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### Scripting justice

*Legal practice and communication in the late medieval law courts of Utrecht, York and Paris*

Camphuijsen, F.W.G.W.

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# Conclusion

“There is no doubt”, said K., “there is no doubt, that behind all the statements of this court, and in my case also behind the arrest and the current investigation, there stands a large organization. One that comprises not only bribable guards, oafish supervisors and at best unpretentious magistrates, but that also maintains a judiciary of a high or even the highest level, along with its myriad, inescapable entourage of servants, scribes, policemen and other assistants, perhaps even executioners – I’m not afraid of using that word. And the purpose of this organization, gentlemen? Its purpose is to arrest innocent people and to begin a pointless procedure against them which, as in my case, usually leads to no result.”<sup>1</sup>

Thus Franz Kafka, often considered the father of modern bureaucratic horror, imagined justice. In his novel *Der Prozess* he sketched the vicissitudes of a man caught in a legal process whose exact cause and procedure remain obscure. Notwithstanding people’s best intentions to help the protagonist with his case, no character in the story ever seems able to fully understand or work the system behind these proceedings. Kafka gave words to a fear of being caught up in the infernal machinations of a faceless legal bureaucracy, whose sole reason for existence was the realization of a purposeless show called the legal process.

Despite a chronological distance of some four-and-a-half centuries, Kafka’s image of legal practice in the early twentieth century echoes much of the criticism uttered at law courts by François Villon and his contemporaries in the later Middle Ages. Central to these images is a fundamental criticism of the court itself. Be it as a Kafkaesque organisation capturing people in a web of legal proceedings, or as Villon’s godlike entity that has the power to pardon and punish at will, courts are conceptualized as particularly inaccessible forms of justice. In such depictions, people are at the mercy of an institution that defines both the nature of justice and the means of achieving it, without allowing individuals any real influence on the process as such.

Institutional legitimacy is no given, neither in a modern nor in a medieval context. Countering such criticisms as uttered by Kafka and Villon, legal bureaucracies are and have been in need of legitimizing their role as authorities – that is to say entities with a norm-setting voice and practice – in the pursuit of justice. The later Middle Ages formed a particularly formative period for the creation of such a discourse and practice of institutional legitimization that continues to play a role to this very day. Late medieval societies saw a change in the ways of working with and the ways of speaking

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<sup>1</sup> Translated from: Franz Kafka, *Sämtliche Werke* (Frankfurt am Main, 2008) 271-272.

about justice, in which a specific format for organizing legal practice, the law court, was propagated as socio-legal norm. Yet it was no self-evident norm, regularly clashing with people's sense of what justice entailed and how one should go about to achieve it. To trace and explain this process of negotiation between a specific court-centered discourse and practice of justice and its many alternatives, has been the goal of the current thesis.

### **Medieval law courts: general and local developments**

Law courts, as spatially fixed and text-producing fora for social disputes, were established in numerous urban localities, following both broader and more case-specific developments. Some of these were related to demographic and socio-economic trends. The growing number of case loads, for example, which led many rulers, both secular and ecclesiastical, to instigate textual procedures, coincided with a more general demographic growth in many parts of Europe, that had its peak in the late thirteenth and early fourteenth centuries. More people meant more potential conflicts, which subsequently translated into more possible litigants. Another factor of importance was urban growth, which had kicked off at the turn of the second millennium. With the increase in cities' size and number, urban residents became a particularly relevant public for the socio-legal claims of rulers. Thus the establishment of permanent courts in an urban context could be a very effective communication strategy, bringing legal presence to places with a relatively high population density. Other influences on the establishment of law courts can be traced to the procedural realm. From the eleventh century onwards, interest in the canon and Roman procedural traditions increased. As the early universities began to incorporate the study of both legal traditions, lawyers came to play a dominant role in urban and princely administrations and at the courts of both secular and ecclesiastical rulers. Efforts to standardize legal procedure made these traditions and their representatives attractive bases for claims to centralized authority. Furthermore, the substantial attention for textual procedure also stimulated the use of documents in daily legal practice.

These general developments impacted all three courts studied here. Yet, zooming in on them individually also shows how particular case-specific conditions merged with these broader trends to shape the way in which each court came into being. In France, the Capetian monarchy's increasing politico-judicial claims brought with it an expansion of the territories from which it would hear legal cases. As the feasibility of personally visiting each region where the king claimed power diminished, the itinerant royal court established a more permanent residence in Paris where it could receive those seeking judgement from all over the realm. At the same time, a system of judicial representatives was set up, along which socio-legal information could flow to and from the court, often in the form of texts. These factors formed the basis for the development of the *Parlement* of Paris, a permanent law court with a fixed staff.

Growing case loads were also at the heart of the institutional changes in the ecclesiastical province of York. Eleventh- and twelfth-century attempts at the standardization of religious practice stimulated the expansion and textualization of episcopal administrations in many regions of western Christendom. In York the formerly itinerant archiepiscopal court became part of a broader administrative block in and around the expanded cathedral church, combining the archiepiscopal residence with scriptoria and a law court. By operating in and around a place like the York Minster, the Consistory Court combined administrative permanence with a presence at the ideological heart of the church province. This symbolic centrality formed a crucial part of its claim to legitimacy in conflicts of jurisdiction with other socio-legal claimants, like the royal courts or local urban authorities.

The Council of Utrecht, also a former episcopal advisory board, took a different path. In the process of gaining independence from its ecclesiastical landlord, the socio-economic elite of Utrecht preferred the Council as representative body over a bench of aldermen appointed by the bishop. As a judicial and governmental body indirectly elected by the Utrecht citizenry, the Council came to constitute the main forum for communicating political and legal messages both within the community and vis-à-vis its rural hinterland, where it had to consider the interests of noble elites and other urban communities. Questions about the role of Utrecht's outlying jurisdictions (*buitengerechten*), the implications of citizenship and the relative position of non-citizens, underlay many of the Council's activities. But at the same time, the Council also formed the main venue for the city's internal power struggles. It was over and through this institution that political factions in Utrecht denied each other's claims for legitimate authority.

The establishment of law courts across late medieval Europe thus followed both broader and case-specific developments. While demographic and intellectual trends shaped the general framework within which these bodies were realized, differences of scale, legal tradition and socio-political context all influenced the particular motivations that brought each court into existence. Their establishment proves to be a remarkably similar response to diverse socio-communicative challenges faced by different claimants to legal legitimacy.

### **Scripting justice**

Despite courts' popularity as forms of legal practice, their role in late medieval societies was contested. Alternative practices and discourses of justice existed, including feuding and other forms of private vengeance. Courts therefore had to market themselves, enticing both potential litigants and audiences to consider them as legitimate forms of socio-legal practice over and above the available alternatives. To do so, they engaged in what I have dubbed the scripting of justice. In a manner akin to a theatrical piece, specific constellations of acts, actors and/or matter, as well as

related discourses, were put forward as normative ways to perform justice. These scripts constituted consistent communication strategies, incorporating spaces, texts, speech and activity, through which courts presented a specific idealized image of socio-legal practice. With them, courts tried to influence people's legal literacy, that is their conceptualization of the nature of justice and how to achieve it. I have identified five of these legal scripts, each engaging with particular challenges that the courts faced to their legitimacy. They are provisionally styled the scripts of accessibility, physicality, rituality, semantic linking, and narrativity.

As the discussion of Villon and Kafka has suggested, one of the main issues facing institutionalized courts was the negotiation of the accessibility versus the opacity of the legal process. Thus the first script which courts employed concerned the degree of access which various participants had to their process. The court space had a fundamental part to play in this. As physical stage on which the courts' proceedings took place it was part and parcel of people's experience with the daily practice of law. The question of which parts of the legal process were to be experienced by whom, was to a large extent negotiated in space. This involved not only the layout of the physical spaces in which the court operated – be it a royal castle, a cathedral or a market square – but also the way in which such spaces were employed. The physical separation of two rooms by means of walls and doors could as easily be used to make a point about the publicity of the legal process, as could limiting access to one of these rooms for a certain group. Other media were also used in scripting the accessibility of legal practice. Certain parts of the legal process, like the *buurspraak* events in Utrecht or the sentence readings in York, formed an explicitly public performance of this process. Here space, activity and speech were combined in order to create a highly visible and audible experience of the court and its activities. Accessibility could likewise be limited by a strategic use of several modes of expression. Texts written in abbreviated Latin or the use of jargon could seriously impede large groups from participating fully in the processes of signification – that is the attribution of meaning – that took place in court, establishing a dominant role for legal professionals in managing such participation.

Whereas the accessibility script was primarily concerned with people's access to the legal process, in a related way courts scripted the presence of this process in society. Through a multitude of media courts reified their presence in the world. The most prominent form of this script was again played out in space. By creating or appropriating physical spaces in the urban landscape, thereby establishing permanent fora of justice, courts made their presence concrete for potential audiences and litigants alike. The courtroom became a physical imprint on society, communicating the court's claim for prominence in the socio-legal field. And the same was true for its texts. As language-objects, these documents of practice not only communicated the contents of a legal case, but also physicalized its proceedings. They provided the court with a presence and permanency unlike many non-physical aspects of the legal process. Finally, a third form in which courts took physical shape

was in the enactment of their legal process. Occasions like the Utrecht forgiveness procedures, the York sentence readings and the *Grands Jours* of the *Parlement* of Paris, despite having less permanency than spaces or texts, made the court and its way of doing things physically present in the socio-legal arena.

Considering legal enactments leads to a third form of scripting, namely the ritualization of legal acts. Within this script, otherwise separate acts were suggested to belong to an overarching and pre-existing structure – that is, a ritual – in an attempt to convincingly imbue them with specific meanings. Thus, public reconciliations between offenders and their community in the city of Utrecht would be framed according to a model of spiritual penance, echoing the moral power claim of the Council. Likewise, the individual *Grands Jours* held by the *Parlement* of Paris referred in the constellation of their activities to the ordinary sessions of this court, despite taking place in a completely different setting. And in York, the Consistory Court's sentence readings focused on the way that individual acts fitted within the overarching whole of canon law procedure. Although primarily concerned with physical activities, these scripts of rituality also drew on their textual record. A text could pose a particularly strong claim on the existence of a ritual whole, by suggesting a uniformity of practice and by fixing this suggestion on a written surface, allowing later audiences – including historians – to take note of the court's ritual myth. Thus the involvement of written documents in the legal process was also part of an attempt to ritually script the events taking place.

Closely involved in all previous forms of scripting, was the semantic linkage of entities and concepts involved in the legal process. Thus when the Council of Utrecht demanded the compensation for a crime to be paid in 'stones', or the Consistory Court earmarked a certain fine to be used for the fabric of the church, they directly related monetary reconciliation to the (re)construction of specific meaningful structures. Likewise, the use of labels like *scelus* (sinful), *mala* (bad), *onredelik* (unreasonable) and *onstantelik* (improper) to describe certain acts as objectionable and thus fit for persecution, linked these acts to certain categories of thought, suggesting a specific meaning and valuation for them. In this fourth script, court records had a fundamental role to play. Even more than was the case in other forms of scripting, semantic links were particularly pronounced in writing. The endless repetition of the 'stone-fine', or 'sinful acts' in the records, formed part of a campaign for the felicity of a particular semantic script.

Whereas semantic scripting focused on individual utterances and their suggested meanings, in a related way a much broader discursive framework was set up to encapsulate the meanings attributed to the court and its legal process as a whole. Often involving many of the previously identified forms of scripting, the courts presented what can best be called a court narrative, that is, a more or less cohesive story on the nature of social order and the role of the court itself in facilitating that order. Thus the *Parlement's* negotiation of its public and secluded spaces, ritualization of its

legal procedure, and moralization of the deeds of its litigants, all contributed to positioning itself in relation to a society where it claimed the highest form of judiciary power. It wrote and performed a script that asserted its role as an experienced and at the same time detached – because royal – justice. And it underscored the logic of the legal manners of the *Parlement*, and of the socio-moral character of the political constellation that was the French kingdom. Similarly, the Consistory Court in York combined its use of the cathedral with an oral and textual performance of the procedure of canon law, in order to narrate its role in society. Taking place in the province's religious centre *par excellence*, and forming the realisation of an ideal system of behaviour, the court's sessions were presented as the community's fundamental moral compass representing a judicial hierarchy whose highest arbiter was God himself. The Council of Utrecht, finally, mobilized everything from urban space to penitential references and categories of improper behaviour to claim a role as representative and guardian of its community. Narrative scripts, although mostly explicated in court documents, incorporated a large array of other media in bringing a broad and more-or-less coherent story about the court and the crucial role it allegedly played in guaranteeing social order.

### **Communicative constellations and the negotiation of justice**

Courts' attempts at scripting socio-legal activity and discourse involved a range of modes of expression, including the use of texts, spaces, physical activities and the spoken word. In distinguishing between various scripts, we have seen how each of them was expressed through several if not all of these forms of communication. Each medium had its own character, influencing the way in which it was engaged in the communicative process. Spaces, while forming the stage on which other means of expression operated, were themselves also applied as medium to conceptualize and communicate messages. Their obdurate materiality – that is the relative complexity of changing them after their initial formation – gave them a particular role in scripting the court's accessibility and physicality, while also lending itself to semantic linking, as evidenced most clearly in the case of the Utrecht stone fines. Physical acts, while possessing a less permanent character than spaces, were also important means to make the court physically present and negotiate its accessibility, through the visualisation or – on the contrary – concealment of its process. Just as important, however, was the performative role of these activities, that is the courts' attempts to speak by acting, which was most pronounced in their ritualization of court practice. Performance also played its part in texts and oral statements, although in the reverse meaning of acting through speech. Common to both oral and textual modes of expression were the attempts to make concrete changes to the world by means of linguistic utterances. This could take the form of the attribution of meaning to specific acts, objects or people, or by explicating their interconnectedness in broader structures of practice and thought. In the case of texts, the medium's materiality further influenced

its application in the process of communication. Having both a physical permanency similar to spaces, and the linguistic explicitness of speech, court documents added a specific dimension to the communicative activity of the court and were involved in all forms of scripting as identified above.

Court records' particular place in the socio-legal communicative constellation makes it all the more relevant to see their numbers and application in legal practice increase markedly with the development of law courts. While taking care not to overstress the uniqueness or novelty of the use of texts in socio-legal practice, the heavy reliance on and production of this particular medium in late medieval law courts was certainly a new phenomenon. This development of the textual record was in its turn related to other changes in the socio-legal communicative constellation related to the establishment of law courts. The link with physical permanence, a feature common to all courts treated here, is particularly pronounced. Not only did a set space for the court facilitate the production, handling and archiving of extensive records, it can also be argued to have sprung from a similar tendency to fix and thereby control the course of legal practice. Just as court space was actively used in scripting legal practice – negotiating accessibility, suggesting ritual structures – so the court record reduced the complexity of practice to a fixed scheme of operations.

These new forms of communicative action built on and interacted with many existing practices. Contrary to the idea of an absolute shift from orality to textuality in legal practice by the late medieval period, the courts under scrutiny here continued to rely on existing forms of oral presentation and validation. Witness testimony, *fama* and other kinds of social information may have been increasingly translated into a textual format, yet their role as validators of the legal process worked because of, rather than despite, their oral character. Likewise, in reporting the legal process back to society, these courts made extensive use of oral modes of communication, publicly reading sentences, oaths and other parts of legal procedure. And the same is true for physical enactment, which is often found in close relation to such acts of public orality. The public staging of decisive moments in legal truth-finding and dispute resolution processes had a long extra-textual history before being incorporated in court practice, encompassing for example various forms of ordeals and systems of public feuding. Such continuation of practices was even regularly explicated as part of courts' strategies of legitimization. Scripting rituality, for example, relied on the suggestion of a relation between one specific instance and a pre-existing structure of communication. Thus while new modes were gradually introduced in the legal format of the court, many practices and ideas about practices that had formed a central part of earlier socio-legal communicative constellations remained relevant in attempts to script justice.

The development of a new socio-legal communicative constellation, even when incorporating familiar practices and ideas, required people to adopt and accept new forms of expression, that is the acquisition of a new kind of legal literacy. The logic of relying on a textualized procedure to

achieve a just resolution in one's dispute, for example, was not self-evident, nor easily practicable, for those used to the private solution of conflicts through oral and enacted feuding practices. Over time people's legal literacy changed to incorporate the specific format of socio-legal communication that the court represented, even though – as the fears expressed by Kafka suggest – its acceptance was never a given. This process, at any rate, was hardly a top-down movement, forcing people to submit to externally implemented socio-legal modalities. Rather, it was the interaction of different agents, including the courts, their litigants and audiences, which shaped the forms and content of communication. All had their motivations to participate in particular socio-legal practices, be it in an attempt to claim legitimacy, in pursuit of specific socio-economic goals, or to seek confirmation of the proper functioning of justice. At the same time, each participant influenced the actions of the others. This could be done directly, by demanding specific activity from others, or, likewise, refusing to follow others' demands. Yet agents' actions were also often shaped in an indirect manner, as seen in audiences' influence on the courts' publication strategies. Thus in the process that gradually changed people's legal literacy, individual socio-legal strategies were combined with a public negotiation of the nature and means of achieving justice.

It is in the context of this negotiated development of new legal literacies, that the courts played out their strategies of scripting justice. These scripts were highly participatory by nature. Many people could, so to speak, become co-authors, by bringing suits, acting as witnesses, forming audiences, and so on. Society at large was actively engaged in legitimizing the courts' claims to socio-legal authority. Consequently, to speak in Bourdieuan terms, such claims were not just concerned with achieving a certain amount of socio-linguistic capital on an existing and stable field of communication. Instead, by involving the participation of so many potential speakers in their scripts of justice, the courts put the constitution of the field itself at stake. Rather than forcing themselves on a potentially unwilling society, courts tried to convince their potential consumers that their show of justice was the most legitimate by enticing them to contribute to and thus participate in it.

### **Scripted justice and historians**

The questions underlying this thesis have sprung from a desire to trace and understand people's experiences in engaging with behavioral norms, moralities and socio-legal practices in their daily lives. They ask what people in a given situation considered just, and how they went about in its pursuit. Such questions interest a growing group of social, legal and cultural historians. In the context of this field of the socio-cultural history of legal mentality and practice, a consideration of courts' scripting strategies can sharpen historians' understanding of past societies and the socio-legal processes taking place there. Firstly, a focus on scripting takes the explanation for actions back to where they actually take place. Rather than consider the socio-legal actions and considerations of

historical individuals as merely derivative of external processes in the social, economic, political or other spheres, it takes these actions and considerations as main *explanandum* for the changes taking place. In the historical narrative presented here, the communicative interaction between historical agents, including the staking and refuting of claims, the performance of acts and words and the suggestion of meaning for them, is the main process driving the development of people's socio-legal environment. As such, we find ourselves in the thick of the action, where people's concepts of justice and injustice are actively negotiated and renegotiated, subsequently influencing the activities employed in other fields of practice.

Secondly, an awareness of processes of judicial scripting is crucial for understanding key records on which historians base their claims about past societies. Among the sources – both textual and non-textual – available for the study of late medieval legal practice, court records form an impressively rich sediment of past human action and interaction, generally increasing in volume as we move further in time. Yet, their sedimentary nature also means that anyone wishing to use these sources to reconstruct broader patterns of thought and action, must be aware of the texts' conditions of coming-into-being. Forming part of processes of judicial scripting, these documents were engaged in the interaction between a multiplicity of actors and modes of communication, complicating the relation of these sources to the social activities and ideas one tries to gather from them. Court records, despite their claim to describe events as they have taken place, are no untroubled mirrors of social activity. Rather, in describing certain practices, they also prescribe how such acts are supposed to proceed and even perform part of these idealized proceedings. They thus constitute an active attempt at reconstituting an external reality, by textually organizing the things that have supposedly taken place.

In this sense, court records are elaborate speech acts, that is the textual performance of an idealized course of events. Whereas Austinian theories of performance focus on the one-directional, simple character of performative speech, court records can be conceived of as constitutive speech acts, that is multi-authored and multi-directional speech acts. When witness testimony was drawn up, for example, a chain of agents, from the witness through to the examiner and the lawyer, each with their own strategies and motivations for speaking, made what they considered a felicitous contribution to the speech act as it has survived in writing. A particular form of influence was furthermore provided by the records' audiences. As many of these texts were written with a certain public in mind, these groups, without necessarily actively engaging in the construction of the historical record, had a major influence on what its authors eventually put into writing and how. The felicity conditions of a speech act were to a large extent dependent on the intended audience of the act as such, which thereby contributed to shaping the record in a similar fashion as its authors. Given, the various voices represented in the material – direct and indirect authors as well as audiences – do

not carry the same weight, and it is the court that speaks to us most directly. Nevertheless, even this dominant voice was not impervious to external influences. As such the court records basically form a textualized, and thus more or less fixed stage in a process of negotiation between multiple social agents, each contributing in some way or another to the document under scrutiny. They reflect attempts to script justice, that is to assert and communicate a definition and practice of justice in a manner considered sufficiently legitimate by its potential participants and audiences.

Court records and the courts producing them thus form a crucial intermediary between historians and the historical actors, actions and mentalities that they try to understand. By taking such sources at face value, one takes the risk of reproducing the court's narrative of justice and idealized socio-legal practice. Yet, assuming that the records were produced in a complete curial vacuum denies the influence of many direct and especially indirect actors on the constitution of ideas and practices of justice. Rather, by acknowledging the underlying communicative processes – as well as their respective power relations – historians may recognize both the complexities and opportunities that these sources offer for those interested in historical understandings and experiences of justice. Reading mere fragments of lives long past, it is unreasonable to expect a complete, let alone unmediated view of people's lives and concerns. Yet the textual mediation that hides so many aspects of the past from our view is itself also a product of that past. In negotiating concepts and practices of justice, courts and other socio-judicial stakeholders found it opportune to invest in linguistic artifacts, including them in a broader complex of strategic activity. The records that form the result of this socio-legal scripting, confront us with the sometimes strikingly familiar attempts of past generations to cope with the ambiguity of justice.