement in an era in which despite all written records, the proceedings were still primarily oral, but also, where it involves two sides, an act in which the compliance of both parties, in the context of an agreed action, is revealed and recorded. In the case of disputes, a common line was therefore drawn from which both parties could no longer withdraw and which they could not alter after the *Verbotung*. In this way, such a process may have served more than anything else to narrow the scope of the dispute. The ‘judicial culture’ of dispute resolution may therefore have been precisely a case of developing the points which were not disputed and focusing the dispute.

Further evidence for the ‘judicial culture’ in Ober-Ingelheim is provided by the examination of the so-called damages claims. Gunter Gudian explored this topic with the help of the material from the high court and came to the conclusion that, not only in Ingelheim but also for example in Neustadt an der Weinstraße or in Fürth, claims were mainly made in proceedings by means of a damages claim with sometimes extremely high and often random sums of money.<sup>20</sup> For this debate, however, it is less the reference to a joint handling of the procedural institution which is significant but rather the question concerning the reasoning behind the use of damages claims in legal proceedings. In the protocols of the high court, we can find some initial clues. Records such as these are common and formulaic: “,... *Da forderte sie iz mit gerichte, daz sie ein stücke duchs hetten, daz ire were, und geben ir dez nit, daz ir schedte. ...*“.<sup>21</sup> It becomes apparent, that the sum for the damages is threatened where no fulfilment of the obligation occurs, and it therefore is conditional. In the Haderbuch, which was archived later, this situation is portrayed even more clearly in the formulaic phrases „*Das schade yme von yry glichen 10 g(ulden) und heist yne des eyne ja ader ney(n), obe sie do bij gewest sihen ader nyt.*“<sup>22</sup> The damages threatened here are for the case of him not testifying. The damages claim represents a procedural instrument by which the parties could push the opposition into acting, be it by the fulfilment of obligations or testifying under threat of painful damages (which were probably far beyond their financial means). This was common, was accepted by the lay judges and is apparent in many of the cases recorded in the Haderbuch. For ‘judicial culture’ it allows us to ascertain, that even after the case was brought to trial, the parties continued to have influence over the trial by means of the institutionalised

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20 Comp. G. Gudian, Zur Klage mit Schadensformel. Ein Beitrag zum mittelalterlichen Klagsystem, in: ZRG Germ. 90 (1973), p. 121-148 passim. Ernst-Günther Fröbel’s dissertation (E.-G. Fröbel, Schadensersatzrecht in den Urteilen des Ingelheimer und des Neustädter Oberhofes, diss. jur., Marburg 1973) did not go beyond the results of Gunter Gudian with regard to the damages claim.

21 A. Erlert (ed.), Die älteren Urteile des Ingelheimer Oberhofs, vol. 2, Frankfurt am Main 1958, p. 254.

22 Haderbuch 1476-1484, f. 5v.

procedure of the damages claim. Furthermore the damages claim can also be understood as a means of dispute resolution or of relieving the burden of the responsibility for dispute resolution from the court. If the party was successful in their threat of damages and a settlement was made, the dispute could also be resolved without reaching a verdict. If the threat was aimed to provoke testimony or to ensure that one stage of the trial took place and was successful, at least the verdict on the dispute was made easier for the court, as ultimately a focusing of the dispute was achieved. Clearly the lay judges had no objections concerning this way of conducting a trial, as is apparent from the large number of records concerning damages claims. Rather, we can probably assume that precisely because of the above mentioned effect on dispute resolution, the instrument was regarded as helpful by the lay judges. Therefore it would also have been part of 'judicial culture' to allow the parties to, as far as possible, achieve a resolution of the dispute without a court judgment even with the help of procedural means.

Finally, another striking point should be considered, namely the many references to mediation. Some years ago, Udo Kornblum demonstrated, after evaluating the Ingelheim High Court verdicts, that distinct extrajudicial conflict resolution mechanisms existed.<sup>23</sup> An examination of the Ober-Ingelheim Haderbuch confirms this observation, although some of his observations are not verifiable.<sup>24</sup> The very nature of the Haderbuch as a written record of adversarial law justice, means that only indirect references to attempts at extrajudicial dispute resolution are present, in which the parties often refer "*off die rachtungs lude*"<sup>25</sup>, it is claimed that „*es sij eyn rachtunge zusch(e)n yne gemacht*“<sup>26</sup> and at another point it is used as a defence, that they have already „*gutlich myt yne v(er)trage(n)*“<sup>27</sup>. Sometimes written records of extrajudicial mediation were also made, in the trial "*nach lude eyñßs rachtunge zittels*"<sup>28</sup> are aired. In rare cases these written records were even transferred to the court book: „*It(em) diß ist die rachtunge zwischen ...*“.<sup>29</sup> These findings of the varied judicial debates concerning extrajudicial attempts to reach consensus lead us to the interpretation that ultimately there was a principle that court

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23 Comp. U. Kornblum, on arbitral proceedings in the Late Middle Ages, in: H.-J. Becker, G. Dilcher, G. Gudian; E. Kaufmann, W. Sellert (ed.), *Rechtsgeschichte als Kulturgeschichte. Festschrift für Adalbert Erler zum 70. Geburtstag*, Aalen 1976, p. 289-312 passim.

24 The variation of the terms in use can be explained with the high court protocols, as the writer often followed the occasional written entries of the enquirers.

25 Haderbuch 1476-1484, f. 59v.

26 Haderbuch 1476-1484, f. 99v.

27 Haderbuch 1476-1484, f. 9r.

28 Haderbuch 1476-1484, f. 147r.

29 Haderbuch 1476-1484, f. 147r.

proceedings before a lay court took precedence. From the various clues it can be seen that extrajudicial dispute resolution was common, but if it failed (for example in the sense, that parties at a later point understood the conclusions of arbitration differently) then regular court proceedings would be held in which any documents concerning the arbitration or any people involved in the arbitration proceedings or in attendance could be called as witnesses. At some points it is also clear, that the court has attempted to achieve an extrajudicial amicable consensus between the parties for the good of the village peace and it is sometimes noted, that a dispute should not be taken to court again. As far as one can see, there is no case in which the parties then attempted to bring such a case before a court once again. This shows the great authority of lay judges and how natural they found it to regularly make judgements on private arbitrations and even to encourage these, although they also ultimately reserved the right to regard these cases as being conclusively ruled upon after having examined them.

For the years 1476 – 1484, there are 240 sheets of protocols of low jurisdiction. Even if we are no longer able to ascertain how many local disputes were brought to court, the number of written records for a period of 8 years makes it apparent, that we must reckon with there having been a high level of cases. Another finding is also of significance in this context: a large number of entries concern the 1<sup>st</sup> and even 2<sup>nd</sup> stage of the trial, whilst the 3<sup>rd</sup> is missing. Therefore there is also an indication, that the dispute, which the court book only sparingly refers to in the context of the opposing parties, was not pursued further in court. It is possible that the commencement of proceedings was therefore precisely used as a means of bringing forward a subsequent extrajudicial agreement. Bearing in mind Karin Nehlsen-von Stryk's words quoted at the start, it can therefore be said, that the judicialisation in Ober-Ingelheim in the late 15<sup>th</sup> century may have been great in the sense of how much the court was used. The commencement of proceedings did not, however, necessarily result in there being a judicial judgment.

These brief explanations can be summarized in four arguments: 1. Although it was, at heart, an oral process before a lay court, there is, particularly with regard to the often identifiable advocates, a professionalisation of the court proceedings (which were occasionally shaped by extensive written records) which is tangible; 2. Private attempts at arbitration by the parties in the area under the jurisdiction of the Ober-Ingelheim Low Court were standard and common. 3. Nevertheless the lay judges at Ober-Ingelheim at the end of 15<sup>th</sup> century made it possible for all disputes to be brought before a court as part of their general responsibilities. Then it only gave arbitration priority over court proceedings when the court agreed to this, occasionally the judicial commencement of legal

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proceedings could bring about and facilitate an extrajudicial settlement; 3. If it came to a trial, they would go frequently back to the points which had been agreed on, which helped to focus the problem at the heart of the dispute; 4 In a trial on the other hand, the parties had opportunities to influence proceedings by putting pressure on the defendant in court by means of the damages claim, which was recognised as a valid instrument by the lay judges. This pressure could result in them obtaining a testimony or the fulfilment of obligations and ultimately if successful meant the dispute could be resolved without a court judgement, or at least the court could be relieved of the burden of ruling on the dispute.