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History of Conflict Resolution in Europe – A Project Report

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Abstract

The four-volume *Handbuch zur Geschichte der Konfliktlösung in Europa* (Handbook on the history of conflict resolution in Europe) deals with the history of institutionalised and rule-based conflict resolution in judicial and extra-judicial forms. It covers the period from antiquity up to the recent past, and the articles take up central problems of conflict resolution or describe the development in specific European regions and states. This contribution provides information on the handbook project, the origins of which reach back to 2012 and came to a conclusion with the publication of the handbook in 2021. The article describes the debates on conflict resolution within the juridical field and offers information about both the central concepts and content of the handbook.

Keywords: conflict resolution, justice, extra-judicial, Europe

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History of Conflict Resolution in Europe – A Project Report

I. Introductory remarks

This text provides information on a project whose early beginnings date back to 2012, and which ended in 2021 with the publication of the four-volume *Handbuch zur Geschichte der Konfliktlösung in Europa* (Handbook on the history of conflict resolution in Europe).[1] Responsibility for the project lay mainly in the hands of legal historians. Nevertheless, as the handbook's title already makes clear, this has not been a legal history project of the usual kind. Its starting point was conflict and its resolution. As this is not limited to judicial procedures, the project's remit went far beyond an approach concentrating on legal norms and judicial institutions. However, the project did not seek to cover every activity related to conflict management, either, such as unregulated violence. Rather, the aim was to explore conflict resolution as a pattern of action following certain ideas of order. The handbook thus discusses institutionalised and rule-based forms of dealing with conflicting interests and sanctioning norm violations.

The area under investigation is Europe. This requires a little explanation. Not only the nation-state-based approach to legal history is currently under pressure to justify itself; a perspective focused on Europe, too, must question its basic assumptions. This is certainly true with regard to the claim that ideas of liberty, the rule of law, and capitalism arose out of a common European legal tradition,[2] and even more so regarding certain narratives of European legal history that emerged after the Second World War, whose underlying cultural and ideological premises need to be historicised. In the mid-20th century, the assumption of a common Western normative heritage both served as a fulcrum for the new European integration[3] and provided additional legitimatory ammunition during the Cold War. The traditional, Europe-centred approach also limited the scholarly purview: spatially, by concentrating on central, western and south-western Europe; with regard to the sources of law, by leading to a narrow focus on private law as shaped by Roman law; and finally, also regarding the identification of overarching developmental tendencies such as scientisation, professionalisation, rationalisation, and secularisation.[4] More recent developments in legal history, however, have seen such approaches being replaced by global historical perspectives.[5] So why not write a global history of conflict resolution, or at least broaden it to include transnational approaches that go beyond Europe?

The main reason why this route was not taken was pragmatic: there was insufficient capacity for such an undertaking within the framework of this project. However, there are also substantive reasons for limiting the project to Europe. Writing a ›history of conflict resolution in Europe‹ does not have to result in a reproduction of traditional Europe-centred narratives of legal history. Rather, it offers the chance to break new ground – in this case, by including procedures and institutions of conflict resolution that are not shaped by learned and / or codified law. However, there are also limits to how far such a project can be open to new approaches. A uniform methodological and conceptual orientation is hardly enforceable in a four-volume compilation with nearly 200 authors, but it is also not desirable. The handbook is also a reflection of the plurality of research, in which conventional approaches have their place just as much as new trends.

1 Grotkamp / Seelentag (eds.) (2021); Mayenburg (ed.) (2021); Decock (ed.) (2021); Collin (ed.) (2021a).
2 A discussion of these claims can be found in Whitman (2018).
3 Lesaffer (2018), however, has pointed out that (German) attempts to conceptualise a European legal history date back further and were connected with a crisis of Roman law as a scientific discipline.
4 On this, see Duve (2012) 21 ff.
5 Duve (2020) 74.

The handbook's scope does extend to regions on the periphery‹ of geographical Europe, such as to early Israel and ancient Egypt, to Byzantium and the Crusader states, to Russia and other Eastern European states, to the Ottoman Empire and modern Turkey as well as to the European colonies. Limitation to the ›Christian West‹ was thus avoided. The handbook also discusses cultures of conflict resolution of groups that have received little attention in the older Western European legal history tradition, such as American indigenous peoples, Muslims and Jews. Finally, the project's chosen remit is additionally justified by the fact that geographical Europe has been an interconnected space since the end of antiquity at the latest – even if one takes into account its diffuse borders and the links with various Asian and African regions. This interconnected space was based on inner-European migration and expansion, on the unifying power of the Church, on the family ties of the ruling dynasties, on the network of inner-European trade relations, on the exchange of scientific knowledge and, last but not least, on law and certain ideas of institutionalised and rule-governed conflict resolution.

II. Self-reflections of the juridical field

Despite its long history, conflict resolution became the subject of research only relatively recently.[6] The origins of modern conflict research lay in the discipline of psychology in the early 20th century. Morton Deutsch identifies the social psychologist Kurt Lewin (1890–1947) as having pioneered this field of study in the early 1930s.[7] Lewin proposed fundamental definitions and typologies and conducted the first empirical studies to verify them. From the start, research on this topic was always oriented towards practical questions, looking for new ways to resolve conflicts at a time of strong social tensions.

Conflict research did not remain confined to the field of psychology for long, as the scientific examination of conflicts and their resolution is almost inevitably an interdisciplinary enterprise. Overlap soon emerged with the research interests of economists. Though the first studies were presented by outsiders such as Kenneth E. Boulding (1910–1993),[8] it was the game theorists who subsquently studied human behaviour in conflict situations empirically.[9] Since the 1960s, it has been above all sociologists and political scientists who conduct conflict research. Initially, the origin and focus of their interest were the global conflicts of the Cold War and the search for ways to resolve them. Subsequent peace research was also supported by representatives of other disciplines, such as theology.[10]

Historical studies, which had always been very interested in social conflict situations, increasingly resorted to the theoretical and methodological tools developed in the social sciences from the 1970s onwards. Social differences of all kinds manifest in the form of more or less violent conflicts; historical conflict research, therefore, became – albeit relatively late[11] – a central concern of social and cultural history.[12] Historians made use of theories and methods of social science conflict research, such as Gerd Althoff and his students who have analysed strategies of medieval conflict resolution[13] and scholars of early modern history who have worked on ›infrajustice‹ as well as historical crime research.[14] They thus dealt with subject areas similar to those of legal history, though they consciously demarcated their work from it. Since the second half of the 20th century, therefore, conflict research has developed into an important interdisciplinary branch of the social sciences, with its own chairs and research institutions. Its findings are presented in numerous monographs as well as dedicated handbooks and journals.

But how did the juridical field reflect on the problem of conflict resolution? Two preliminary remarks are necessary at this point. Firstly, the term ›juridical field‹ and not ›legal system‹ has been deliberately chosen for this text.[15] In systems

6 The following paragraph (up to and including the phrase »Since the second half …«) is the English translation of a passage from the overall introduction to the handbook.
7 Deutsch (2014) XXXII.
8 Boulding (1962).
9 Deutsch (2014) XXXIII f.
10 On this, see the brief overview in Jahn (2012) 12–17.
11 Volkmann (1972) 551.
12 Dressel (1996) 123.
13 See e. g. Althoff (1997).
14 Garnot (2000); Schwerhoff (2011).
15 It should be emphasised that the following remarks do not outline the theoretical framework of the handbook – which cannot be pressed into a specific theoretical corset, anyway.

theory a legal system is more than a »context of coordinated rules« (which is in any case not capable of self-reflection), namely a »context of communications«.[16] However, this implies a significant limitation of communications, because such a system is operatively closed. Its self-description relates to its own operation and is only to a very limited extent able to include factors and reasons whose rationality lies outside the system rationality of the legal system. While this does not preclude the discussion of, for example, extra-legal justifications and conceptions, it forces them onto the Procrustean bed of legal argumentation.[17] In contrast, Bourdieu's »actor-dependent, constructivist-structural approach« of the juridical field is more open.[18] The juridical field is not merely a context of communications coded in a certain way – as in the case of the systems-theoretical understanding of ›legal system‹ – but a space in which struggles over beliefs and interests are conducted by specialists in the law and their institutions. Without necessarily following further theoretical implications of the Bourdieusian concept of the juridical field,[19] the terminology of the judicial field enables us to broaden the perspective in our investigation of how lawyers – both jurists and practitioners, though in many cases the distinction does not matter – reflect on the problem of conflict resolution.

The debates on judicial reform in Germany in the first half of the 19th century may serve as an example. Here, a comprehensive discussion emerged about the possibilities and limits of judicial conflict resolution – and thus also about the potential of its extrajudicial forms. An important impulse came from the new organisation of the justice system in France, which in the wake of the Napoleonic conquests spread to many European countries, including to large parts of Germany. In this period, French law established modern forms of conflict resolution to complement the ›normal‹ judicial process. Justices of the peace, for example, were an institution that, while also intended to enforce the regulatory claim of state law even in remote areas,[20] was above all meant to create a form of conflict resolution for minor disputes, outside the ›normal‹ judicial system, that was as citizen-oriented, effective and inexpensive as possible.[21] However, the French model of jury courts was even more in the focus of the debates regarding judicial reforms among German lawyers. Here, participatory democratic concepts and distrust of the traditional criminal courts met with the idea that the jurors' sense of justice would lead to an interpretation of the law that corresponded more closely to the needs of practical life than the verdicts of professional judges.[22] Those arguing for the introduction of jury courts hoped they would bridge the »gap between learned law and popular law«.[23]

The first half of the 19th century also saw the beginning of German debates on arbitration, which was similarly expected to take better account of the ›lifeworld‹ of the people concerned. Here the focus lay above all on commercial arbitration.[24]

The debate about the best ways to organise conflict resolution was given new impetus by the enactment of the *Civilprozeßordnung* of 1877, which introduced a uniform civil procedure law for the whole of Germany. The new code was dominated by liberal concepts, which meant that a large part of the procedural actions were placed in the hands of the parties, and the judge's management of the proceedings was restricted. This resulted in an elaborate and complicated procedure that often could only be managed by lawyers and, in addition, carried the possibility of procedural delays.[25] While the discussion of these issues could be conducted on a purely technical-procedural level, in actual fact they also raised fundamental questions. How could conflict resolution be organised in a way that made its institutions easily

16 Luhmann (1995) 40.
17 Ibid. 501 ff.
18 Kretschmann (2019) 15.
19 For a comprehensive discussion, see Guibentif (2019); Sapiro (2019).
20 Boers (2014) 32, 40 f.; D'Antuono (2014) 59 f.
21 Erkens (1994) 31 f.; Mölling (2000), summarising 213–223.
22 Mittermeier (1848) 90; also Heffter (1848) 112: »Der Gesetzgeber muß nämlich dem Geschwornengerichte die Befugnis eröffnen, das Gesetz rein menschlich auszulegen […] nach dem im Volke gewöhnlichen sittlichen Vorstellungen […]« (The legislator must give the jury court the power to interpret the law in a purely humane way, in accordance with the moral conceptions common among the people.)
23 Schwarze (1865) 128.
24 Reyscher (1847).
25 For a summary, see Wilhelm (2010) 252 f.

accessible, offered a procedure that could be easily understood by laypersons and limited costs? It was precisely on these issues that a number of jurists criticised the new German civil procedure. Otto Bähr, one of the most influential players in German legal policy at the time, labelled it »Manchestertum«[26] to emphasise its social imbalance. With his usual eloquence, Otto von Gierke, the most important representative of the Germanist school of jurisprudence, proclaimed: »Our current civil procedure is not German. Nor is it ›of the people‹ [*volkstümlich*]. And least of all is it social.«[27]

At the beginning of the 20th century, the so-called ›free law‹ movement (*Freirechtsbewegung*)[28] concentrated on a different level of the judicial process: instead of debating civil procedure, its members focused on judges' decision-making. Here, the question was whether modern conflict resolution could still take place within the boundaries of statutory law. Based on the premise that there were gaps in positive law, the free law movement demanded that judges be given broad scope for decision-making, unfettered by written law. Its members thus ultimately aimed at the acceptance of an »alternative law«,[29] or in other words, at opening the judicial decision-making basis to normative criteria that were not codified. They argued that the inclusion of such criteria would enable judicial decisions to correspond more closely to the needs of real life.

Contemporary with the free law movement was the so-called ›special courts debate‹ (*Sondergerichtsdebatte*). In such courts, lay assessors were to provide the court with specialist expertise, such as, in particular, in conflicts concerning industrial property rights.[30] However, other special courts were also discussed, including for agricultural disputes, conflicts under tenancy law, construction and real estate law, marital law, for craft trades (*Handwerk*) and even publishers and writers.[31] Not as present in the jurists' debates, but part of its larger context, were other institutions that could also broadly be seen as ›special courts‹: the early labour courts (the so-called *Gewerbegerichte*)[32] and the arbitration courts for workers' insurance (*Schiedsgerichte der Arbeiterversicherung*).[33] The debate centred on the creation of conflict resolution bodies outside the ordinary courts, which was in many respects conceptualised in opposition[34] to the ordinary judicial system: a judicial power guiding the process vs. leaving it to the parties; lay (expert) participation vs. learned professional lawyers; simple, inexpensive and fast proceedings vs. complicated, expensive and protracted civil procedure; a normative taking into account of the practical needs of the lifeworlds concerned vs. strict adherence to dogmatically shaped statutory law; finding compromise through fact-oriented agreement vs. decision by judgement. In short, while the *Sondergerichtsdebatte* did not formulate a coherent proposal for an alternative form of conflict resolution, the outline of one can be reconstructed from various scattered contributions to it, as well as from the concepts that were implemented in practice. It goes without saying that the opening up of judicial decision-making to non-legal rationalities should not be seen solely in a positive light. While such concepts did not completely dispense with the liberal concept of the rule of law, it could no longer necessarily claim primacy.

In Germany, the years around the turn of the last century were the heyday of the debates about an alternative justice system, and thus about more diverse approaches to institutionalised and rule-based conflict resolution. Later discussions did not reach the same breadth or intensity, but rather focused on individual aspects. This was the case during the First World War, when many jurists argued for ending more court proceedings through amicable settlements. This movement was partly motivated by the reduced capacities of the judiciary due to the war, but the desire to strengthen the domestic political »truce« (*Burgfrieden*) through a »legal peace« (*Rechtsfrieden*)[35] in the interest of national unity also played a role. In the course of the democratisation efforts after 1918, the voices for the expansion of lay participation in the judicial

26 Bähr (1885) 341.
27 Gierke (1898) 456.
28 On this, see Riebschläger (1968).
29 Rückert (2008) 200.
30 Franck (2013) 158 ff.
31 Rathenau (1910) 394; Wilhelm (2010) 429 f.; Franck (2013) 159.
32 For a recent overview, see Rudloff / Vogt (2016); Collin (2021b).
33 Ayass (2014) 270 ff.
34 Strictly speaking, such a clear opposition between ordinary and alternative justice institutions applies only if based on the legal concept of ordinary civil justice as it existed at the end of the 19th century. In the 20th century, ordinary courts gradually adopted aspects of alternative dispute resolution that had proven successful.
35 Deinhardt (1916).

system became louder,[36] and many party programmes contained corresponding demands.[37] In the end, however, none of these changes were implemented and the judicial system of conflict resolution remained the same.

Only from the end of the 1960s onwards, as a result of the growing unease with traditional authoritarian structures in politics, law and science, did a fundamental legal discussion about conflict resolution re-emerge in Germany,this time encompassing an even broader range of issues. In the academic and legal policy debate, the demand for judicial decisions to pay greater attention to real-life needs met with increasing approval. Particularly sociologists of law argued for a more comprehensive inclusion of sociological knowledge in legal practice.[38] The call for a reform of the judiciary grew louder. The aim was to dismantle encrusted hierarchies and to take greater account of the ›lifeworld‹ of those affected.[39] Theo Rasehorn, a judge who produced a number of provocative and much-discussed analyses, demanded that judges should take on a *Betreuungsfunktion*, ›taking care‹ of the parties by guiding and accompanying them through the proceedings. »Similar to the arbitrator (*Schiedsmann*) in the big cities today, [the judge] will have a district jurisdiction and will hold talks with those seeking justice in manageable, private locations with a few assistants (*Hilfspersonen*) at a ›round table‹.«[40] In the end, these ideas of far-reaching judiciary reform did not catch on. Instead, the focus of legal sociologists and reform-oriented jurists shifted to extrajudicial forms of conflict resolution (arbitrators, arbitration boards, etc.).[41] However, the general population's demand for such extra-judicial options did not match the academic attention they received, nor did the reform ideas of the left and liberal camps receive much attention outside these circles. In the 1980s, when the literature on this topic had grown in volume, the actual use of such institutions had reached a low point,[42] and there was little demand for them in general.[43]

Since the 1990s, the discussion about alternative justice has intensified once again, though under somewhat different auspices and heavily influenced by international debates.[44] The Alternative Dispute Resolution (ADR) debate – which originated in the USA, where it aimed at broadening and facilitating access to justice[45] – is also gaining ground in Germany. In Europe it has been linked to the need for procedural efficiency and for relieving the courts. Initially driven in part by European legislation, ADR has meanwhile developed numerous institutional manifestations, the most important of which is mediation.[46] In addition, a special form of consumer dispute resolution has established itself.[47] More and more organisations are equipping themselves with ombudspersons, thus creating opportunities for conflict management in advance of judicial conflict resolution.[48] International commercial arbitration has already replaced state jurisdiction in some sectors.[49] Extra-judicial arbitration bodies of various sports associations have recently attracted attention due to a number of controversial decisions.[50] Online platforms, such as eBay, offer their own forms of dispute resolution, Online Dispute Resolution (ODR).[51] Finally, in some Western countries the emergence of ›Islamic justices of the peace‹ has raised fears that an atavistic parallel justice system may develop on a broad scale.[52]

Regardless of whether the above-mentioned developments continue and we really are dealing with a systematic displacement of state justice by extrajudicial or non-state forms of conflict resolution, it is clear that the communication of the juridical field has to a large extent turned to the question of alternative conflict resolution. The number of publications on the various forms of ADR is almost unmanageable, courses in mediation are offered to legal practitioners; and even

36 Le Bouëdec (2018).
37 Zentrumspartei 1918 (pt 29) (in: Lepper (ed.) (1998) 397 ff.); Unabhängige Sozialdemokratische Partei 1919 (pt 12) (in: Treue (ed.) (1954) 108 ff.); Deutsche Volkspartei 1920 (pt 4) (in: ibid. 127 ff.); Sozialdemokratische Partei 1921 (in: ibid. 111 ff.).
38 Bender (1994) 127 ff.
39 Requate (2001).
40 Rasehorn (1969) 281.
41 Rottleuthner (1987) 144.
42 Ibid. 151 (with regard to the arbitrators [*Schiedsmänner*]).
43 Röhl (1987) 518.
44 See on this Schütze (1998).
45 Menkel-Meadow (2016).
46 Masser et al. (2018).
47 Berlin (2014).
48 Hertogh / Kirkham (eds.) (2018).
49 Maurer (2016).
50 Case Pechstein, European Court of Human Rights (3rd Section), 2 October 2018 – 40575/10, 67474/10.
51 Zekoll (2012).
52 Wagner (2011).

lawyers are forced to leave the purely legal discourse and engage with non-legal arguments, for example when Muslim ›justices of the peace‹ raise concerns that traditional Western standards of the rule of law may be eroded, or when transnational investment arbitration tribunals override national sovereignty. In the juridical field, too, we no longer speak only of the resolution of legal conflicts before state courts, but of conflict resolution in the overarching sense – albeit with a special juridical accentuation.

III. Institutional prerequisites of the handbook project

Against the background of this debate, considerations began in the early 2010s to establish a research network on »Extrajudicial and Judicial Conflict Resolution«, in which legal historical issues played an important role. There were special reasons why Frankfurt was the location of these deliberations. On the one hand, this project benefitted from the comparatively high concentration of legal historians in one place. The Goethe University in Frankfurt has five chairs in legal history and the Max Planck Institute for Legal History and Legal Theory (formerly the Max Planck Institute for European Legal History) is also located in Frankfurt. Moreover, Frankfurt could look back on a long tradition of research in the field of the history of conflict resolution. The topic had been formally incorporated into the Max Planck Institute's research programme in 1988. Under the heading of »norm enforcement« (*Normdurchsetzung*), research was to be conducted into »the history of state and private justice, its alternative institutions, and the associated ways of thinking and agents at work in these institutions«.[53] A new book series, *Rechtsprechung*, had already been founded in 1986 and by now comprises 28 volumes.[54] The repertories of printed[55] and unprinted[56] source materials published in other book series focused largely on Europe. After the fall of the Wall in 1989, the project *Normdurchsetzung* was extended to include Eastern Europe.[57] To be sure, the focus of this project lay on the history of the state justice. However, by focussing on procedures, decisions and actors, the project's conceptualisation had already considerably emancipated itself from older fixations on the history of legislation and legal doctrine.

Similar developments had taken place at the Goethe University in Frankfurt. One of the main topics of the Research Training Group (*Graduiertenkolleg*) »European Medieval Legal History, Modern Legal History and Contemporary Legal History«, based at the university from 1988 to 2002, was »The Formation, Dissemination and Enforcement of Norms«,[58] drawing attention to the fact that its approach to legal history also included conflict resolution. A particular focus in Frankfurt was the research on the Imperial Chamber Court (*Reichskammergericht*) of the late medieval and early modern Holy Roman Empire.[59] Another important topic was the study of medieval and early modern commercial conflicts[60] and conflict resolution in the ancient Near East.[61]

This legal-historical focus complemented the research interests of scholars of current law, historians and representatives of other disciplines. It also served the needs of legal practitioners who sought to discuss their own ideas on a broader interdisciplinary basis. In 2012, this resulted in the establishment of the LOEWE Research Focus »Extrajudicial and judicial conflict resolution«,[62] a research network within the framework of the »Funding Programme for the Development of Scientific and Economic Excellence« of the State of Hesse.[63] This provided a broad interdisciplinary platform for research into historical and contemporary manifestations of conflict resolution. As a result, numer-

53 Simon (1988) 201.
54 The first volume of this book series was Ogorek (1986).
55 Ranieri (ed.) (1992).
56 Dölemeyer (1995).
57 Mohnhaupt et al. (eds.) (1997–2003).
58 Rückert (1997) 697.
59 See above all Diestelkamp (1993); Diestelkamp (1995); and various articles in Diestelkamp (1999).
60 Cordes / Dauchy (eds.) (2013); Cordes (2013); Cordes / Höhn (2018). This and the following footnote also include literature published after the start of the LOEWE Research Focus.
61 Pfeifer (2010); Pfeifer (2013a); Pfeifer (2013b); Pfeifer (2015).
62 http://www.konfliktloesung.eu/de.
63 https://wissenschaft.hessen.de/Forschen/Landesprogramm-LOEWE.

ous dissertations, studies and edited volumes were produced;[64] research outcomes were published as part of a working paper series;[65] and a lecture series was held with a focus on conflict resolution under the conditions of cultural diversity,[66] with some of the lectures subsequently published.[67] All in all, it was a project that brought together research questions and work on the topic of extrajudicial and judicial conflict resolution in a quantity and diversity that had not been achieved before.

The funding period of the LOEWE Research Focus ended in 2015. With the end of the project, the need arose to systematically summarise the research findings to date. This intention expanded into the idea of a comprehensive inventory that went beyond the topics and results of the LOEWE Focus – a handbook that was initially conceived as a single volume and then grew to four.

IV. Key concepts

1. *Conflict resolution*

As already stated at the beginning of this article, the handbook project conceptually starts from conflict and its resolution.[68] This avoids the selective and isolating effect of a purely legal approach and overcomes the fixation, typical of conventional legal history, on legal evaluation and judicial decision-making in favour of a broader focus. Starting from typical clashes of interests that manifest themselves in conflicts, the handbook seeks to show the diversity of conflict resolution options available to conflict parties, and with it the numerous institutions, procedures and rationalities of conflict resolution that also exist beyond law and the courts: heads of families, priests or entire village communities could participate in or facilitate dispute settlement processes such as negotiation, mediation and arbitration, reprimand practices, self-help (feud) and magic. These practices also reveal the role of moral or religious norms guiding decision-making in conflict resolution, either alongside the law or indeed in its place. The aim of the handbook is to examine this plurality of conflict resolution strategies, their respective characteristics and their relationship to each other. This approach frees legal history from its exclusive fixation on law and courts, and encompasses the social, cultural, economic, institutional and normative contexts in which partly competing, partly complementary forms of conflict resolution were practised. This opening up of the handbook's purview is apparent in the numerous contributions written by social or cultural historians, political scientists and sociologists, as well as scholars of Jewish, Byzantine and Islamic studies.

Despite the centrality of the concepts of conflict and conflict resolution to the handbook's approach, no single overarching definition of these terms underlies, or emerges from, the contributions. There is neither a uniform social science theory of conflict nor a generally accepted definition of it.[69] What is understood by conflict and conflict resolution dissolves into a multitude of classification criteria, e. g. concerning the levels of analysis (intrapersonal, interpersonal, international conflicts), the objects of conflicts and their structure (indivisible / divisible conflicts), the relative strength of conflict parties (asymmetric / symmetrical conflicts), the degrees of regulation and the functions of conflicts.[70] As a useful starting point for this project, conflict can be understood as a dispute between two or more parties over values, status, power and / or material resources.[71] However, this definition needs to be both expanded and narrowed down in several respects. Firstly, the handbook also takes into account procedures for sanctioning norm violations, i. e. primarily criminal law procedures. This cannot be easily integrated into a classic understanding of conflict. However, it must be borne in mind that, especially for the period before the High Middle Ages, it is often not possible to draw a sharp line between criminal and civil proceedings. By contrast, conflicts between

64 Examples of edited volumes include Zekoll et al. (eds.) (2014); Cordes (2015); Pfeifer / Grotkamp (eds.) (2017); Collin (ed.) (2016). A complete overview (as of 2015) can be found here: http://www.konfliktloesung.eu/de/veroeffentlichungen/.

65 http://www.konfliktloesung.eu/de/veroeffentlichungen/wps/.

66 LOEWE-Ringvorlesung (2013/14) »Die Justiz vor den Herausforderungen der kulturellen Diversität – rechtshistorische Annäherungen«. The programme is available at http://www.konfliktloesung.eu/images/pdf/131205_Ringvorlesung_Programm.pdf.

67 Duve (2013).

68 The following paragraph is the English translation of a passage from the handbook's general introduction.

69 Bonacker (2005) 14 f.

70 Bonacker / Imbusch (2010) 69 ff.

71 Coser (1968) 232; received in historical science, for example, by Mörke (1982) 147.

states – a classic field of peace research – have been largely excluded; however, for the 19th and 20th centuries, both international arbitration and the EU's justice system have been included. In any case, the core of the handbook concentrates on conflicts between citizens and between citizens and the state (or any other superordinate community).

Furthermore, as already mentioned above, the handbook is limited to institutionalised and rule-based conflict resolution. ›Institutionalised‹ means that the process of conflict resolution takes place before persons or institutions who are recognised as legitimate decision-makers or mediators on the basis of legal provisions or social conventions, or it concerns cases in which conflict resolution is placed in the hands of the participants in a generally recognised manner, as in the case of legitimate forms of feud. Spontaneous solutions and unauthorised self-help are thus excluded. ›Rule-governed‹ means that the procedures and decision-making are governed by norms. These can be legal norms, but also norms based on, for example, social conventions, religious beliefs or economic rationalities. Admittedly, this leaves a considerable grey area, especially when groups within a polity practice a type of conflict resolution according to their normative ideas that is either not recognised by the national legal system or operates on the margins of the law. This applies, for example, to the above-mentioned Islamic justices of the peace active in Western countries,[72] the ›thieves' justice‹ (*vorovskaia spravedlivost*) in Russia and the Soviet Union,[73] or the mafia,[74] but also the journeymen's courts at the end of the 18th and the beginning of the 19th century in Germany.[75]

2. *Judicial / extrajudicial*

Even on the basis of the understanding of conflict resolution outlined above, considerable problems remain with regard to internal differentiations. First of all, this concerns the distinction between judicial and extrajudicial conflict resolution – a key distinction of relevance to the handbook, as the regional / national research reports were to contain separate sections for each. The following criteria might be used as indicators of judicial conflict resolution (at least for continental Europe): independence of the decision-making bodies or individual decision-makers, regulation by codified procedural laws (code of civil procedure, code of criminal procedure), legally trained judges, designation as a court. Already for the 19th and 20th centuries, however, some of these criteria fail. For example, the English and French justices of the peace of the 19th century lacked specialised legal training; legal assistance was provided by subordinate employees, in the English case by the clerks.[76] Personal judicial independence remained decidedly precarious in France until the middle of the 20th century.[77] Above all, however, it must be taken into account that the question of what belonged to the judicial system was not answered according to general criteria but on the basis of legal provisions that listed what counted as a court.[78] It is even more difficult to draw the line in the period before the 19th century. The court of the Swabian League in the 16th century, for example, was designed as a court of arbitration, but its institutional organisation and its legally trained staff came very close to a ›real‹ court.[79]

Whether or not a mode of conflict resolution should be considered judicial is not only important for the sake of formal classification. As a result of the constitutional guarantees introduced during the 19th century, courts became subject to certain requirements (e. g. regarding procedure or the judges' qualification), and were at the same time provided with certain protective mechanisms and competences. Distinguishing between judicial / extra-judicial modes is even more difficult for the periods before the emergence of modern notions of the separation of powers. Looking at the variety of conflict resolution institutions over centuries and across many different societies, it may therefore be more productive to understand ›judicial‹ and ›non-judicial‹ not as a dichotomy but rather as the opposite ends of a spectrum.

3. *State / non-state*

Another essential dichotomy – again not merely for classification purposes – is whether, and to what extent, a particular mode of conflict resolution was

72 Rohe / Jaraba (2015) 161 f.
73 Schuppert (2016) 122 ff.
74 Keiser (2011) 140 ff.
75 Deter (1987) 74 ff.
76 Steinmetz (2002) 180 f.
77 Schill (1961).
78 E. g. §§ 12–14 Gerichtsverfassungsgesetz 1877 (Germany).
79 For a comprehensive discussion, see Carl (2000) 370 ff.

organised in state or non-state institutions. This raises the questions of the power constellations in which a mode of conflict resolution is embedded, what ordering principle comes into play, and to what extent the manner and outcome of the process are at the disposal of those affected. Admittedly, in order to determine whether a mode of conflict resolution should be categorised as belonging to the state, we need to clarify our premises. How do we define ›state‹, and to what periods and cultures do we apply this concept? These questions touch on fundamental issues that cannot be pursued here. However, it seems safe to assume that by at least the beginning of the early modern period, European polities had organised themselves as states.[80] For earlier periods, an equivalent role might be attributed to an institutional structure headed by a ruler or ruling body governing a territory or a defined group of people and who, at least in principle, held the monopoly over setting and enforcing norms to which binding force was attributed and which could be enforced with coercive power. Based on these criteria, a mode of conflict resolution can be assigned to the state or the non-state sphere; moreover, one can also – in a more flexible way – make gradations according to its proximity to state institutions or distance from them. This can be done in the form of a typology[81] or according to criteria such as the degree of institutional integration, the staffing, the intensity of state control and state regulation.

4. *Adjudication / conciliation*

Another important pair of words for exploring the inner workings of conflict resolution is that of conciliation / adjudication. Unlike the dichotomies discussed so far, these terms are not opposites; instead, they highlight particular modes of conflict resolution from a more comprehensive set of mechanisms. In the field of ADR, for example, such forms also include arbitration, mediation, negotiation, facilitation, and proceedings before ombudspersons.[82] In legal debates, however, adjudication and conciliation sometimes also appear as a contrasting pair or, more precisely, are seen as representing alternatives. This is particularly the case in discussions of legal policy, where the terms are used to describe two types of judicial problem-solving that are fundamentally differently conceived. In such cases, ›authoritarian‹ adjudication is contrasted with the allegedly positive characteristics of arbitration: the participation of those affected, more flexible solutions, more future-oriented conflict management, and undistorted communication.[83] To some extent, these different perspectives can also be projected back onto historical debates, but they do not really capture the complexity of conflict resolution practice;[84] especially in the Middle Ages, greater authority naturally also promised greater legal certainty.

Looking at the pair of terms from another angle, adjudication and conciliation can also be depicted as complementary. This is the case, for example, when state courts take over cases that are not amenable to conciliation, e. g. because of fundamental normative differences between the parties. This either relieves arbitration institutions from these potential resource-draining proceedings or, because of the state's prohibition of self-help, can actually make the parties more inclined to come to a negotiated agreement.[85] Last but not least, adjudication and conciliation can be identified as components of a uniformly conceived conflict resolution procedure in which judgement is preceded by an attempt to reach an amicable settlement[86] – a concept that can already be observed in pre-modern times. However, the reverse order is also possible: in medieval Japan, a judgement was not the end of the conflict but rather an intermediate step, to be followed by further negotiations. This unusual order can be explained by the lack of a functioning enforcement apparatus within the Japanese legal system at the time.[87]

V. The volumes' thematic structure

In the individual volumes of the handbook, the description of conflict resolution in Europe initially concentrates on examining the formative institutions and structures of the time period covered. However, the overall conception of the

80 See e. g. Duve (2011) 150.
81 Forsyth (2007); similar approaches in Connolly (2005); Kötter (2012) 17 ff.
82 Hopt / Steffek (2008) 16.
83 About this Prütting (1985) 262 f.
84 For a more comprehensive discussion of the following, see Collin (2013).
85 Spittler (1980).
86 § 278 Zivilprozessordnung (Germany).
87 Nishikawa (2001) 109.

handbook that provides the structure of its four volumes also offers the possibility of looking at conflict resolution in a longitudinal view, from antiquity to the present day. This *longue durée* approach allows for the differentiated exploration of both stabilising and dynamic factors and also makes diachronic connections visible. Each volume contains the same thematic sections: »Foundations and fundamental problems«, »Actors of conflict resolution«, »Procedures and institutions« and »Fields of conflict«, which are followed by the research reports on specific regions or countries. While the same main themes can thus be found throughout all four volumes, certain concessions had to be made. These resulted, firstly, from the fact that certain thematic foci had different relevance in the different epochs. For example, while ›revenge‹ is an indispensable key concept for analysing conflict resolution in antiquity, it hardly played a role as an institutionalised form of conflict resolution in 19th- and 20th-century Europe. Secondly, the thematic structure could not always be fully realised, as authors willing and able to write about a certain topic in a European perspective could not always be found. In addition, for certain topics the current state of research simply did not yet provide sufficient material for a handbook article of this nature. Original research would have needed to be performed, which, however, lay outside the scope of a handbook project.

1. *Foundations and fundamental problems*

A number of fundamental questions apply to all forms of conflict resolution, irrespective of period or location. First and foremost, there is the question of the extent to which people had access to institutionalised and rule-based conflict resolution at all. In other words, were there alternatives to unregulated, often violent conflicts or to the arbitrary exercise of the ›law of the strongest‹? Each volume of the handbook thus begins with a discussion of ›access to justice‹ – a modern expression that is nevertheless more generally applicable. Another key theme running through all volumes is ›legal certainty‹. The latter is not only a principle of the modern constitutional state; the topoi of *ius certum* and *certitudo iuris* hint at the older origins of this concept. Legal certainty is about the existence of norms – and not only legal norms – as »counterfactually stabilised expectations«[88] that do not have to prejudice any particular outcomes, but which convey a reliable framework.

Linked to legal certainty is the further fundamental question of how both the normative foundations and the procedure and results of conflict resolution are communicated beyond the narrow circle of those directly involved, and can thus serve as an orientation for other jurists as well as the general public. Under the heading »Media of conflict resolution«, the handbook's authors discuss not only forms of publicising decisions but also, for example, the relationship between written and oral communication.

Another topic dealt with in each of the four volumes is that of the »Sites of conflict resolution«. Where proceedings take place determines not only whether they will be public or not, or how they will be demarcated from everyday life and thus given a certain dignity. The architecture of court locations can also convey a particular understanding of the exercise of justice and, not least, the status one assigns to judicial authorities in relation to other authorities.

Other fundamental questions dealt with in this handbook tend to reflect problems specific to the period covered, such as the topic of »Revenge« for antiquity or that of »Feud« for the Middle Ages, of »Professionalisation« for the early modern period, or that of the distortions of »Justice under National Socialism« in the modern era.

2. *Actors of conflict resolution*

Throughout all four volumes, particular attention is paid to those participating in conflict resolution. Gender-specific problems are addressed, including the position of women not only as plaintiffs or defendants (and whether such a status was granted to them at all), but also the question of the extent to which they could belong to the decision-making personnel or intervene in conflict resolution in other functions. Mostly, however, the groups of actors discussed are period-specific: in antiquity, the focus lies on types of Greek and Roman judicial institutions; for the Middle Ages, on the diversity of actors in the tension-laden duality of secular and ecclesiastical power; for the early modern period, on the inclusion of the indigenous population of the new

88 Luhmann (1969) 37.

European colonies and of Muslim foreigners in Europe; for the 19th and 20th centuries, on the groups of professional and lay judges, who finally came to be distinguished from one other.

3. *Procedures and institutions*

Institutionalised and rule-governed forms of conflict resolution are based on organisations and procedures. Certain structural patterns are visible across all periods covered by the handbook, even if the borders between the categories sometimes blur and the terms vary. In most periods, a fundamental distinction between procedures aimed at penalising misbehaviour and those in which claims were disputed between conflicting parties – that is, between what we label as criminal and civil proceedings – is recognisable. Likewise, it becomes apparent that arbitration as an alternative to judicial decision-making always existed in some form, though its role and character varied. Frequently, its institutions were not open to all but rather accessible only to certain groups or classes. In addition, procedures for mediation also existed throughout the periods studied, though these were only partially formally organised. Of course, this summary is still a rather schematic view based on the thematic foci of the handbook articles in question. A closer look reveals numerous mixed forms and manifestations of ›infrajustice‹ and ›popular justice‹. Furthermore, key elements structuring procedures and influencing or even determining decisions/outcomes were often time-specific and can be presented diachronically only to a limited extent, if at all. Thus, during the period of antiquity we need to pay special attention to magic, and in the Middle Ages to the ordeal. Oath-taking as a procedural element played a prominent role from antiquity up to and including the early modern period. The handbook's volumes also focus on the formative court and procedural structures of each period, such as Roman provincial justice in antiquity, the instruments of dispensations under canon law and appeal procedures in the Late Middle Ages, territorial and imperial jurisdiction in the early modern period, the *ius commune* procedure in the latter two eras, and international arbitration and criminal jurisdiction as well as EU justice in the modern era.

4. *Fields of conflict*

The term ›fields of conflict‹ refers to social areas that have established their own culture of conflict resolution, which are often what Sally Falk Moore termed »semi-autonomous fields«,[89] with their own normative rationalities and specific ideas of authority, consensus and cooperation. That ordinary judicial systems are also active in these fields is clear, but they are partially displaced by specific forms of conflict resolution that attach themselves to them, overlap with them, or operate in semi-legal grey zones. Such social fields can be structured according to the logic of stratified or segmentary order or to the functional rationalities of the modern world. Nevertheless, some constants can be observed (even if the functional mechanisms change over time). Certain groups or social fields tend to develop their own modes and institutions of conflict resolution, such as the military, the nobility, the family and the economic sphere. Religious communities generally produce their own conflict resolution cultures, oriented towards religious normativity. For a long time, there existed also a special kind of rural conflict resolution. The volume on antiquity highlights conflict resolution in Greek competitive sports and in the cities; for the Middle Ages, the authors focus on cities, long-distance trade and universities, among other things, as do the authors of the volume on the early modern period. The latter also examine mining, crafts and guilds. The volume for the 19th and 20th centuries pays special attention to labour relations, state-citizen relations and the European colonies, amongst other things.

5. *Countries, regions and territories – regional research reports*

Each of the handbook's volumes concludes with a section dealing with countries, regions and territories, in the volumes on the early modern and modern periods in the form of country research reports.[90] These are intended, firstly, to overcome the problem that the thematic contributions cannot fully cover the European dimensions either in their breadth or in their depth; in this respect, the

89 Moore (1973).
90 The following passage (up to »development of extrajudicial and judicial conflict resolution«) is the English translation of a passage from the introduction to vol. 4 of the handbook.

country/regional research reports have a supplementary function. Secondly, however, they also have a purpose in their own right. On the one hand, they offer an introduction to the relevant secondary literature, providing starting points for those interested in exploring the issues in greater depth. On the other hand, these chapters provide brief sketches of the specific national or regional development of extrajudicial and judicial conflict resolution. Of course, for many centuries, the polities under consideration were not modern nation-states. The chapters dealing with antiquity, the Middles Ages, as well as some of the early modern period, often focus on empires, the scattered territories held by one dynasty, or regions with weak state institutions. In the volume on antiquity, in addition to the Roman Empire (discussed in detail in the thematic contributions) and classical Greece, the polities discussed include ancient Israel, ancient and Roman Egypt, and the Hellenistic world. The chapters in the volume on the Middle Ages discuss Byzantium, the early medieval ›Germanic‹ world, the Holy Roman Empire, Russia, France, England and Scandinavia. For the early modern period, alongside polities constructed along the lines of nation-states (such as France, the Netherlands, England and Wales, Scotland, Portugal, and to a certain extent Spain), we find composite monarchies (Poland-Lithuania), multiple territories ruled by the same dynasty (Sweden-Finland, Denmark-Norway), confederation-like entities (the Holy Roman Empire), (partially) dependent territories (Ireland, Italy), federations of regions (the Swiss Confederation) and empires (Habsburg and Ottoman). For the 19th and 20th centuries, individual chapters are devoted to most European nation states, although it should be borne in mind that in these 200 years, too, new states were created, old ones ceased to exist and borders were shifted.

VI. Concluding remarks

Of course, the findings of a four-volume handbook can hardly be summarised in a single article. In general, the handbook provides broad information on the basic lines of development and offers an introduction to more detailed research. But what general conclusions can be drawn? In the following, a number of key findings will be highlighted for each individual epoch.

The initial concept of the handbook included the idea of challenging the generally established understanding of conflict resolution in classical antiquity by asking whether the conventional concentration of research on Athens and Rome did not need to be broadened to include other regions as well as possible non-urban ways of dispute settlement. After all, the traditional focus on Athens and Rome is, to a certain extent, a relic of the research interests of scholars in whose contemporary societies the procedural rules of the *Corpus Iuris Civilis* continued to be directly applicable law. As the research progressed, however, it became clear that the traditional focus is actually justified by the central role of cities in ancient life. The authors' attempt to identify separate fields of conflict demonstrated that in antiquity, the city was not one field of conflict among many others but rather the central anchor point, both spatially and institutionally. Supra-regional structures, like the common courts of Greek cities or the different forms of provincial jurisdiction in the Roman Empire, were based on urban structures. Those involved in conflict resolution (parties, judges, arbitrators, etc.) were mainly identified by their city affiliation – their citizenship – even in the Hellenistic kingdoms and the Roman Empire.

Another peculiarity of antiquity that comparison within the project brought to light is that the identifiable functions and structures of conflict resolution appear less independent from roles and structures for other purposes. For example, cult practices were not fundamentally detached from the – in the original sense ›political‹ – structures of city government and administration, and conflict resolution was only rarely performed by ›professional‹ personnel. A person could be a priest or merchant and help others to settle their conflicts, without the notion that any of these tasks should be his principal occupation. This is in line with ancient theoretical thoughts: Aristotle, for example, while distinguishing different aspects of power, did not call for the separation of powers.

The Middle Ages can be described as a kind of laboratory for the development of a highly diverse range of conflict resolution strategies – as diverse as the forms of rule, social structures and political cultures during this period. Sometimes written and oral, ecclesiastical and secular, centuries-old and spontaneously emerging conflict resolution techniques coexisted in close geographical and temporal proximity. Despite this heterogeneity,

however, the contributions to the handbook suggest that the development of these multiple modes of conflict resolution did not proceeded at random. Instead, we find some surprising parallels in the history of conflict resolution strategies in very different places in Europe. The handbook's contributions show, for example, that authorities everywhere saw the judicial institutionalisation of instruments of conflict resolution as an important element in securing their rule. Wherever this did not succeed, extrajudicial dispute resolution instruments dominated.

Similar observations apply to the early modern period, which, in many regards, can be considered as perpetuating the medieval paradigm of conflict resolution characterised by normative pluralism and jurisdictional competition. Personal status, religious affiliation and decentralised power structures continued to play a paramount role in shaping particular modes of conflict resolution. For example, in university cities, endless disputes arose about who was competent to judge disputes involving students. The university chancellor, the local bishop, the city alderman's court, the duke's council and the royal high court each asserted their claims. The clergy and nobility enjoyed privileges that challenged the attempts by kings and local governors to centralise power and harmonise procedures – as even Louis XIV came to understand when he prepared his reform of civil and criminal procedure, which prompted hostile reactions by clergy- and noblemen. Well into the 19th century, various forms of conflict resolution outside the normal judicial order remained a »privilege« not only of the nobility and clergy but also of the military and universities. At the same time, by the 18th century the Enlightenment had given impetus to a reform movement that ushered in many of the revolutionary ideas that became reality after 1789. Judges were increasingly expected to motivate their decisions, ecclesiastical authorities were sidelined, and criminal justice, to be applied equally to all citizens, was deemed to be a prerogative belonging exclusively to the state.

In the 19th and 20th centuries, the territorial organisation and professionalisation of the judiciary, begun in the early modern period, continued. In the country research reports, we see how the French system spread throughout most of Europe or at least had a lasting influence on the national development of the judiciary in many areas. At the same time, an enormous push towards juridification can be observed – not only in the sense that legal norms now formed the basis for decision-making, but also in as much as that, due to the requirement of legal bindingness and the independence of the judiciary, only legal communication became permissible in legal decisions. In addition, there is a quantitative aspect: through the gradual establishment of judicial protection of administrative rights throughout Europe, juridification also came to extend to state-citizen relations. Over the same period we also see both judicial and extrajudicial conflict resolution institutions based on the estates or religion either having their competences severely reduced or disappearing altogether. However, with the emergence of the interventionist and welfare state from the end of the 19th century onwards, both the liberal litigation model and the dominance of the ordinary courts entered into a crisis. This manifested itself both in demands for the opening up of judicial decision-making to social and economic concerns and in the emergence of new judicial and extrajudicial conflict resolution institutions – especially in labour relations, social policy and economics – and finally also in an unprecedented internationalisation of justice.

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