

**From “Improvised Theater” to Scripted Roles:
Literacy and Changes in Communication in North Italian Law Courts
(Twelfth-Thirteenth Centuries)**

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This paper deals with the changes of the form of communication that took place in North Italian law courts during the High Middle Ages. These changes are linked to the intensive use of writing that had been implemented since the last decades of the twelfth century in a massive way within the normal everyday activities of law courts. Many parts of the increasingly differentiated proceedings were written down and—the crucial points of this paper—oral communication in court was based increasingly upon written texts.

The strong growth in the use of writing in court—together with the reception of Roman law—is usually discussed from the perspective of an inclination towards a more rational and objective approach to legal matters. It is true that, from a contemporary point of view, the way legal proceedings were structured in the thirteenth century seemed to lead to more appropriate and “just” decisions than was the case in the sometimes ordeal-based judgements of earlier periods.¹ But, looking at penal justice and the way *heretici* were treated, some **[216]** doubts may arise concerning whether the people of the Italian city-states aimed at creating a “rational” or “fair” trial in the modern sense of the word when they dramatically changed the way their law courts operated.²

¹ The Liber Consuetudinum, written in Milan in 1216, relates that with the Peace of Constance (1183) ordeals fell out of use in Northern Italy. “Istae solemnitates olim ante pacem imperatoris Federici in usu fuerunt: pace vero facta cum Federico imperatore, qui Mediolanensibus et aliis Lombardis plenam iurisdictionem concessit, pro magna parte huiusmodi solemnitates exularunt ...” (Liber Consuetudinum Mediolani anni MCCXVI, ed. E. BESTA AND G.L. BARNI, “Nuova edizione interamente rifatta” (Milan, 1949), pp. 298 ff.). For the use of writing in the Italian communes, see H. KELLER, “Vorschrift, Mitschrift, Nachschrift: Instrumente des Willens zu vernunftgemäßem Handeln und guter Regierung in den italienischen Kommunen des Duecento”, in: *Schriftlichkeit und Lebenspraxis: Erfassen, Bewahren, Verändern*, ed. H. KELLER, CH. MEIER and TH. SCHARFF (Munich, 1999: MMS 76), pp. 25-41.

² For the Janus-faced trials against heretics (with examples from Italy), where “rational” methods such as writing were used to produce “the truth”, see recently TH. SCHARFF, “Auf der Suche nach der ‘Wahrheit’: Zur Befragung von verdächtigen Personen durch mittelalterliche Inquisitoren”, in: *Eid und Wahrheitssuche: Studien zu rechtlichen Befragungspraktiken in Mittelalter und früher Neuzeit*, ed. ST. ESDERS and TH. SCHARFF (Frankfurt am M., 1999: *Gesellschaft, Kultur und Schrift: Mediävistische Beiträge* 7), pp. 139-162. For Italian penal justice, see A. ZORZI, “Rituali e cerimoniali penali nelle città italiane (secc. XIII-XVI)”, in: *Riti e Rituali nelle società medievali*, ed. J. CHIFFOLEAU, L. MARTINES and A. PARAVICINI BAGLIANI (Spoleto, 1994: *Centro Italiano di Studi sull’Alto Medioevo, Collectanea* 5), pp. 141-157. New insights into the penal justice system of the medieval city are offered by the recently-published volume *Die Entstehung des öffentlichen Strafrechts: Bestandsaufnahme eines europäischen Forschungsproblems*, ed. D. WILLOWEIT (Cologne, Weimar and Vienna, 1999: *Konflikt, Verbrechen und Sanktion in der Gesellschaft Alteuropas, Symposien und Synthesen* 1), especially the papers of E. COHEN (for France), H. SCHLOSSER (for Augsburg) and D. WILLOWEIT (for Würzburg).

What Is the Problem? Part I

Before going any further, it may be useful first to ask which function legal proceedings have in a given society anyhow. Firstly, for the city commune, it must have had as a priority the guarantee of the function of the society as a whole, in spite of the quarrels that may exist between certain citizens. At a time when a conflict between two individuals was almost always a conflict between two families, between two rival groups, or even between “political” parties, it was no easy task to prevent the outbreak of open fights within the city, which in turn would then hinder the function of market places or even make it difficult to pass through certain streets, etc. Secondly, it seems very difficult for a court to produce a decision which, in the eyes of both parties, is regarded as “just”, because the losing party is likely to dispute the decision, no matter what good reason might be given.³ Certainly a timeless phenomenon, it is an even greater threat to a medieval city, the structure of which was already very complex and gave rise to various conflicts not common in rural societies,⁴ and in which, on [217] the other hand, the point of reference was not the individual but the social context of the single person, and hence any litigation was seen as a quarrel between groups, as has been pointed out above.

Looking at the specific situation of the twelfth and thirteenth centuries,⁵ within Milan—as within many other cities in northern and central Italy—we see an almost constant growth of conflicts between different social and political groups, mainly between what are referred to as the *nobiles* and the *popolo*, the latter divided into the “party” of the *Credenza di S. Ambrogio* (mainly craftsman) and the *Motta* (dominated by merchants). After the Peace of Constance in 1183, the pressure from outside lessened for several decades, and it seems that now the city societies of northern Italy allowed themselves the breakout of sometimes open conflicts which could even lead to the expulsion of large groups of the population belonging to the “wrong” party.⁶ What is more, the freedom gained at that

³ For a theoretical reflection on the two problems in modern courts, see N. LUHMANN, *Legitimation durch Verfahren*, (Frankfurt am M., 1993), pp. 69 ff. and 113 ff.

⁴ It is sufficient to consider the numerous quarrels which arose because certain buildings were erected in places where, in the eyes of the neighbours, they ought not to have been built. In March 1221, Jacobus Menclotius sued Otto Longus to tear down a wooden fence, which was built behind the wall surrounding Jacobus’ property, but still on his ground. The monastery of St. Radegonda in Milan took Bellottus de Dexio to court to make him close two “windows”, which he had put in the wall that bordered the cloister, with an iron (“*stoparet seu clauderet de muro fenestras duas que sunt in quodam muro*”) (ACM Nos. 339 and 312). For a relatively small town like Perugia, about 560 law cases were registered for the year 1258 alone (M. VALLERANI, “Modelli processuali e riti sociali nelle città comunali”, in: *Riti e Rituali*, pp. 115-140); VALLERANI found out that about 25% of the population of a city had contacts with the courts in one way or another (ID., *Il sistema giudiziario del comune di Perugia: Conflitti, reati e processi nella seconda metà del XIII secolo* (Perugia, 1991: *Deputazione di storia Patria per l’Umbria, Appendice al Bollettino* 14), p. 18).

⁵ For the history of Milan in the twelfth and thirteenth centuries, see H. KELLER, “Gli inizi del comune in Lombardia: limiti della documentazione e metodi di ricerca”, in: *L’evoluzione delle città italiane nell’XI secolo*, ed. R. BORDONE and J. JARNUT (Bologna, 1988: *Annali dell’Istituto storico italo-germanico* 25), pp. 45-70, at pp. 48 ff.; G. ROSSETTI, “Le istituzioni comunali a Milano nel XII secolo”, in: *Atti dell’11° congresso internazionale di studi sull’alto medioevo: Milano e il suo territorio in età comunale (XI-XII secolo)*, Milano, 26-30 ottobre 1987 (Spoleto, 1989), pp. 83-112, pp. 90 ff.; G.L. BARNI, “Milano verso l’egemonia”, in: *Storia di Milano*, 3.2 (Milan, 1954), pp. 239-393; F. FRANCESCHINI, “La vita sociale e politica nel duecento”, in: *Storia di Milano*, 4.2 (Milan, 1954), pp. 155 and 392; R. HERMES, *Totius Libertatis Patrona. Die Kommune Mailand in Reich und Region während der ersten Hälfte des 13. Jahrhunderts* (Frankfurt am M., 1999: *Europäische Hochschulschriften*, Reihe 3, *Geschichte und Hilfswissenschaften* 858), pp. 423 ff. For a general survey, see PH. JONES, *The Italian City-State: From Commune to Signoria* (Oxford, 1997), pp. 130 ff.

⁶ F. MENANT, “La transformation des institutions et de la vie politique milanaises au dernier âge consulaire (1186-1216)”, in: *Atti dell’11° congresso internazionale di studi sull’alto medioevo*, pp. 113-144. Although the survey of literature and sources in HERMES, *Totius Libertatis Patrona*, pp. 423 ff., is excellent, I cannot follow his interpretation.

time—some scholars speak of the Peace of Constance as the *Magna Carta* of the city communes—made the city community more responsible for their own affairs and hence limited the possibilities of referring to the emperor as a legitimation device, especially with reference to the juridical administration of the town.⁷ The war against Frederick II did not ease this situation. [218] When the party of the *popolo* dominated Milan in the 1250s, inner peace was still not guaranteed and the first “strong men” like Martinus della Torre tried to govern the city by their own will.⁸ But it was not until the late thirteenth and early fourteenth centuries, when the Visconti successfully established themselves as *signore* of the city of Milan, that internal conflicts lessened.⁹

What Is the Problem? Part II

If we assume that, due to the density of population and because of the complexity of social relations, conflicts are more likely to arise in a big city such as Milan than in less-populated rural areas, then the described historical situation of Milan in the thirteenth century only served to aggravate the problem. How must legal proceedings in such a city and time be structured to achieve the above goals? One successful strategy may consist of creating an autonomous [219] “area of communication” within the city commune, in which the controversies can be treated separately from other areas of communication.¹⁰ Dealing with conflicts within an independent frame offers the possibility of them having fewer negative implications on the city commune as a whole. It also makes it easier for the *familiars* of the judges, advocates and especially the litigant parties and their witnesses to, as it were, visit the same market and attend public meetings without the risk of perpetuating the conflict there, because now everybody knows that the quarrel is being dealt with elsewhere. The damage

⁷ A. HAVERKAMP, “Der Konstanzer Friede zwischen Kaiser und Lombardenbund (1183)”, in: *Kommunale Bündnisse Oberitaliens und Oberdeutschlands im Vergleich*, ed. H. MAURER (Sigmaringen, 1987: *Vorträge und Forschungen* 33), pp. 11-44, at p. 42. Fundamental for the relationship between Barbarossa and Milan is still G. FASOLI, “Friedrich Barbarossa und die lombardischen Städte”, in: *Friedrich Barbarossa*, ed. G. WOLF (Darmstadt, 1975: *Wege der Forschung* 390), pp. 149-183. A link between the Peace of Constance and the development of communal statutes in Milan is perceived by H. KELLER, “Die Kodifizierung des Mailänder Gewohnheitsrechts von 1216 in ihrem gesellschaftlichen-institutionellen Kontext”, in: *Atti dell’11° congresso internazionale di studi sull’alto medioevo*, pp. 145-171. On connections between the growth of the city administration and the agreement of 1183, see F. MENANT, “La transformation des institutions”, pp. 113 ff.; M.F. BARONI, “La registrazione negli uffici del Comune di Milano nel sec. XIII”, *Studi di storia medioevale e diplomatica* 1 (1976), pp. 51-68; and ID., “Il notaio milanese e la redazione del documento comunale tra il 1150 e il 1250”, in: *Felix olim Lombardia: Studi di storia padana dedicati dagli allievi a Giuseppe Martini* (Milan, 1978), pp. 5-25.

⁸ H. KELLER, “Mailand zur Zeit des Kampfes gegen Kaiser Friedrich II.”, in: *Europas Städte zwischen Zwang und Freiheit: Die europäische Stadt um die Mitte des 13. Jahrhunderts*, ed. W. HARTMANN (Regensburg, 1995: *Schriftenreihe der Europa-Kolloquien im Alten Reichstag* “Sonderband”), pp. 273-296; G. FASOLI, “Federico II e la Lega Lombarda: Linie di ricerca”, *Annali dell’Istituto storico italo-germanico di Trento* 2 (1976), pp. 39-74; E. VOLTMER, “Formen und Möglichkeiten städtischer Bündnispolitik in Oberitalien nach dem Konstanzer Frieden: Der sogenannte Zweite Lombardenbund”, in: *Kommunale Bündnisse*, pp. 97-116.

⁹ E. SESTAN, “Die Anfänge der städtischen Signorien: Ein erschöpfend behandeltes historisches Problem?”, in: *Altständisches Bürgertum 1: Herrschaft und Gemeinverfassung* ed. H. STOOB (Darmstadt, 1978: *Wege der Forschung* 352), pp. 346-379 (first published in Italian as: “Le origini delle signorie cittadine: un problema storico esaurito?”, *Bullettino dell’istituto storico italiano per il Medio Evo e Archivio Muratoriano* 73 (1961), pp. 41-69); JONES, *The Italian City-State*, p. 9. For changes in the juridical administration, see M. SPINELLI, “Il capitano di giustizia durante la prima metà del Quattrocento: Spunti e riflessioni”, in: *L’età dei Visconti: Il dominio di Milano fra XIII e XV secolo*, ed. L. CHIAPPA MAURI, L. DE ANGELIS CAPPABIANCA and P. MAINONI (Milan, 1993: *Gli Studi* 2), pp. 27-34.

¹⁰ This is not to be confused with the “separation of powers”; in fact, what is understood here by “autonomous area of communication” goes beyond an institutional separation and includes the way people act and communicate in court. See LUHMANN, *Legitimation durch Verfahren*, pp. 72 ff.

caused by a collective manner of regulating conflicts, which draws the entire circle of kindred and friends into it, is shown by Vallerani's analysis of the *vendetta* in thirteenth-century Perugia. The large numbers of persons involved in the conflicts seriously threatened the functioning of the town's institutions.¹¹ A way of regulating conflicts collectively also before official courts seems to have been dominant in Italy until the middle of the twelfth century.¹² In this respect dissolving the settlements of conflicts from their entanglement in society is something new.

If the proceedings themselves have become an autonomous modus of social interaction, and if the individual in these proceedings is successfully detached from his social context, the chances increase that, in the case of a defeat in court, this person would have greater difficulty mobilizing his social relations [220] in a protest against the decision. The "socialisation" of his defeat in court is then more difficult.¹³

This way of looking at the problem is inspired by recent sociological research of twentieth century law courts, suggesting that the way legal proceedings are structured is decisive for the acceptance of law as a whole.¹⁴ While this analysis can presuppose that the procedures implemented functions in an already-differentiated environment, which was accustomed to autonomous discourses, this can not be assumed for the medieval society. As for the "modern" individual, taking a certain role in an autonomous discourse is something he is familiar with because it is part of his everyday life in modern society.¹⁵ As far as society itself is concerned, the existence of independent systems¹⁶ within

¹¹ M. VALLERANI, *Il sistema giudiziario del comune di Perugia*, p. x, note 10.

¹² The analysis of the functioning of Italian tribunals from 1000 until 1150, recently published by Chris Wickham, shows that conflict regulation in the form of *placita* were "large scale public ceremonial(s)". This seems to be true not only for the *placita*, but also for the more "inofficial" ways of dealing with conflicts at that time (CH. WICKHAM, "Justice in the Kingdom of Italy in the eleventh century", in: *La giustizia nell' alto medioevo (secoli IX-XI)* (Spoleto, 1997: *Atti della XLIV settimana di studio del Centro Italiano di Studi sull'Alto Medioevo, 11-17 aprile 1996*), pp. 179-250, at pp. 237 ff.; quotation from p. 193). For the difference between the *placita* and the consular tribunals, which are seen as "direct representations of increasingly-formalized local power", see *ibid.*, pp. 244 ff., at p. 246. For the *placita*, see also F. BOUGARD, "'*Falsum falsorum iudicum consilium*': L'écrit et la justice en Italie centro-septentrionale au XI^e siècle, *BEC* 155.1 (1997), pp. 299-314. The different types of conflict regulation in (the rather more rural) France of the time seem to have in common that "*tous ces rites sont publics*" (P.J. GEARY, "Vivre en conflit dans une France sans état: Typologie des mécanismes de règlement des conflits (1050-1200)", *Annales Economies Sociétés Civilisations* 41 (1986), pp. 1107-1133, at p. 1119); see also K. HEIDECKER, "Communication by written texts in court cases: Some charter evidence (ca. 800-ca. 1100)", in: *New Approaches to Medieval Communication*, ed. M. MOSTERT, (Turnhout, 1999: *Utrecht Studies in Medieval Literacy* 1), pp. 101-126.

¹³ LUHMANN, *Legitimation durch Verfahren*, p. 112: "*Funktion des Verfahrens ist mithin die Spezifizierung der Unzufriedenheit und die Zersplitterung und Absorption von Protesten*".

¹⁴ N. LUHMANN, *Legitimation durch Verfahren*, *id.*, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie* (Frankfurt am M., 1981), pp. 60 ff.; *id.*, *Das Recht der Gesellschaft* (Frankfurt am M., 1993). For a discussion of Luhmann's theses, see the critical approach of J. RÜCKERT, *Autonomie des Rechts in rechtshistorischer Perspektive* (Hannover, 1988: *Schriftenreihe der Juristischen Studiengesellschaft Hannover* 19), which is in part rejected by D. SIMON, "Rückerts Frage: Rezension zu Niklas LUHMANN, *Das Recht der Gesellschaft*", *Rechtshistorisches Journal* 14 (1995), pp. 36-47; further: K. GÜNTHER, "Vom Zeitkern des Rechts: zu Niklas LUHMANN, *Das Recht der Gesellschaft*", *Rechtshistorisches Journal* 14 (1995), pp. 13-35.

¹⁵ For LUHMANN, *Das Recht der Gesellschaft*, pp. 292 ff., modern individualism is essential for separated systems (such as "law") to create a complexity of their own. For critics of the (sometimes simplistic) concept of the "Middle Ages" in Luhmann's works, see O.G. OEXLE, "Luhmanns Mittelalter: Rezension zu N. LUHMANN, *Gesellschaftsstruktur und Semantik*, Bd. 3", *Rechtshistorisches Journal* 10 (1991), pp. 53-66 (with reference to his idea of "individualism"), and LUHMANN's reply: "Mein 'Mittelalter'", *ibidem*, pp. 66-70. For role-playing in modern societies, see E. GOFFMAN, *The Presentation of Self in Everyday Life* (New York, 1959). Illich—in addition to others—states that "individuality" in the modern sense of the word, began to emerge in the twelfth century (I. ILLICH, *Im Weinberg des Textes: Als das Schriftbild der*

modern society (law, economics, politics and so forth) and the creation of new ones is nothing that would astonish society. Around 1200, however, the growing autonomy of law was something new. As far as we can see, at that time hardly any models were available of acting in independent systems.¹⁷ This [221] meant that neither the commune nor the individual could rely on experience in operating in an autonomous area of conflict regulation. Therefore it is obvious that when such areas evolve, greater efforts will be required to mark the independence of the discourse. It was for the purpose of emphasis that these efforts had to be made by and during the proceedings themselves.¹⁸

When employing the strategy described above in an evolutionary process,¹⁹ the city administration would have to allow the formation of certain institutions or offices, independent of other administrative units and separated from the everyday business of the citizens. In fact, in Milan it can be observed that at the end of the twelfth century the *consules iustitiae* separated from the *consules comunes* and became independent.²⁰ In the thirteenth century, additional “institutions” such as delegate judges, *iurisperiti* and *consilarii*,²¹ whose tasks [222] were to work on limited problems,²² were ap-

Moderne entstand: Ein Kommentar zu Hugos “Didascalion” (Frankfurt am M., 1991), pp. 27 ff. (originally published in English as: *In the Vineyard of the Text: A Commentary on Hugh of St. Victor’s “Didascalion”* (Chicago, 1993)).

¹⁶ The term “system” will be avoided in this paper, because it is associated with a complex modern society (N. LUHMANN, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (Frankfurt am M., 1999)).

¹⁷ Even for the late Middle Ages, it is not at all clear how and to what extent we can talk, e.g. of a “private” and “business” life of a merchant. Insights into the relation between family and merchant-company that are still fundamental are given by M. WEBER, *Zur Geschichte der Handelsgesellschaften im Mittelalter: Nach südeuropäischen Quellen* (Stuttgart, 1889; reprint Amsterdam, 1964), pp. 128 ff.; an example is given by F.J. ARLINGHAUS, “*Io, noi und noi insieme* Transpersonale Konzepte in den Verträgen einer italienischen Handelsgesellschaft des 14. Jahrhunderts”, in: *Bene vivere in communitate: Beiträge zum italienischen und deutschen Mittelalter—Hagen Keller zum 60. Geburtstag überreicht von seinen Schülerinnen und Schülern*, ed. TH. SCHARFF and TH. BEHRMANN (Münster, 1997), pp. 131-153.

¹⁸ M.T. CLANCHY, *From Memory to Written Record: England 1066-1307*, 2nd edn. (Oxford, Cambridge, Mass. 1993), p. 193.

¹⁹ The strategies are not seen as the results of a meaningful search, but rather as the outcome of a variation/selection process, fostering the development of forms of proceedings more appropriate to a given communal society (the “environment”). For this concept, see LUHMANN, *Das Recht der Gesellschaft*, pp. 267 ff., and ID., *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtsstheorie* (Frankfurt am M., 1999), pp. 11 ff.

²⁰ For a survey of Milanese institutions, see MANARESI’s introduction to *ACM*, pp. xxxvii ff.; C. SANTORO, “Gli uffici del comune di Milano e del dominio visconteo-sforzesco (1216-1515)” (Milan, 1968: *Archivio della fondazione italiana per la storia amministrativa*, “Prima collana” 7), pp. 13 ff. For the administration of the legal system, with special regard to the development of “files”, see TH. BEHRMANN, “Von der Sentenz zur Akte: Beobachtungen zur Entwicklung des Prozeßschriftgutes in Mailand”, in: *Kommunales Schriftgut in Oberitalien: Formen, Funktionen, Überlieferung* ed. H. KELLER and Th. BEHRMANN (Munich, 1995: *MMS* 68), pp. 71-90. A reduction of public participation in Milanese civil litigations is stated by TH. BEHRMANN, “Der Rechtsakt und sein Publikum: Beobachtungen an Mailänder und Novareser Urkunden des 12. und 13. Jahrhunderts”, in: *Formen der Verschriftlichung und Strukturen der Überlieferung: Studien über Gestalt, Funktion und Tradierung von kommunalem Schriftgut des 12. und 13. Jahrhunderts*, ed. H. KELLER and M. BLATTMANN (Münster, forthcoming in *MMS*); F.J. ARLINGHAUS, “Legitimationsstrategien in schwieriger Zeit: Die Sentenzen der Mailänder Kommunalgerichte im 12. und 13. Jahrhundert”, in: *ibid.* It is no contradiction that the concept of “direct” participation of the whole city commune to legitimize political and legal proceedings is still predominant in the Italian communes: see P. SCHULTE, “*“Omnis homo sciat et audiat”*: Die Kontrolle kommunalen Handelns in Como im späten 12. und 13. Jahrhundert”, *Mélanges de l’École française de Rome: Moyen Âge* 110 (1998), pp. 501-547.

²¹ M. CHIANTINI, “Dal mondo della prassi: Una raccolta di *consilia* della seconda metà del Duecento per la curia podestare di San Gimignano”, in: *Consilia im späten Mittelalter: Zum historischen Aussagewert einer Quellengattung* ed. I. BAUMGÄRTNER (Sigmaringen, 1995: *Studi: Schriftenreihe des Deutschen Studienzentrums in Venedig* 13), pp. 33-50; for Milan, see F.J. ARLINGHAUS, “Legitimationsstrategien”. For a general survey of this type of source, see I. BAUMGÄRTNER, “Stadtgeschichte und Consilia im italienischen Spätmittelalter: Eine Quellengattung und ihre Möglichkeiten”, *Zeitschrift für historische Forschung* 17 (1990), pp. 129-154; see also the papers of M. ASCHERI, “Le fonti e la flessibilità del diritto

pointed *ad hoc* during the proceedings with the consent of the parties, thus creating even more autonomy from the central city administration.²³ The key element here is the fact that these “institutions”, dealing with a certain case, could refer to each other and hence create a more independent judicial procedure, strongly based on self reference. Because the “institutional” side of the problem is analyzed elsewhere,²⁴ we can be brief here and concentrate on the manner in which communication patterns were changed by the reorganisation of the legal procedures.

Two Theses

For the given historical situation, the increased institutional independence of the courts seems not to have been enough to create an autonomous area for dealing with disputes and transforming the conflict from a quarrel between two [223] members of different social groups into a litigation between two individuals—at least in so far as possible. *Combined* with the institutional alterations, fundamental changes in communication patterns in court were necessary. Changing the way people communicate with each other during the proceedings can be interpreted as essential for demonstrating the autonomy and otherness of the newly-created discourse to all participants. These changes took place supported by a specific use of written texts in the litigation. To put it briefly:

First: the way writing was used in courts in the thirteenth century created a specific form of communication between the judges and the parties involved. More than was the case in the twelfth century, a great part of the verbal exchange in the thirteenth century consisted in reading out documents and protocols. Tying communication to written texts can be regarded as a successful way of creating a specific discourse in court, making it distinguishable from others.²⁵

comune: Il paradosso del *consilium sapientis*”, in: *Legal Consulting in the Civil Law Tradition*, ed. M. ASCHERI, I. BAUMGÄRTNER and J. KIRSHNER (Berkeley, 1999: *Studies in Comparative Legal History*), pp. 11-53, and I. BAUMGÄRTNER, “Einführung”, in: *ibid.*, pp. 1-8.

²² The notaries e.g., by now not only protocol the responses to the testimonies, but in fact interview the witnesses separately without the participation of the *consules iustitiae*, see *infra*, notes 45 and 56.

²³ The similarities to legal proceedings in church courts are obvious, but it must be emphasized that in the context of the legal administration of the Church or the city, these “institutions” take on different meanings. The *iudex delegatus* e.g., is found in canon law and in the proceedings of urban courts, but the reason why they were employed and the meaning of the institution are quite different. For the *iudex delegatus* in Milan, see W. ENGELMANN, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre: Eine Darlegung der Entfaltung des gemeinen italienischen Rechts und seiner Justizkultur im Mittelalter unter dem Einfluß der herrschenden Lehre der Gutachterpraxis der Rechtsgelehrten und der Verantwortung der Richter im Syndikatsprozeß* (Leipzig, 1938), pp. 328 ff.. For the function of delegate judges in ecclesiastical trials, see W.M. PLÖCHL, *Geschichte des Kirchenrechts, 2: Das Kirchenrecht der abendländischen Christenheit* (Vienna and Munich, 1962²), pp. 83 ff.; P. HERDE, *Beiträge zum päpstlichen Kanzlei- und Urkundenwesen im dreizehnten Jahrhundert* (Munich, 1967: *Münchener Historische Studien, Abteilung geschichtliche Hilfswissenschaften* 1), pp. 125 and 217 ff.; ID., *Audientia litterarum contradictarum: Untersuchungen über die päpstlichen Justizbriefe und die päpstliche Delegationsgerichtsbarkeit vom 13. bis zum Beginn des 16. Jahrhunderts*, <?> vols. (Tübingen, 1970: *Bibliothek des Deutschen Historischen Instituts in Rom* 23), 1, pp. 181 ff. and 191 ff.

²⁴ ARLINGHAUS, “Legitimationsstrategien”.

²⁵ For differences between oral and the written language, see W.J. ONG, *Orality and Literacy: The Technologizing of the Word* (London, 1982), pp. 81 ff. Koch and Oesterreicher characterize the differences, generally defining “*Sprache der Nähe (oral)–Sprache der Distanz*” (written) as follows: “*Die Kombination ‘Dialog’, ‘freier Sprecherwechsel’, ‘Vertraulichkeit der Partner’, ‘freie Themenentwicklung’, ‘Spontaneität’ ... ‘starkes Beteiligtsein’, ‘Situationsverschränkung etc. charakterisieren den Pol ‘gesprochen’*” (i.e. “*Sprache der Nähe*”). “*Dagegen Charakterisieren ‘räumliche und zeitliche Trennung’, ‘festes Thema’, ‘völlige Öffentlichkeit’, ‘Reflektiertheit’, ‘geringes Beteiligtsein’, ‘Situationsentbindung’, etc. den Pol ‘geschrieben’*” (i.e. “*Sprache der Distanz*”) (P. KOCH and W. OESTERREICHER, “Sprache der Nähe–Sprache der Distanz: Mündlichkeit und Schriftlichkeit im Spannungsfeld von Sprachtheorie und Sprachgeschichte”, *Romanistisches Jahrbuch* 36 (1985), pp. 15-43, at pp. 21 ff.; ID., “Funktionale As-

Second: these changes in the structure of communication go hand in hand with a different form of participation by the person in the proceedings. For his part, the individual now had to comprehend that his actions in court are different from other actions of daily life. At the same time, this had to be signaled to his social relations. The changed modus of speech, that is verbal communication on the basis of written texts, helped to mark the difference between the role the individual adopted in court and the way he acted in his ordinary social life. [224]

How Can We Prove This?

Firstly, if and to what extent texts produced during the proceedings were read out in court must be examined. Was there a development towards more reading and less open oral dispute? Secondly, the function of the reading must be discussed. Can this development simply be attributed to a general growth of the importance of writing? Is it possible to differentiate between the use of writing, say, to aid the memory or for the structuring of arguments and the use of texts as a substitute for verbal exchange? And if a “non-rational” employment of texts can be observed, what is the advantage of reading as compared to the use of spoken formulae in the proceedings?

To answer these questions, one must determine as precisely as possible how legal proceedings in northern Italy in the twelfth and thirteenth centuries were performed. Two different kinds of sources shall be taken into account: Documents, which mainly means the judgements of the city courts, and the *ordines iudicarii*. This paper will focus on the sentences passed by Milanese courts, but San Gimignano and Bologna will also be taken into account. About 252 judgement have survived from Milan for the 136 years between 1140—only from this time onward one can speak of the beginning of a regular administration of justice by the *consules*²⁶—and 1276—the beginning of the government of the Visconti.²⁷ For 98 of these 136 years, at least one charter has been left to us, thus there is a relatively constant flow of documents from the observed period.²⁸

The charter provides information about certain cases, including who the litigants were, who decided the case, the names of the witnesses and scribes present, etc. It also reports on the allegations put forward by the parties and, important for the question being raised here, how and under what circumstances these statements were made (see examples below). If it is true that by looking at the charters we can get as clear an idea as possible concerning how legal proceedings in Milan were put into practice, it is also true that most of the documents are quite brief with respect to the procedure as such. More detailed [225] information is available from the *ordines iudicarii*. This type of source can be regarded as a kind of handbook-literature, written to inform judges, notaries and advocates about

pekte der Schriftkultur”, in: *Schrift und Schriftlichkeit—Writing and its Use: Ein interdisziplinäres Handbuch internationaler Forschung—An Interdisciplinary Handbook of International Research*, 2 “Halbbände”, ed. H. GÜNTHER and O. LUDWIG (Berlin and New York, 1994-1995), 1, pp. 587-604. Their theses that “in principle” there is a continuity between the two poles cannot be discussed here. For the performance of medieval literature and the re-oralization of written texts, see F.H. BÄUML, “Autorität und Performanz: Gesehene Leser, gehörte Bilder, geschriebener Text”, in: *Verschriftung und Verschriftlichung: Aspekte des Medienwechsels in verschiedenen Kulturen und Epochen*, ed. CH. EHLER and U. SCHAEFER (Tübingen, 1998: *ScriptOralia* 94), pp. 248-273, at p. 261.

²⁶ H. KELLER, “Gli inizi del comune”, p. 53; A. PADOA SCHIOPPA, “Aspetti della giustizia milanese dal X al XII secolo”, in: *Atti dell’11° Congresso internazionale di studi sull’alto medioevo*, pp. 459-549, at pp. 516 ff.

²⁷ The sentences—together with numerous other Milanese communal documents—have been edited in: *ACM* (until 1216), *ACM sec. XIII 1*, *ACM sec. XIII 2.1* and *ACM sec. XIII 2.2*. For a diplomatical description of the Milanese communal *sententiae*, see *ACM*, pp. CVI-CVIII.

²⁸ Only for the periods 1158-1169 and 1243-1246 no judgements have survived, mainly due to military actions and for political reasons; for the statistics, see ARLINGHAUS, “Legitimationsstrategien”.

the way a legal trial should be held.²⁹ Often written by learned jurists with experience in everyday legal affairs, in explaining the procedure the *ordines* refer either to the practice in court, as observed by the authors, or to other legal texts.³⁰

Twelfth-Century Court Cases

In the middle of June 1143, the consuls of Milan were asked to decide in a litigation between the monastery and the chapter of St. Ambrogio. The dispute concerned to which of the two parties the rights to the altars of the church of St. Ambrogio belonged, which of the two was allowed to put bells into the tower, and which party was responsible for the burning of incense. After the canons' oral presentation of their claims (*dicebant*) and the monks' response to this (*repondebant*), they agreed to meet in the house of the archbishop the following day. The statements of the parties at the next meeting were also recorded comprehensively in the *sententia*, the written decision of the court. A main point of reference in the decision was an older written agreement between the monastery and the chapter. It provided equal rights for both communities on the donations to the altars of the church. In spite of the importance of this document, [226] it is not cited in the *sententia* but—like the oral testimonies of the parties—recorded in the form of indirect speech.³¹

In October 1145 the city consuls of Milan had to judge in a dispute between the archpriest of Santa Maria ad Montem, Landulf, and Ardericus surnamed Patarinus. “For this was the conflict (*Lis talis enim erat*)”, so the charter begins, and it continues thus: the archpriest said (*dicebat*), that Ardericus had appropriated a piece of land which belonged to the Church. Ardericus responded that this land had been given to him by his father Anricus, and that he had received it from Valbertus. And he presented “witnesses to whom no credibility was given (*testes, quibus nulla fuit data fides*)”. Then, in turn, Landulf again made statements which were supported by his witnesses, and so forth.³²

²⁹ A survey of the *ordines* of the twelfth century is given by L. FOWLER-MAGERL, *Ordo iudiciorum vel ordo iudiciarius: Begriff und Literaturgattung* (Frankfurt am M., 1984: *Ius Commune: Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte, Sonderhefte* 19), pp. 1-31. GUILIELMO DURANTIS, *Speculum iudicale*, probably the most famous book of its kind, was written between 1271 and 1276, and first “updated” between 1289 and 1291 (G. DURANTIS, *Speculum iudicale: Illustratum et repurgatum a Giovanni Andrea et Baldo degli Ubaldi* (Basel, 1574; reprint Aalen, 1975)). Editions of a number of *ordines*, mainly from the thirteenth century, have been published by L. WAHRMUND in the series *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter* (<place>, <year>; reprinted during the 1960s in Aalen). Special “Handbooks” for notaries also give descriptions of how legal proceedings were performed (*Die Ars Notariae des Rainerius Perusinus*, ed. L. WAHRMUND, (*Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter* 3, Heft 3; repr. Aalen, 1962), pp. 147 ff. rubric CCXCI; ROLANDINI RODULPHINI BONONIENSIS, *Summa totius artis notariae* (Venice, 1546; reprint <Aalen?>, 1977), f. 34r ff).

³⁰ But a reference to the *Liber extra* or the *Codex Iustiniani* does not essentially mean that the texts are pure theory. Given the aim of the *ordines*, it is more likely that even here the texts describe what “really” happened in communal courts, maybe justifying the proceedings by mentioning authoritative texts (see WAHRMUND, “Einleitung”, in: *Die Ars Notariae des Rainerius Perusinus*, pp. XXXVIII ff. and XLVII ff.).

³¹ ACM, No. 9, June 1143: “*Ad hec ipse abbas et monachi respondebant quod tota oblatio ipsorum altarium seu oraculorum sicut superius legitur ad ipsum monasterium ratione pertinere debeat; sed quia quondam discordia fuit inter ipsum monasterium et ipsam canonicam de iam dictis oblationibus et aliis quam pluribus capitulis, dicebat ipse abbas sicut terminata et finita fuit adtendere et adimplere volebat, et de ipsa concordia instrumentum unum ostendebat; ... Anselmus iudex pro eo quod consules fecerant eum, inbreviare ipsam convenientiam in cartula una quam in sua tenebat manu, per iussionem et parabolam ipsorum consulum iussit atque precepit eisdem abbati et monachis et preposito et canonicis ut ambe partes sic adtendant et tacite et contente sint sicut legitur de oblatione et sepellitione in cartula quam ante hos dies et annos fecerunt Amizo archidiaconus*”.

³² ACM, No. 13, 18 October 1145: “*Lis enim talis erat. Dicebat ipse archipresbiter quod ipse Ardericus iniuste detinet mansum unum quod dicitur de Violare ei reiacet in eodem loco Vellate et est iuris ipsius ecclesie. Ipse vero Ardericus respondebat quin ipse quin Anricus avus eius quin Vualbertus de Vellate, qui dederat predictum mansum eidem Anrico avo suo, possederant per sexaginta annos et dice-*

The *sententiae* of the urban courts written around 1150 often present themselves more as a memorandum over regulations of a certain conflict than as a judgement. They record the things that happened in court as in a protocol. Besides the judgement, no other written record was produced during the proceedings. If older documents were of any importance, their content was referred to in indirect speech. With the exception of a few cases—such as in a charter of 1155³³—the text is not cited in the *sententiae*. [227]

It is more than doubtful whether the charters presented as evidence in Milanese courts at that time were read out aloud in public, because “*ostendere*” is the only verb used. This is an expression that in later years was usually accompanied by “*legere*” or “*perlegere*”.³⁴ A sidelong glance at quarrels between two communes shows that even in more important cases of that time, even if famous jurists like Obertus de Orto³⁵ were among the judges, most likely the charters were not read in public. In a litigation between the communes of Piuro and Chiavenna, the Milanese *consules comunis* functioned several times as an arbitration tribunal. In their decision from 14 April 1154 we read: “After having heard and seen these and many other notices of sentences, Guertius confirmed ... (*His et aliis multis auditis et visis notitiis sententiarum, laudavit Guertius...*)”.³⁶ It seems likely that “*auditis*” refers to the verbal dispute reported in the charter and “*visis*” to a (silent) inspection by the judge of older *sententiae* mentioned in the text. By contrast, in later Milanese documents “*videre*” seldom stands alone but is usually accompanied by “*legere*” or “*perlegere*”, signalling that the charters were not only “seen” by the judge but also read aloud. When [228] in 1208 on one side Arialdus, the abbot of the monastery of St. Ambrogio, and “on the other side the brothers Beltramus and Petrinus surnamed De Figino and Boziardus De Intusvineam” met once again in the Milanese communal court, reference to the verbal dispute and to an older judgement were given as follows: “Having heard, seen and read these and

bat, quod pertinuit eidem Vualberto beneficiario more; et de predicta possessione dedit testes quibus nulla fuit data fides. Quod ipse archipresbiter prorsus negabat et insuper dicebat si hoc verum fuisset, tamen non debet prodesse eidem Arderico pro eo quod ipse quondam Anricus avus eius fecerat finem de predicto manso in manu presbiteri Goldi; et de hoc dedit testes qui fuerunt Aripandus de Azello et Lazarus ... qui dixerunt sub iureiurando vidisse discordiam inter Anricum Isatarinum ... et pre Goldum de Sancta Maria ad Montem de manso de Villaira ... ubi viderunt ipsum Anricum facere finem in manu ipsius pre Goldi de predicto manso, et usumfructum habere debebat ipse Anricus donec vivus fuerit, et hoc fuit minus est de annis triginta et duobus et plus de annis viginti ...”.

³³ ACM, No. 33, 29 June 1155: “... idque publico instrumento insinuari volebant, asserentes prefatum Gilbertum consulem Mediolanensem ita statuisset per concordiam utriusque partis, unde quendam brevem hostendebant ipsius Gilberti precepto compositum, cuius verba hec sunt: ‘In nomine domini nostri Iesu Christi. Breve recordacionis de concordia hominum Clavennatum et Pluriensium’ ...”.

³⁴ One of the first examples dates from 10 July 1207, ACM, No. 298: “... et super his quoddam instrumentum investiture feudi hostendebat. His et aliis auditis, et visis et perlectis scripturis et instrumentis ab utraque parte hostensis ... prefatus Robbacomus talem in scriptis protulit sententiam ...”. As early as the early eleventh century, the *ostensio cartae* played an important role in Italian courts; it is not yet clear whether at that time the document was read out or simply recited (see BOUGARD, “*Falsum falsorum iudicum consilium*”, pp. 300-311; ID., *La justice dans le royaume d’Italie de la fin du VIII^e siècle au début du XI^e siècle* (Rome, 1995: *Bibliothèque des écoles françaises d’Athènes et de Rome* 291); and WICKHAM, “Justice in the Kingdom of Italy”, p. 190). For the use of writing in earlier times, see H. BRUNNER, “Das Gerichtszeugnis und die fränkische Königsurkunde”, in: *Abhandlungen zur Rechtsgeschichte: Gesammelte Aufsätze* 1, ed. K. RAUCH (Weimar, 1931), p. 443 (first published in: *Festgaben für A. W. Heffter* (Berlin, 1873)); *Recht und Schrift im Mittelalter*, ed. P. CLASSEN (Sigmaringen, 1977: *Vorträge und Forschungen* 23); a recent bibliography in: *New Approaches to Medieval Communication*, pp. 268-275.

³⁵ For Obertus, see P. CLASSEN, “Richterstand und Rechtswissenschaft in den italienischen Kommunen des 12. Jahrhunderts”, in: ID., *Studium und Gesellschaft im Mittelalter*, ed. J. FRIED (Stuttgart, 1983: *Schriften der MGH* 29), pp. 27-126, at p. 50. For the problem in general, see J. FRIED, *Die Entstehung des Juristenstandes im 12. Jahrhundert: Zur sozialen Stellung und politischen Bedeutung gelehrter Juristen in Bologna und Modena* (Cologne and Vienna, 1974: *Forschungen zur neueren Privatrechtsgeschichte* 21).

³⁶ ACM, No. 30. For the Piuro-Chiavenna trial, see H. KELLER, “Mehrheitsentscheidung und Majorisierungsproblem im Verbund der Landgemeinden Chiavenna und Piuro (1151-1155)”, in: *Civitatium Communitas: Studien zum europäischen Städtewesen: Festschrift Heinz Stoob zum 65. Geburtstag* ed. H. JÄGER, F. PETRI and H. QUIRIN, 2 vols. (Cologne, 1984: *Städteforschung* A 21), 1, pp. 2-41, at pp. 10 ff.

other aforementioned instruments of sentences, forenamed (judge) Paganus ... condemned ... (*His et aliis auditis, viso et perlecto suprascripto instrumento sententie, prefatus Paganus ... condemnavit ...*).³⁷ And it seems that as in 1208 and also around 1150, if presented documents were read out in public, this was explicitly stated. When the representatives of the *Legi lombarda* ordered the citizens of Reggio not to disturb the citizens of Cavriago, they were told to do so “as was written in the charter and was read there by forenamed Gerardus Faber (*sicut in carta scriptum erat, et ibi fuit lecta per predictum Gerardum Fabrum*)”.³⁸

A short excursion is necessary at this point. Like Ivan Illich, Paul Saenger and others state, starting from the twelfth century there was a change in the way texts were read. It is no longer essential to “hear” the words of a book. In Italy earlier than elsewhere, silent reading combined with a more analytical approach to texts now became more and more commonplace.³⁹ Viewed in this context it is not unlikely that charters were not read out in court during the twelfth century. And the emphasis that was put on reading aloud in courts in the thirteenth century, together with the specific way this was employed, can hardly be understood as the consequence of a “medieval” necessity of hearing the words of a text. It is interesting to see that from the late twelfth century onward, the instruments parties presented in court as evidence were more and more often read silently (“*diligenter inspectis*”) by the judge,⁴⁰ while the texts [229] produced during the proceedings had to be read aloud.⁴¹

But we are jumping ahead. Up to the end of the twelfth century, the situation of communication can be described as follows: Both parties, accompanied by their witnesses (and presumably other people socially related to them), appeared before four or six *consules communis*, who functioned as judges. In a more or less spontaneous battle of words, which probably included certain formulae commonly used in such a situation, they presented their arguments.⁴² The witnesses made their statements in the presence of both parties and in the presence of the witnesses of the opposite party. Then it was the turn of the testes of the second party to speak. It is obvious that with this form of implementing law, this form of stage-management, the people related to the litigants participated directly in the win-or-lose question. Both parties appeared accompanied by their supporters, entered into a verbal exchange and—because their supporters (the “*testes, quibus nulla fuit data fides*”) appeared in part responsible—had a good chance that the indignation would be shared by their community, socialising the defeat.

³⁷ ACM, No. 312, 28 March 1208.

³⁸ ACM, No. 6714, December 1168. In 1164 in Verona, for unknown reasons Albertus Tinca gave a judgement to his “*assessor*” Guido “*ut eam legeret*” (J. FICKER, *Forschungen zur Reichs- und Rechtsgeschichte Italiens* (Innsbruck, 1868-74), IV, No. 134, pp. 176 ff.).

³⁹ ILLICH, *Im Weinberg des Textes*, pp. 65 ff.; P. SAENGER, “Silent reading: Its impact on late medieval script and society”, *Viator: Medieval and Renaissance Studies* 13 (1982), pp. 367-414, at pp. 385 ff.; ID., *Space Between Words: The Origins of Silent Reading* (Stanford, 1997: *Figurae: Reading Medieval Culture*), pp. 271 ff. If in the case of England it is true that documents mostly had to be “heard”, in the first half of the thirteenth century charters might have been “shown”, that is inspected, in court (CLANCHY, *From Memory to Written Record*, pp. 267 ff. and 272 ff.).

⁴⁰ In a case heard by Arnaldus, the defendant presented charters which were “inspected” by Arnaldus: “*Et de his publica instrumenta ostendebat* (the defendant) ... *Quibus et aliis visis et auditis, instrumentis quoque utriusque partis diligenter inspectis ... Arnaldus ... condemnavit ...* (ACM, No. 228, 20 April 1200); a few examples of many are successively ACM, No. 245, 20 April 1202; ACM, No. 274, 20 December 1204; ACM, No. 283, 26 October 1205. For “*inspexere*” and “*videre*” as verbs which indicate silent reading, see SAENGER, “Silent Reading”, p. 384.

⁴¹ see below, pp. <000-000(*19-*23)>.

⁴² As early as the eleventh century, in formal and informal dispute settlements, proceedings could include open verbal disputes (WICKHAM, “Justice in the kingdom of Italy”, pp. 232 ff., drawing a parallel between cases of the eleventh and late twelfth centuries (at p. 233); BOUGARD, “*Falsum falsorum iudicium consilium*”, pp. 299 ff.; PADOA SCHIOPPA, “Aspetti della giustizia milanese”, pp. 510 ff.).

Thirteenth-Century Court Cases

After the end of the twelfth and during the thirteenth centuries, the way of proceeding in the urban courts changed considerably. The *consules comunis*, the “political” heads of the administration, were no longer responsible for civil litigations. Now, with the *consules iusticiae* somewhat independent institution dealt separately with the quarrels.⁴³ The legal action no longer took place on one or two successive days; instead a long row of hearings was put into practice: there was a date of hearing for the plaintiff to bring in the charge, [230] another to obtain an initial response from the defendant, one for the *iuramentum calumniae*, and so forth—in total usually more than ten dates for one case.⁴⁴ The examination of the witnesses was now the task of the notaries, who questioned them without the presence of the judge and protocolled the answers.⁴⁵ But this is not the only important part of the proceedings that took place without the official judge, the *iudex ordinarius* (which is the *consul iustitiae*) being present. More and more *consilarii*, *iurisperiti* and/or *delegati* were appointed during the proceedings to deal with the case.⁴⁶

Before examining two stages of the procedure in detail (the pronouncement of the sentence and the reading of the witness protocols), a short comparison of the Milanese charters written around 1150 and 1250 shall be presented. The *sententia* written down in 1264 over a case heard by Gualterius Balbus can be seen as a collection of the important documents written during the proceedings. Apart from a little entry sentence at the beginning and a note at the end, the charter consists of a copy of the plaint (*libellus*) and the insertion of the judgement.⁴⁷ Comparing the *sententia* of 1143 (see note 30)

⁴³ The discussion concerns the question whether the first appearance of the *consules iustitiae* can be dated back to the 1150s (when certain *consules causarum* are mentioned) or to the 1170s (when the term *consules iustitiae* is first found). But it is not before the late 1180s—which is important for the argument presented here—that they deal as an independent institution with civil litigation, separate from the *consules comunis*. For the discussion, see ACM, pp. LIII ff.; C. SANTORO, “Gli uffici”, pp. 51; G. ROSSETTI, “Le istituzioni comunali a Milano”, pp. 97 ff.; and P. CLASSEN, “Richterstand”, p. 46. For the institutional separation, see ARLINGHAUS, “Legitimationsstrategien”.

⁴⁴ G. DOLEZALEK, *Das Imbreviaturbuch des erzbischöflichen Gerichtsnotars Hubaldus aus Pisa, Mai bis August 1230* (Cologne and Vienna, 1969: *Forschungen zur neueren Privatrechtsgeschichte* 13), pp. 43 ff.; for Verona, see P. LÜTKE-WESTHUES, *Die Kommunalstatuten von Verona im 13. Jahrhundert. Formen und Funktionen von Recht und Schrift in einer oberitalienischen Kommune* (Frankfurt am M. etc., 1991: *Gesellschaft, Kultur und Schrift: Mediävistische Beiträge* 2), pp. 219 ff.; for Bologna, with interesting insights, M. VALLERANI, “L’amministrazione della giustizia a Bologna in età podestarile”, *Atti e memorie della Deputazione di Storia Patria per le Province di Romagna* 43 (1992), pp. 291-316. A general survey is given by K.W. NÖRR, “Reihenfolgeprinzip, Terminsequenz und Schriftlichkeit: Bemerkungen zum römisch-kanonischen Zivilprozeß”, *Zeitschrift für Zivilprozeß* 85 (1972), pp. 160-170.

⁴⁵ One of the first references of reading out a witness protocol in a Milanese sentence dates from 9 February 1195 (ACM, No. 188). The examination of witnesses in northern Italy is explained by H. HIMSTEDT, *Die neuen Rechtsgedanken im Zeugenbeweis des oberitalienischen Stadtrechtsprozesses des 13. und 14. Jahrhunderts* (Berlin and Leipzig, 1910: *Zivilprozessrechtliche Forschungen* 5), pp. 79 ff.; G. DOLEZALEK, *Das Imbreviaturbuch*, pp. 54 ff.; H. V. VOLTELINI, *Die Südtiroler Notariats-Imbreviaturen des 13. Jahrhunderts* 1 (Innsbruck, 1899: *Acta Tirolensia* 2; reprint Aalen, 1973), p. CLXII.

⁴⁶ ENGELMANN, *Die Wiedergeburt der Rechtskultur*, pp. 243 ff. (*consilarii*), pp. 328 ff. (*iudices delegati*); G. ROSSI, *Consilium sapientis iudiciale: Studi e ricerche per la storia del processo romano-canonico, secoli XII-XIII* (Milan, 1958), pp. 48 ff.; M. ASCHERI, “Diritto comune, processo e istituzioni: Ovvero della credibilità dei giuristi (e dei medici)”, in: ID., *Diritto medievale e moderno: Problemi del processo, della cultura e delle fonti giuridiche* (Rimini, 1991), pp. 195 ff.. For a survey on *consilia*, see *Consilia im späten Mittelalter*. For the similarity in the tasks of *delegati* and *iurisperiti* in Milan, see ARLINGHAUS, “Legitimationsstrategien”.

⁴⁷ ACM sec. XIII 2.2, No. 359, 8 March 1264: after a short introduction, the *libellus* is cited, followed by the judgement and a short comment (starting with “*pronunciavit*”, third person sing.). Introduction: “*Super questione que vertebatur coram ... Gualterio Balbo ... inter dominum Lavizium Villanum canonicum ecclesie Sancti Laurentii Maioris Mediolani et syndicus capituli ipsius ... ex una parte, et Biriamum de Citelago ... In qua questione talis porrecta fuit petitio, tenor cuius talis est. [cited libellus.] In nomine*

with that of 1264, we [231] find that both documents appear more or less to be protocols of the legal action that took place, in fact as protocols of the central arguments spoken in court. But while the first charter reports an open verbal exchange, the last presents itself as a composition of texts that were read out–texts, it should be emphasised, that were written only for and during the legal proceedings.

To see how these texts were used in court, let us look at the way the *iurisperiti* communicated with the judge. After 1250, in almost every case the “ad hoc set-up” of this “institution” can be observed.⁴⁸ Analyzing the *sententiae*, it seems that now either some stages of the proceedings were performed twice (once in front of the *iudex ordinarius* and once in the presence of the appointed *iurisperiti*),⁴⁹ or all of the decisive parts were performed by the *iurisperitus*, and the “official judge” only read the verdict, which had already been written down by the *iurisperitus*. A good example of the latter is the *sententia* of 1264 referred to above. Admittedly, it was the judge Gualterius who seemed to appoint the *iurisperitus* Guido Nadius, but only the latter “saw witnesses (*vidit testes*)” and “diligently saw, heard and examined the rights, the allegations and the arguments of both parties (*diligenter vidit et audivit et examinavit iura et allegationes et rationes utriusque partis*)”, while Gualterius only “*pronunciavit*”, that is, pronounced the consilium/judgement given by Guido.⁵⁰ For San Gimignano, more than 100 of these *consilia* have survived from the second half of the thirteenth [232] century.⁵¹ With their format of little papers, these differ significantly from the *consilia* of the fourteenth and fifteenth centuries⁵² and correspond to how reference is given to these writings in the Milanese *sententiae*. Juridical arguments are hardly ever found in these little texts; usually, no reasons were even given for the decision made by the *iurisperitus* and sent to the *iudex ordinarius*. It thus seems very unlikely that presenting an “expert’s” report was the real function of the *consiliarii*, at least in the thirteenth century.⁵³ But what is more important for the argumentation proposed here is how the reading of the sentence was staged. As we learn from little notes put on the *consilia*, the *iurisperitus* wrote down the sentence, sealed the

*Domini. Ego Lavizius Villanus ... peto quatenus Biriamus de Citelago ... michi suprascripto nomine exhibeat et consignet omnes fructus, redditus et proventus, de quibus datur decima, qui fuerunt in infradictis terris ... [cited judgement:] In nomine Domini. Nos predictus dominus Gualterius consul Mediolani, habito consilio domini Guidonis Nadii iurisperiti et sotiorum nostrorum, consulum Mediolani, qui vidit testes ... et qui diligenter vidit et audivit et examinavit iura et allegationes et rationes utriusque partis, condemnamus predictum Biriamum ut hinc ad decem dies proximos det et solvat ... ut de cetero omni anno det et solvat eidem domino Lavizio nomine illius ecclesie decimam omnium fructuum illarum terrarum ... [last comment:] Dicitur dominus Gualterius Balbus pronuntiavit ut supra, presentibus partibus, videlicet [Names] ... ex una parte, actores, et [Names] ex altera. Actum in foro iudiciali comunis Mediolani. Interfuerunt ibi testes ...”. What might cause some difficulties is the “*condemnamus*”, indicating that Gualterius and Guido worked together on the case. As described in the charter, they did so separately, and when Gualterius read the verdict to the public, Guido very likely was not present, because his name is found neither among the witnesses nor elsewhere.*

⁴⁸ For a statistical survey up to the year 1276, see ARLINGHAUS, “Legitimationsstrategien”. One of the few exceptions in the period: the *sententia* from 6 July 1248 (*ACM sec. XIII 1*, No. 492). For the last quarter of the thirteenth century, see *Gli atti del Comune di Milano nel secolo XIII*, 3, ed. M.F. BARONI, (Alessandria, 1992), No. 20, post 14 June 1277; No. 53, 17 December 1277; No. 87, 14 March 1279; No. 101, 23 June 1279; No. 126, 2 April 1280; No. 273, 3 June 1283; many more examples could be cited.

⁴⁹ 11 April 1256, *ACM sec. XIII 2.1*, No. 139; 1 August 1256, *ACM sec. XIII 2.1*, No. 152.

⁵⁰ See *supra*, note 47.

⁵¹ For the following, see CHIANTINI, “Dal mondo della prassi”, pp. 46 ff.; ID., *Il consilium sapientis nel processo del secolo XIII: San Gimignano 1246-1312* (Siena, 1997), pp. XLIV and 7.

⁵² For examples from the fifteenth century, see I. BAUMGÄRTNER, “Rechtsnorm und Rechtsanwendung in der venezianischen Terraferma des 15. Jahrhunderts: Die Consilia von Bartolomeo Cipolla”, in: *Consilia im späten Mittelalter*, pp. 79–111.

⁵³ M. CHIANTINI, *Il consilium sapientis*, p. XXXII (for San Gimignano); ARLINGHAUS, “Legitimationsstrategien” (for Milan). The same seems to be true for criminal proceedings in the second half of the thirteenth century, when *consilia* were given and read out without presenting any reasons (H. KANTOROWICZ, *Albertus Gandinus und das Strafrecht der Scholastik*, 1: *Die Praxis: Ausgewählte Strafprozessakten des dreizehnten Jahrhunderts nebst diplomatischer Einleitung* (Berlin, 1907), p. 120).

paper and sent it to the *iudex ordinarius*. But it was not until the next hearing that the latter broke the seal, unfolded the document and read it to the parties.⁵⁴ Here, the fact that the *iudex ordinarius* used the text of the *iurisperitus* when pronouncing the sentence can be interpreted in two ways: On the one hand this can be seen as a way of signalling both responsibility and distance to the *sententia* pronounced, thus leading to a fragmentation of possible protests against the sentence.⁵⁵ But here the second aspect must be emphasized. Binding his speech to the written text in this decisive stage of the legal proceedings prevented him from using expressions that could be interpreted as “personal”, underlining that not Gualterius but the *iudex ordinarius* was speaking. And here the difference between “person” and “role” is marked through the estrangement of verbal speech by using a written text.

The way written texts are used during the pronouncement of the sentence [233] highlights different aspects of communication in court (such as “responsibility”, “role-taking”, “scattering protest” etc., as in the example just given), making it difficult to see how important the connection between “reading” and “role-taking” actually was. The specific use of witness protocols in legal proceedings of that time seemed to put stronger emphasis on the rehearsal of roles than on other aspects of communication. In Milan, like in many other Italian cities, after the last two decades of the twelfth century, the witnesses’ statements were no longer made in front of the judge. “Private” notaries, appointed during the proceedings, were given the task of questioning the witnesses and protocolling the answers. Like the text of the *consilium*, the witness protocols were kept secret until they were read to the *iudex ordinarius* and the parties by the official court notaries in a separate hearing.⁵⁶ As pointed out above, in Milan in the second half of the thirteenth century, when the *iurisperiti* came into play, important stages of the proceedings were sometimes performed twice—in front of the judge and in front of the *iurisperitus*. Because he was now the one who really decided the case, the reading of the protocols in front of the *iudex ordinarius* can be seen as a kind of ritualised performance. It is interesting to see how, in his *ordo*, Aegidius Fuscarariis described the way witness protocols were dealt with in the hearings of the *iudex ordinarius*. Although written for advocates and notaries who mainly appeared in ecclesiastical courts,⁵⁷ the *ordo* was famous for its reference to the practice and was often copied in the second half of the thirteenth century.⁵⁸ In the hearing, the official judge ordered the notary to read the protocols. But it does not seem that the contents of the texts were of greater interest in this date of hearing, because if there were many of these testimonies, says Aegidius, reading only a few of

⁵⁴ That San Gimignano is not at all an exceptional case in the way *consilia* are presented in court, can be detected by the explanations given by DURANTIS, *Speculum iudicale*, No. 11: “*Porro auditis partium disputationibus et actis causae examinatis et consilarii deliberatione praehabita diligenti, consilium in scriptis redactum, ne iudici relinquatur via malignandi, et secreta offerant, prout eis visum et aequum videbitur, qualiter iudex debeat condemnare vel absolvere*”. For the reading of *consilia* in criminal proceedings, see KANTOROWICZ, *Albertus Gandinus und das Strafrecht der Scholastik*, p. 120.

⁵⁵ ARLINGHAUS, “Legitimationsstrategien”.

⁵⁶ *ACM*, No. 260, 21 October 1203: “*His et aliis auditis visis et perlectis testibus ipsius prepositi et viso instrumento emptionis, prefatus Miranus condemnavit ...*”; *ACM*, No. 309, 21 December 1207: “*His et multis aliis hinc inde auditis et testibus utriusque partis diligenter perlectis ... Ubertarius ... absolvit*”; *ACM*, No. 316, 12 December 1208; *ACM*, No. 317 (same day), and many more examples in the following pages of *ACM*. For Milan, see also *Liber Consuetudinum Mediolani*, pp. 59 ff. The handbooks of the notaries give a description of the procedure (see the editions of A. GAUDENTIO, *Ars notaria (Liber formularius)* (Bologna, 1892), p. 46 (written around 1214); *Die Ars Notariae des Rainerius Perusinus*, pp. 147 ff. rubric CCXCI, (written around 1233); and ROLANDINI RODULPHINI BONONIENSIS, *Summa totius artis notariae*, f. 344r ff.; for literature see *supra*, note 44).

⁵⁷ Several times he explicitly refers to the practice of the Bolognese city courts (cf. AEGIDIUS DE FUSCARARIIS, *Ordo iudiciarius*, ed. L. WAHRMUND (*Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, 3, Heft 1; repr. Aalen, 1962), p. XLI, note 3, and p. 112).

⁵⁸ “*Aegidius will in erster Linie tatsächliche Rechtsübungen darstellen. Er arbeitet für die Praxis und er schöpft aus dem Leben*” (WAHRMUND, “Einleitung”, in: AEGIDIUS DE FUSCARARIIS, *Ordo iudiciarius*, pp. XXIX ff. and XXXV ff., quotation at p. XXXI).

them sufficed: “*et sufficiat [234] pro omnibus*”. Why this was sufficient becomes clearer when we look at the next step of the proceedings: To come to the point, when a close examination of the testimonies was to take place, the judge informed the parties that he did not want to go on with the proceedings. He now directed them to the *iurisperiti* and would only proceed to sentencing after receiving their counsel; that is, the counsel of one or two *consilarii* who separately dealt with the testimonies in detail.⁵⁹

It can be concluded that the hearings in which in the presence of the *iudex ordinarius* the testimonies were (in part) read was not meant to inform everybody about what the witnesses really said. This meeting was more a play, but a play performed with hardly any texts learned by heart. Because giving the information as such was not of any importance here, it would well have been possible to exchange some general formulaic sentences⁶⁰ if performing a legal ceremony were the only goal.⁶¹ But in contrast to formulae, by reading out witness protocols one can—as in a ceremony—give communication a rigid form and *at the same time* focus on a particular litigation.⁶² In this way, not only [235] justice in general but the specific dispute are staged as a distinct discourse. The questions formulated by the parties and the answers given by their witnesses now sounded quite different from the discussion of the same case in the tavern. For the parties, it was easier to understand their action in court as a role different from others. It offered a chance that it was clear for all to see that conflict regulations are allocated a special area of communication, created between “judge”, “plaintiff” and “defendant”-roles now played by the participants.

Conclusion

Compared to the twelfth century, in the thirteenth century the proceedings of urban law courts took on more of an autonomous element within the social structure of the North Italian city communes. The legal action now consisted of several steps that in part took place in front of committee-like institutions, which were often created during the proceedings. Now the plaintiff did not meet the

⁵⁹ AEGIDIUS DE FUSCARARIIS, *Ordo iudiciarius*, p. 108: “*Demum iudex praecipiat notario, quod legat dicta testium. Et notarius statim incipiat in nomine domini testes legere. Et si est magna multitudo testium vel attestaciones sunt nimis prolixae, legat dicta unius testis et sufficiat pro omnibus. Et ita servatur Bononiae*”; *ibid.*, p. 115: “*Adveniente termino praefixo ad allegandum et disputandum super dictis testium et aliis, tunc dicit iudex partibus: ‘Ego intendo habere consilium et de peritorum consilio procedere ad sententiam. Si vos habetis aliquos suspectos, detis mihi in scriptis’*”.

⁶⁰ KOCH and OESTERREICHER, “Sprache der Nähe–Sprache der Distanz”, pp. 29 ff., talk of “elaborated orality” (“*elaborierte Mündlichkeit*”), thus indicating the closeness of “ritual speech” to written texts. But it should be emphasized here that, despite all closeness, there is a difference between the two modes of speech. For ritual speech and written text, see also KOCH and OESTERREICHER, “Funktionale Aspekte der Schriftkultur”, pp. 593 ff.; ONG, *Orality and Literacy*, pp. 81 ff.

⁶¹ WICKHAM, “Justice in the Kingdom of Italy”, p. 194, states that the strongly formalized *placita* of the eleventh century were “occasions whose entire ideology was the maintenance of justice” and “in the Italian kingdom public rituals were ... heavily, explicitly, associated with the law”. It is likely that from the last decades of the twelfth century onwards the rituals focused more on the individual case than on “law” or “city administration” in general. For this purpose, it seems that different and new rituals—as e.g. elaborated forms of elections—were now being employed. For voting in Italian city communes, see H. KELLER, “Wahlformen und Gemeinschaftsverständnis in den italienischen Stadtkommunen (12.-14. Jahrhundert)”, in: *Wahlen und Wählen im Mittelalter*, ed. R. SCHNEIDER and H. ZIMMERMANN (Sigmaringen, 1990: *Vorträge und Forschungen* 37), pp. 345-374.

⁶² If one looks at the *forespeca* (*Fürsprecher*), who appears in courts north of the Alps up to the fifteenth century, in categories such as “role-playing”, “estrangement through speech” and “creating an autonomous discourse”, it can be argued that this institution comes close to what is observed here. A detailed analysis of the differences cannot be given here, but in general it can be said that the *forespeca* still acts in the context of “improvised theatre”. For a brief survey, see H. WINTERBERG, “Fürsprecher”, in: *Handwörterbuch zur deutschen Rechtsgeschichte* 1 (Berlin, 1971), col. 1333-1337.

defendant in a direct confrontation, consisting of an open verbal exchange, surrounded by “his” witnesses. Only accompanied by his hired lawyer, sometimes even represented by him in his absence, he met the opponent in 10 or 15 dates of hearings in court. But giving legal proceedings another institutional “design” seems not to be enough to establish an independent discourse and enable a necessary “role-taking” in court. At a time when the separation of the “political” and the “juridical” sphere was not at all common, legal proceedings that claimed autonomy had to be staged in a specific way. In a period when merchants of the same town in a foreign country had to pay for the debts of their compatriots as a matter of course, it was convenient to transform the way the participants communicated in court into a distinct form in order to establish an independent discourse. To change the way people communicate can be considered a mainstay in creating a separate space for dealing with a quarrel.

Up to a certain degree this probably could have been done by using formulaic expressions here and there, such as can be observed in almost any kind of legal action. But this strategy has its limits, when not only the proceeding in general but also the specific dispute being dealt with has to be elaborated as an independent sector of communication in the urban cities of that time. And such independence was needed to give people living in an undifferentiated society the opportunity of successful “role-playing”.

The massive use of writing in court opened up a way to mark even the [236] specific dispute as distinct. Michael Clanchy, referring to W.J. Ong, states: “writing anything down externalized it and—in that process—changed it ... to some extent”.⁶³ By reading the written text aloud in court, this change cannot be undone. There is a certain “otherness” in the way things were now spoken by the judge, plaintiff and defendant, and it can be presumed that this other form of communicating was not attributed to the written text, but to the reader.⁶⁴ By attributing this other modus of speech to the person, his acting in court could be regarded as something that only took place in this context.⁶⁵ Tying verbal speech to written texts meant an estrangement from familiar situations of communication, laying a trench between the way the person communicated here and his unbound oral discussion elsewhere. Since this estrangement would be attributed to the way the person acted in court, his performance could now be defined as “role playing”, a performance of scripted roles based on reading

⁶³ CLANCHY, *From Memory to Written Record*, p. 193; ONG, *Orality and Literacy*, p. 82: “By contrast with natural, oral speech, writing is completely artificial. There is no way to write ‘naturally’”.

⁶⁴ If a text was read out or performed, the written text almost disappeared, and what was heard was attributed to the one who read out the text (H. WENZEL, *Hören und Sehen, Schrift und Bild: Kultur und Gedächtnis im Mittelalter* (Munich, 1995), pp. 216 ff.; ID., “Boten und Briefe. Zum Verhältnis körperlicher und nicht-körperlicher Nachrichtenträger”, in: *Gespräche-Boten-Briefe: Körpergedächtnis und Schriftgedächtnis im Mittelalter*, ed. H. WENZEL (Berlin, 1997: *Philologische Studien und Quellen* 143), pp. 86-105, at pp. 88 ff.). It is difficult to say what part the author plays in the minds of those who hear a text. Bäuml states that, for medieval literature which was read out or even performed, it is not yet clear whether the audience attributed what was heard to the author or to the reader: “*Was in primärer Oralität kein Problem war, ist in der Vokalität durch die Gegenwart des Textes dadurch kompliziert, daß ... der Autor als persona und der Vorleser einander ‘opakisieren’*” (F.H. BÄUML, “Autorität und Performanz”, p. 261). For our purposes, this is of minor importance as long as the audience does not attribute the “otherness” of speech to the text.

⁶⁵ Certainly, speech is here not only bound to written texts, but to written *Latin* texts, which may have strengthened the “otherness” of the communication. However, Latin was heard in church and, especially in the thirteenth century, spoken more and more in schools and universities (in the form of open verbal disputes!). For the abbot of the monastery of San Ambrogio or the trained lawyer of his adversary, hearing Latin in court probably did not mean any “estrangement” that could mark a difference from their everyday life. For a brief survey of the use of Latin in the Middle Ages, see F. BRUNHÖLZL, “Lateinische Sprache und Literatur”, in: LDM 5 (1991), col. 1722-1735, esp. col. 1733; for England, see CLANCHY, *From Memory to Written Record*, pp. 260 ff. In Germany, during the thirteenth century even in law books the vernacular was the common language; see P. JOHANEK, “Rechtsschrifttum”, in: *Die deutsche Literatur im späten Mittelalter (1250-1370)*, ed. I. GLIER (Munich, 1987: *Geschichte der deutschen Literatur von den Anfängen bis zur Gegenwart*, 3.2), pp. 396-431, with brief glances at France and Scandinavia.

out texts.

It becomes clear that by restraining unbound verbal disputes in favour of reading texts, the situation of communication in court as well as the statements [237] of the individual were marked as “distinct”. A specific discourse was established which was able to signalize and withstand autonomy. Within the historical context of the thirteenth century city communes, that is: in a context of almost no experience with autonomous elements in urban societies, it was possible to establish a differentiated and specific area of discourse by excessively mobilizing the potential that lies in writing. To some extent, this probably lessened the strain put on the city community by conflicts between individuals. The question of whether this active “role-playing” might also have contributed to a differentiated construction of “role”, “social context” and “self” *in general* must be left open.