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# On procedural discoursivation – or how local utterances are turned into binding facts

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## Abstract

The article deals with a fundamental mechanism here referred to as ‘discoursivation’ meaning the transformation of local utterances into available and binding discursive facts. Discoursivation, it is claimed, lies at the heart of (legal) discourse formation since it provides the basic material for all the operations to follow such as defining, assessing, and deciding. The basic mechanism is explored in light of two models: Luhmann’s “procedural past” and Foucault’s “field of presence”. Do these models grasp the mechanism of discoursivation? Three criminal cases provide the empirical reference for the conceptual endeavour. In each of these cases, the analysis traces the suspect’s early defence and the multiple reappearances and references to it in the procedural course. On these grounds, the article distinguishes three modes of discoursivation. Utterances are turned into discursive facts by ways of staging, reiteration, and mobilisation. By using only one of these modes, an analysis of legal discourse unavoidably mistakes the subject- and power-position of the contributor vis-à-vis the procedure.

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## 1. Introduction

This article is about the temporal formation of legal discourses and about the momentousness and the limitation of this formation. Legal discourses – here taken as legal procedures – are presented as forceful socio-material processes that are capable of making local utterances available for effectual discursive operations. To put it differently, utterances are

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turned into discursive facts or statements.<sup>1</sup> The latter require attention by and put pressure on the following contributions. Discursive facts equip the procedural publics to tell apart coherent from incoherent, credible from incredible, beneficial from harmful contributions. How does the transformation from the local to the translocal unit, from the interactional to the processual unit, from the ephemeral to the lasting unit take place? Answers, naturally, are partial and preliminary. They will satisfy fully neither theoretical nor empirical discourse analytical scholars. However, the aim of this article is to merely establish a problematic and to provide some tools, perspectives, and hypotheses to dwell on.

The distinction of local utterances and discursive facts marks an important difference to conventional discourse analyses. Usually everything that surfaces is considered as being already part of the discourse under study. Every expression, let it be oral or written, is taken as an articulation or even citation of the focal discourse. Utterances are analysed as being always already positioned right ‘inside’ the discourse. Instead, I suggest a multi-dimensional perspective on (legal) discourse formation. I identify the availability and binding of utterances as the basic task to be accomplished for all practical purposes.<sup>2</sup> The ‘discoursivation’ of utterances, meaning their transformation into fully available contributions, is necessary for legal discourses to employ their powerful operations. In return, I suppose that not everything uttered is exposed to the hegemonic discourse. Not everything can be utilised later on. Not everything will be binding or, what is more, damaging for the one who ‘said so’.

In the following, I ask accordingly: how are local utterances turned into discursive facts to be available and relevant for procedural events such as plea bargaining sessions or trial hearings? I launch two rather abstract models, before I offer some case stories collected during my long-term fieldwork in English Crown Courts: Luhmann’s concept of the “procedural history” and Foucault’s notion of the “field of presence”. Both suggest general answers to our enquiry on discoursivation. Additionally, I introduce two methodical devices that link up the three case stories and the analytical scope of this exploration: the trans-sequential analysis and the analysis of co-productive and preset materialities. Both, the mechanisms to be discussed and the methods to be applied, should shed some light on the focal concern: in what ways and to what effects are past utterances turned into available and binding facts?

### *1.1. Full availability: Luhmann’s “procedural past”*

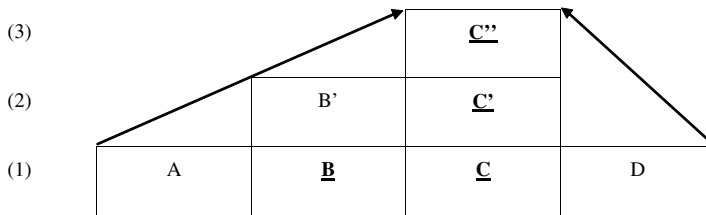
Luhmann (1989) presents one general answer to our question. The past is present in procedural events by means of what he described as “procedural history”. Luhmann referred to this concept as a core mechanism that can explain the triumph of legal procedures over the individual contestants. Simply put, Luhmann’s model works like this: something is more or less carelessly uttered at an early stage and turns into a binding version in due course.

<sup>1</sup> I use the two notions synonymously in order to refer to the elementary units of legal discourse. Statements, thus, is not primarily used in the mundane judicial sense of ‘giving a statement’.

<sup>2</sup> The similar task could be identified for scientific, political, or even private discourses. The availability of utterances is closely related to the often discussed question of accountability. Broader concepts such as authorship, proof, or the person are of relevance to organise availability.

In legal procedures, according to Luhmann (1989, p. 44 [my translation]), ‘every communication, even the unintended presentation that contributes to the proceeding, counts as information that opens, thickens and excludes opportunities that define the acting persons and their relevant history and reduces their options to decide. Every contribution enters the procedural history and can be reinterpreted but not neglected.’ Luhmann names a number of preconditions for this forceful mechanism to work: the contributor can decide freely amongst several options (no torture!); he/she is accountable for the decisions taken (no insanity!); the outcome of the contest remains open until the end (no preliminary decision!).

Early contributions turn into binding norms, into robust criteria to probe and assess what will be entered later to the ‘same issue’. Notice that what is ‘at issue’ is co-constructed by the very same movement of transformation and accumulation. This binding describes the core mechanism of legal discourses: the contestants, once they start engaging with the proceeding, get entangled with their own choices. Options get blocked because of the participant’s self-involvement. Luhmann’s procedure takes the shape of a selective and integrated ‘funnel’ (Luhmann, 1989)<sup>3</sup>:



The options available are reduced from stage to stage. What seems a relatively free choice at the start (1), and a matter of strategy halfway through (2), turns into a restriction at the closing stages (3). The procedural past is binding owing to the norms of consistency. Binding, however, does not mean that the past determines the presence. It restricts and guides any later representation of the case.

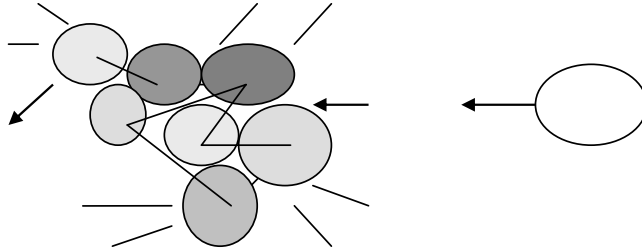
‘The participants (...) try regularly to attach a new past to their own case. While trying to do so, they get unexpectedly entangled with what is transformed into the procedural history and what now increasingly restricts their options in due course. Everybody, thus, who wants to develop mastery in the art of the procedure, must learn to control two pasts simultaneously.’ (my own translation, Luhmann, 1989 [1976], p. 44)

### 1.2. The confrontation of scattered statements: Foucault’s “fields of presence”

In order to spell out the operation of the procedural past, one can employ Foucault’s idea of the ‘field of presence (by which is understood all statements formulated elsewhere

<sup>3</sup> Luhmann’s idea of a funnel as temporal division of labour contradicts the common understanding of trials: ‘At the trial all issues of law and fact arising in the case will be determined.’ (A concise Dictionary of Law, Oxford, 1983)

and taken up in a discourse, acknowledged to be truthful ... criticized, discussed, and judged, as well as those that are rejected and excluded)' (Foucault, 2003 [1972], p. 64). The "field of presence" can be imagined as the translocal coexistence of interrelated statements.<sup>4</sup> It can be imagined as the vibrant constellation of relatively young and old statements. The constellation is shaken by and shapes newly entered statements. I graphically imagine this formation like this:



New contributions meet the already existing relation of statements that each feature different ages and origins. The meaning of the contribution is 'decided' for now by the relation entered. Meaning is not connected to propositions or sentences, but to the ever-changing links between statements within the dynamic field of presence. Meaning is neither imagined as moving from the inside of the author to her outside. Meaning is rather an effect of these fields in formation. Meaning itself is in formation.

At this point, it may be helpful to introduce a basic distinction that can be found in Foucault as well. Foucault, in his analysis of the (temporal) "formation of discourse", gradually distinguishes formulations in terms of their spatiotemporal expansion. Not every utterance works outside the moments of its emergence. Not every word stirs and shakes the wider net of coexisting statements. There is a certain materiality (steadiness) and mediality (circulation) necessary to run an extended discourse. Discursive units vary in the ways they survive, circulate, and interrelate.

In this line, Foucault differentiates utterances and statements. While the first are units of everyday conversation, the latter are units of powerful hegemonic discourses. Utterances are, like their hosting discourses, local and momentary (often misleadingly called "natural" or "informal").<sup>5</sup> Similar to the procedural successions, statements or discursive facts are translocal and lasting. Utterances drive conversations, while statements drive, e.g., legal processes. For Foucault, this distinction is not absolute, but relative:

'In short, I suspect one could find a kind of gradation between different types of discourse within most societies: discourse 'uttered' in the course of the day and in casual meetings, and which disappears with the very act which gave rise to it; and those

<sup>4</sup> Foucault names other forms of coexistence: 'a field of concomitance (this includes statements that concern quite different domains of objects, and belong to quite different types of discourse ...)' and 'a field of memory (statements that are no longer accepted or discussed, and which consequently no longer define either a body of truth or a domain of validity ...)' (Foucault, 2003, p. 64).

<sup>5</sup> See for the ground-breaking study of naturally occurring utterances within talk, Sacks (1992). His studies were taken up by Ethnomethodological scholars and their transcript driven conversation analyses. As the classic text in this realm, see Sacks et al. (1974).

forms of discourse that lie at the origins of a certain number of verbal acts, which are reiterated, transformed or discussed (...)’ (Foucault, 2003, p. 220)

For our purposes, the gradual distinction can explicate the direction and efficacy of discoursivation.

<i>Local</i> —————→ <i>Translocal</i>	
Embodied utterance	Legal statement
• <i>Contribution to talk</i>	• <i>Discursive fact</i>
• <i>Short lived</i>	• <i>Proc. history</i>

Discourse formation involves this meticulous and inconspicuous mechanism: the transformation of utterances into statements. The reader might imagine a suspect being confronted with unpleasant questions by the police. No matter the extent to which they are stipulated by local influences, her responses are recorded, documented and circulated ‘on paper’. They are systematically made available for the prosecution (case). But the closer examination of the creation of history shows that discoursivation is not reducible to documentary practices.<sup>6</sup> There are more ways to guide utterances into the procedure. So far and in light of Foucault’s “gradation” one can spell out some notes of caution in regard to Luhmann’s “procedural past”: not everything expressed is available in due course; the availability is itself a practical accomplishment; the discourse formation rests on certain socio-material arrangements.

### 1.3. Accounting for multiple temporalizations

In the following, I focus on one procedural regime to examine the discoursivation of early defences: the pre-trial and trial of English Crown Courts. My argument sets off with the following reservations: Crown Court procedures do not progress in just one space-time; statements are not integrated in just one transparent discursive field; procedural pasts are not piled up just in the course of the pre-trial. Rather than of a single succession that could be traced from start to end, the legal procedure includes several interruptions and “multiple temporalizations”.<sup>7</sup>

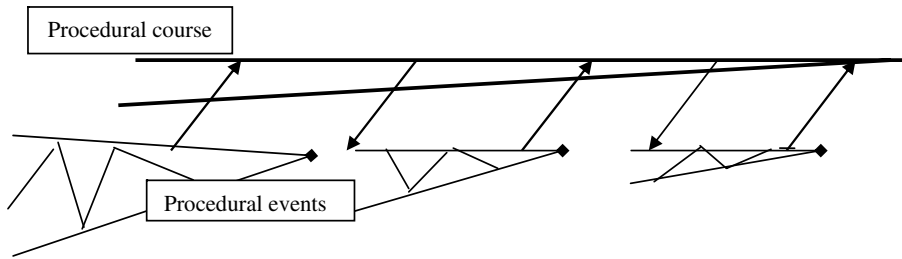
As the empirical method to trace and link up “multiple temporalizations”, I propose a “trans-sequential analysis” (Scheffer, 2004, 2005a, 2005, 2006). Trans-sequential analysis accounts for becomings and their various appearances. It presumes that contributions to one situation trigger systematic effects on a bigger scale.<sup>8</sup> For instance, “doing

<sup>6</sup> Lynch (1999) introduces the various relations of archive and history from a sociological perspective. No history without the archive, one may recapitulate. There is, however, a rising significance of witnessing in new forms of writing history. See for Ethnomethodological studies that follow the natives’ movements from talk to text, Zimmerman (1969) and Smith (1985, 2000).

<sup>7</sup> Again Foucault: ‘I reject a uniform model of temporalization, in order to describe, for each discursive practice, its rules of accumulation, exclusion, reactivation, its own forms of derivation, and its specific modes of connexion over various successions.’ (Foucault, 2003, p. 221).

<sup>8</sup> For Foucault, every statement is trans-sequential. It ‘is linked not only to the situations that provoke it, and to the consequences that gives rise to, but at the same time, and in accordance with a quite different modality, to the statements that precede and follow it.’ (Foucault, 2003, p. 31) We use the utterance-statement distinction to open up this concurrence empirically.

interview” is coupled in various ways to “doing procedure”.<sup>9</sup> The following diagram suggests a straightforward coupling of event and procedure:



Trans-sequentiality accounts for the two temporalities or courses of legal discourse: the procedural course is fed with discursive facts that derive from preceding events. The events are “structurally coupled” (Luhmann) with the procedural course and gain relevant orientation and resources from it. Procedural events, in this view, are guided but not determined. They are bounded, but not preset.

In this line, the study of legal discourses requires at least two methodical scopes: Firstly, it requires a focus on co-presence in order to account for the unique events and the embodied contributions; the inquiry secondly requires access to the legal process by means of the usually employed media such as the archive and the file. But does this two-step suffice to actually grasp legal discourse formation?

#### 1.4. *Towards a temporal understanding of materiality*

The coupling of events and the criminal process rests on a whole range of materialities that enact continuation despite disruption, process despite containment, stability despite change. The materialities expand the temporal scope of procedural events without substituting them. The events still need to take place as something that has not been there before. Materialities do not replace but allow the singularity of the event.

Commonly, the noun “legal materiality” refers to substantial things such as documents, files, archives, courtrooms, law books etc. Temporally understood, materialities are – from the point of view of any current encounter – ‘material’ to various degrees and therefore provide different degrees of stability and elasticity. They trigger continuation by not being fully included in any of the procedural events. They are in fact a-synchronic becomings that are in different ways un/available for local manipulations and adjustments.<sup>10</sup> For

<sup>9</sup> For an example of the use of discursive facts in the courtroom, see [Benson and Drew \(1978\)](#). For the use of discursive facts in political debates, see [Antaki and Leudar \(2001\)](#). [Lynch and Bogen \(1996\)](#) use the notion of “documentary method of interrogation” to describe the reference to facts in the Iran-Contra hearings. One can summarise that all utilisations are necessarily interpretative and selective. They ascribe a certain meaning to the mobilised portion of the document – and render it relevant to the current dealings (see [Smith, 1974](#)).

<sup>10</sup> This concept of materiality refers back to [Durkheim’s \(1982, p. 51\)](#) definition of “the social fact”. For him social facts ‘possess the remarkable property of existing outside the consciousness of the individual (...) whether he wishes it or not, they impose themselves upon him’. I understand materialities of discourse analogously as exceeding the space-time of face-to-face interaction. Things are ‘material’ for the interaction thanks to their separate modes of becoming: like the drafting of a document (that can not be *talked* out of existence), the compiling of a file (that can not be amended by way of *talking*), or the trained body (that can not be *talked* into existence). Due to this separation, materialities turn into essential co-producers of the hearings.

sociological and sociolinguistic approaches to interaction, this framework is deeply influential: to interactively accomplish court hearings, for instance, does not mean that everything derives from the situation or is locally produced by its participants.

Commonly, materiality is conceptualised as stable and robust, as being in place like an infrastructure or as being in circulation like documents. It is imagined as taking space, or reaching out. Especially the latter – being here and there by means of circulation – was productive in dealing with the micro–macro problem. Material things helped to explain the integration, stabilisation, and control of wide territories. In addition to this spatial understanding of materiality, I propose a temporal one.<sup>11</sup> In the temporal version, the micro and the macro are linked in terms of integrating past and future into the present course. Several irreversible pasts and anticipated futures are (made) available to the current dealings.

There is another aspect that marks the difference between spatial and temporal foundations of materiality. In the spatial version, things are not just turned into immutable beings; spatiality also ascribes stable qualities to these things. An identity is inscribed into the thing in the way that readings are inscribed into texts. Where do these inscriptions derive from? In the spatial version, material things – tools, technologies, or machines – appear as upshots of (intentional) design projects.<sup>12</sup> The inscriptions can store the strategies of their founders. Material things enable engineers and machinists to “act over distances” (Latour, 1987).

The temporal understanding of materiality does not deny strategic inscriptions, but makes their durability and practicality an empirical issue. The trans-sequential analysis includes the process and working of materialities. It accounts for their distinct rhythms of “continuous coming to be and passing away” (Turetzky, 1998, p. 104): a number of seats in the traditional Crown Courts, for instance, are not in use anymore; phrases in law books are overwritten or disarmed by later “authorities”; stories are forgotten or out of use. Considering these displacements, one may follow Foucault and his idea of discourse formation: new statements do not just pile up on top of the stored past. They rather keep the whole formation ‘awake’. A single statement may be capable of disturbing what had been ‘once and for all’ filed: ‘the archive never sleeps.’

In the following, I present three cases that show the binding forces of the procedural past in various ways. On this basis, I discuss three modes of transforming utterances into statements.

## 2. Three stories on binding effects

In the following, I briefly present three different Crown Court cases. The three cases derive from extended ethnographic “law in action” fieldwork<sup>13</sup> in small law firms and barristers’ Chambers in Northern England. The case histories introduce different variants of discoursivation. They broaden the view on the various relations of utterances and statements. The stories set off with the early defences presented by the suspects in their police interviews. The suspects’ responses give rise to the following specifications: only a few turn

<sup>11</sup> The temporal foundation of materiality is informed by Bergson (1889/1910) followed by Deleuze (1991). For an analytical specification see Scheffer (2004). For an empirical application see Scheffer (2006).

<sup>12</sup> In this line, Hirschauer (2004) claims that post-humanist ANT is rooted in a human centred action-paradigm. Capable actors develop things in order to act upon the world. These things transport their founders’ strategies.

<sup>13</sup> A concise overview on law in action research is provided by Travers and Manzo (1997) and Travers (1997).



into discursive facts; only some are made available; only certain ones trigger binding effects. The case histories report on how utterances reappear, how some are strategically developed, and how they are pushed into the limelight of the open court.

The three cases derive from, what I call, the “Crown Court regime”. This procedural regime is characterised by an extended pre-trial that invites independent inquiries by the adversaries into the matter. It furthermore invites the step-by-step separation of agreed-upon and debated issues, resolutions outside court by means of plea bargaining, and, if necessary, a detailed and agreed-upon choreography for the days in court. Crown Court cases arrive from lower Magistrates Courts, where they are usually heard by three lay judges assisted by one legally educated clerk. Cases are delegated to the higher Crown Court because of three reasons: (1) the offence is triable only on indictment (such as murder, manslaughter, rape, and wounding with intent); (2) the defendant of an ‘offence triable either way’ chooses the trial by jury<sup>14</sup>; (3) the Magistrates decide that the maximum adequate penalty exceeds their powers.<sup>15</sup>

The investigation into the matter begins with the police. Police officers gather evidence. The main occasion to collect (early) accounts of what ‘really happened’ is the police interview. Here, the ‘victim’, the ‘suspect’, and the ‘eyewitnesses’ are questioned first (see [Innes, 2003](#)). The case is brought to Magistrates Court not by the police but by the Crown Prosecution Service. The CPS must convince the Magistrates that there is in fact a triable case. Some matters include a defence or explanation by the accused already at this early stage.

### *2.1. The 1st case: repeating the early defence*

The first case chosen here resembles a simple and unproblematic matter – at least in technical terms. It deals with a battering that allegedly took place in a night club. The man arrested on the scene was interviewed by two police officers the morning after. The following play of question and answer enters the interview protocol. Interviewers and interviewee co-produce to different degrees<sup>16</sup> the following ‘early’ account as a protocol text. The client’s answers are accentuated by dint of capital letters:

PC What’s happened last night?

Client WELL I WAS OUT WITH MY BROTHER AND HIS MATER IN A NIGHTCLUB. JUST COMING BACK FROM THE TOILET, THIS GUY BUMPED INTO ME, SO I TURNED ROUND AND SAID, “SORRY,” AND HE JUST PUSHED ME ... THEN I STARTED CALLING HIM ... I DON’T KNOW EXACTLY WHAT I WAS CALLING HIM, “DICKHEAD,” ... “FAGGOT.”

<sup>14</sup> This category includes offences of intermediate seriousness, such as theft, handling stolen goods, obtaining by deception, or burglary. The client faces a tricky decision: while the jury is more likely to acquit, the Crown Court judge does enter a higher sentence in case of a guilty verdict. For the career of the jury concept in the English jurisdiction, see [Lloyd-Bostock and Thomas \(1999\)](#).

<sup>15</sup> According to the Magistrates’ Courts Act 1980 the maximum imprisonment is in summary offences up to 6 months. The maximum aggregate term is up to 12 months.

<sup>16</sup> They contribute to the record in different ways. The interviewee is generally separated from the writing process, while the police officer speaks the protocol into his Dictaphone. See for a close analysis of documentation practices ([Scheffer, 1998](#)).

- PC He was calling you?
- Client NO, I WAS CALLING HIM THAT ... COS I THOUGHT THERE WAS NO NEED FOR PUSHING ME ... COS I APOLOGISED ... AND THEN HE CAME UP TO ME, PUNCHED ME, I FELL ON THE FLOOR, AND THEN HIM AND THIS OTHER LAD STARTED STAMPING ON ME. I HAD ME DRINK IN ME HAND, SO WHEN I GOT UP IT WAS EMPTY, SO I JUST HIT HIM WITH IT. I GOT THE CHANCE TO GET UP AND THEN I JUST HIT HIM WITH IT.
- PC When you say “hit him with it,” what do you mean by that?
- Client WELL, I HAD IT IN ME HAND AND I JUST SMACKED IT IN HIS FACE:
- PC That’s your right hand, is it?
- Client ME RIGHT HAND.
- PC ...What was it? A bottle? A glass?
- Client IT WAS A GLASS, IT WASN’T A BOTTLE.

According to the protocol “our client” stated that he was provoked and even attacked first. ‘His’ documented version of “what happened” strings together various details and aspects: what kind of glass it was; where he hit him; what happened after; whether he regrets it, etc. The protocol became the reference point for further operations in the procedural course: the defence barrister uses it to take instructions from his client; the two barristers quote it during their plea bargaining session; the defence barrister uses the protocol to lead his ‘only witness’ (the defendant) through the ‘coherent’ testimony; the prosecuting barrister quotes it during his cross-examination.

How does this first defence relate to the account offered months later in court? How is the testimony different considering the fact that the early version was generated under different circumstances? In court, there are no police officers asking unwelcome questions. There is no hangover causing distress. The former anger and rage vanished. This time, the defendant’s account is initiated by the “friendly examination” in front of judge, jury and opponent. This time, it is his defence barrister who guides him through the account.<sup>17</sup>

Despite these diverse circumstances, the storyline accompanied by some details reappears. The account seems surprisingly stable. The testimony in court unfolds like this:

- Q. And how long were you on the floor for, could you say? – A. About a minute.
- Q. And who was involved in the stamping and kicking? – A. Jonathan Victim and his friend, the blonde one.
- Q. What happened then? – A. Well then, after they had been stamping on me, I stood up and I had the glass in my hand and I spun round and just – just went for him.
- Q. Right. Well, did you have any difficulty getting up? – A. Yes.

<sup>17</sup> Courtroom studies focus in general on cross-examinations, while the accomplishment of friendly examinations is rendered as rather unproblematic.

- Q. Why did you have difficulty getting up? – A. Because they were still stamping on me. I just managed to get up somehow.
- Q. And at what point did you start to swing the glass? – A. Well, as I got my feet on the floor I just spun round and lashed out as I was standing up – at the same time as I was just standing up. I was like crouched down.

The defendant in court refers once *again* to details such as the glass, the ‘dubious’ blonde guy, the exchange of words prior to the blow, the single blow etc. In fact, in the duet of defence barrister and defendant, a reiteration of the early account is created. This quality as reiteration, however, can only be accessed by weighing the testimony in court against the written statement (the interview protocol taken by the police). A close comparison shows that the testimony is more streamlined than the early account, less ambiguous, and more definite.

No one in court does obtain the police protocol except the barristers and the presiding judge. No one else in court is able to contrast the testimony with the early account, not even the jurors. The field interview protocol, despite these import restrictions, seems sufficient to trigger binding effects. This becomes apparent at the end of the friendly examination. The defence barrister’s questions retract problematic parts of the early account that the defendant has to account for now several months later:

- Q. And then you were asked, “Did you feel remorse for what you had done, or anything?”, and you say, “No, I wasn’t finished”. What did you mean by that?  
– A. I don’t know. I was still very angry. I just – I don’t know.
- Q. And, when you struck with the glass, what did you intend to do? – A.  
I don’t know.
- Q. Did you think about the fact that you had the glass in your hand? – A. No.
- Q. Did you want to cause him really serious injury? – A. Not really serious injury, no.

The defendant gains an opportunity for repair in front of judge and jury. The questions by the defence barrister anticipate the knowledge of the counterpart and the foreseeable course of the cross-examination. Undoubtedly, the prosecuting barrister would use the weakest link of the early account to provoke revealing replies by the defendant. Undoubtedly, any prosecuting barrister would utilise the comments that the defendant (as the suspect) gave to the police months ago:

- PC        You’ve hit him intensively on the side of the head, obviously it creates a wound.  
            When you did it, did you see the fact you’d cut him?
- Striker   YEH.
- PC        Did it start bleed straight away?
- Striker   YEH.
- PC        Did you feel any remorse for what you’d done or anything?
- Striker   NO, I WASN’T FINISHED.
- PC        That would you have done to him?
- Striker   I DON’T KNOW

PC continues to recap the interview.

PC I take it from talking to you, you're not sorry for what you've done, are you?

Striker NO.

PC I take it as far as you're concerned he deserved it?

Striker YEH.

PC I have to say you seem almost quite proud of what you have done. Are you proud of what you've done?

Striker NO, NOT PROUD ABOUT IT. I'M JUST NOT FEELING BAD ABOUT IT NEITHER.

## 2.2. *The 2nd case: the early defence as an obstacle*

In a case of indecent assault, the first defence appears once again in the police interview. The suspect, like the vast majority of suspects, does not exercise the (restricted) “right to silence”.<sup>18</sup> He tries to defend himself against the allegations uttered by the two interviewing officers. This early account reappears months later in court, here during the sentencing hearing. The two counsels agreed on a ‘basis of the plea’. They fixed their agreement by delimiting the police protocol to “page 5” (out of 8). The agreed-upon version reads like this:

BLUE ... JUST SNOGGED WITH HER, JUST PLAYED WITH HER BREASTS, AS FAR AS I KNOW THAT' ALL I DID, THEN I GOT UP AND SHE SAID YOU HAD BETTER GO AND I JUST APOLOGISED, I JUST SAID SORRY, I SAID YOU WONT SAY OWT TO JANE WILL YOU

DC So you'd started kissing with her, did she resist that?

BLUE SHE DID AT FIRST AND THEN SHE JUST RELAXED AFTERWARDS

DC Is that because you told her to relax?

BLUE NO I DIDN'T SAY, CAN'T REMEMBER SAYING THAT

DC Right so you've been kissing with her and she's told you to go and you've carried on kissing with her, was that with consent or without?

BLUE WITHOUT I SHOULD THINK – ALL I CAN DO IS REMEMBER JUST CUDDLING UP TO HER AND JUST TOUCHING HER BREASTS

DC Is this outside her clothing or inside her pyjamas?

BLUE INSIDE I THINK

DC And what was she saying while you were doing this?

BLUE SHE JUST SAID YOU HAD BETTER GO

<sup>18</sup> According to the Criminal Justice and Public Order Act 1994, p. 34 “the court or jury, in determining whether the accused is guilty of the offence charged, may draw (...) inferences from the failure” to “mention when so questioned, charged or informed as appear proper” (Blackstone's, 1998, F 19.4, p. 2223). After this legislation, according to Bucke and Brown (1997, chapter 4), refusals to answer all questions decreased from 10% to 6%. The refusal to answer some questions decreased from 13% to 10%. In 84% of the interviews all questions were answered compared to 77% in the pre-1994 act group.

How many of the suspect's answers survived this agreement and how much is cut off?<sup>19</sup> How much remains unsaid in the light of the police interview and how much is quoted directly from the document? What price does each party pay for the “bargain of the facts”? Here, the reappearances of the account during the pre-trial may give some orientation.

The early account emerged during the police interview by confronting the suspect ‘freely’ with some allegations put forward by the complainant. She reported in an interview some weeks earlier how Tim Blue entered her bedroom, how he started kissing and stroking her, how he went even further and made her “do things”. These allegations are brought up again to confront the suspect with ‘what really happened’ – and to stabilise the allegations:

- DC       ... She then says that you undid your trouser zip and your belt?  
 BLUE     NO – I CAN'T REMEMBER DOING THAT  
 DC       And that you then took hold of her left wrist and pulled her hand and put it down your trousers and inside your underpants and made her touch your erect penis?  
 BLUE     NO – I CAN'T REMEMBER DOING THAT  
 DC       And you then put your hand down her shorts and began to touch her vaginal area, do you remember that?  
 BLUE     NO, NO, BUT I CAN'T REMEMBER THAT BIT. I CAN REMEMBER GOING OUT THE DOOR BUT I CAN'T REMEMBER TAKING MY GLASS BACK

Instead of offering an alternative account of what happened, the interviewee's answers remain vague. They leave room for speculations. The precise and detailed story by the alleged victim developed into the hegemonic version. As such, it started circulating as the prosecution case.

The degree of admitted guilt changes from one conference with the client to the next. The client, internally, stated a whole range of versions: from an optimistic ‘nothing really happened’ to a realistic (in light of the procedure) ‘I did not go that far’. Rumours circulated about the determination of the ‘victim’ to actually serve as a witness. (She was embarrassed, file notes reported.) The solicitor undertook inquiries into her sexual life, her former relationships, or the activities she undertook the following days after the incident. The file analysis revealed the following entries regarding some inquiries into her family background:

<sup>19</sup> Plea bargaining is widely criticised for its uncontrollable results. See the critique of the US system as ‘a criminal justice system completely given over to plea bargaining’ (Pizzi, 1999, p. 184). He seems to refer to a similar case to the one presented here: ‘One finds rape cases in which, as police reports make clear, the defendant sexually penetrated the victim, being pled down to ‘unconsented touching’, as if the defendant simply brushed the victim's breast with his hand.’ (Pizzi, 1999, p. 186 n.)

## Case II; Topic No. 12: Family background

Content	16.01	25.01	26.01	23.03	25.04
Dubious family background	Meeting solicitor + client + his partner				
Check family history; ask his partner for more information		Diary note: 'What to do next!'			
His partner mentioned irregularities in the ... More details?			Letter > client		
Changing partners of complainant's mother				Tel. talk > his partner	
This information of no great help for trial					Instruct. to barrister

Nothing of substance came out of these inquiries that tried to undermine the complainant's integrity. Confronted with the hegemonic account, the lack of a counter-version and a point to attack, the defence work was reduced to cutting back the worst allegations by means of plea bargaining. The client had to learn the lesson: he could not get rid of his answers in the police interview.

The admission of guilt changed internally: the account given in the first lawyer–client conferences and the several drafts deriving from here represented the deed as much more trivial than the accounts that the barrister used to delimit the client's hopes, to advice the plea, and to attend the plea bargaining session etc.<sup>20</sup> The police protocol, interestingly, was involved in all these encounters. It animated them, oriented them, and assisted the defence ensemble to weigh up its case. Bound to his early account, the client turns into its appendix.

### 2.3. *The 3rd case: the exhaustion of the early defence*

The first account in this case was more promising. Again pressing questions were asked by the police. The police interview, however, was only served months later. The defence could not work with the protocol but with the co-present solicitor's notes. According to the solicitor's report, the police officer accused her client of having punched a man in front of his house, throwing stones at him and even attacking him with a knife. Just before the

<sup>20</sup> This array may manifest what [Luhmann \(1989\)](#) called "learning" mediated by the procedure itself. The parties start rebuilding their expectations. What can be achieved is measured less in light of the 'ideal truth', but in view of what is feasible under the circumstances.

interview, the complainant selected Linda (out of nine) in an identification parade. The police had, consequently, good reasons to choose and prosecute Linda as the prime suspect.

According to the solicitor's notes, the police officer opened the interrogation by asking the following question: "Is there anything that you would now like to tell us following that identification parade and following that identification?" The solicitor reports the following responses by his client:<sup>21</sup>

6. I think it was Kim's sister, who wanted some cigarettes and so we went to get some. I remember that we went back across the wooden gate it was on our way back to her mum's home that we passed a woman and a lad. Kim told me that the woman was called Lucy and that she was having problems with her.
7. I thought that the lad with Lucy was her boyfriend. He was carrying some shopping.
8. Next to the wooden gate, I remember that there is a sort of stony road. I don't know where it leads, as I didn't go up it.
9. Kim, me and the other girl, who was about 8 stood at the end of the stony road whilst Lucy and the lad were a bit further up it.
10. Kim and Lucy started to argue. The lad, who I heard was called Andy, dropped his shopping. He seemed to be aggressive. I did not join in the argument. But stood close to Kim.
11. I noticed that whilst the argument was going on, a police van was stopped at the end of the lane ...
12. I can't really recall how long the argument lasted. I did not join in and I did not in anyway threaten Andy or Lucy, or use any form of violence against them.
13. Following the argument, we went straight back to Kim's mother's home ...". (21.1.2001)

The defence (file) work started from this basis, presupposing that the prosecution side would come back to these answers. Next, the defence ensemble had to enter an official notice of alibi. Such a notice gives the prosecution the opportunity to counter the alibi in court, and beforehand, to disclose all material available that refers to it. The deadline for disclosure ahead, the solicitor intensified the information flow towards the barrister's office. He handed over a bundle comprising the printed and drafted alibi-story next to the copied official indictment and the self-made summary of the police interview. In the instructions, the solicitor promoted Kim's account as "the core of our case". Would the barrister consent to this high ranking? Two weeks before the notice of alibi was to be disclosed, the solicitor wrote in his instructions to barrister:

She was interviewed at X-village Police Station in the presence of X from instructing Solicitors. She confirmed that she had been in x-village and met her friend Kim and that they had been to Kim's house and they then went out with her little sister to buy some cigarettes. She stated that they came across a male and female and an argument ensued between that male and female and Kim and her sister. She stated that the male involved took an aggressive stance. She denied that there had been any violence

<sup>21</sup> The first five points of the solicitor's notes deal with the story on what the two friends – Linda and Kim – did before they met Andy who is the complainant and who is going to be the first prosecution witness.

whatsoever between her and the male. She believed the male to be called Andy and Counsel will have noted the aggrieved in this allegation is Andy Colin who on the 10th November was staying with his sister who lives at 13 Kings Street, x-village. That is on the main Counsel housing estate in x-village and our client has indicated she would not go onto that estate willingly because she has an ex-boyfriend who lives on the estate and would not wish to bump into him. (28.3.2001)

What happened here? The correspondence did not just strive to deliver necessary information. The letter, furthermore, took the chance to test the story in a protected and friendly environment. Consequently, the solicitor highlights functions and relevancies of the account. For instance, he points out that the aggressive male in Linda's version is identical with the aggrieved.

Through the instructed account, solicitor and barrister manage to synchronize their views on the case. The instructions allowed the lawyers to refer to and work on a shared object within a protected sphere. Solicitor and barrister could, on this basis, deliberate strategic (the positioning of the story in the case) as well as tactical questions (the steps to strengthen the story). Once chosen as being at the heart of the case, the story imposed some practical steps to take. The barrister receives the following report:

We have asked our client whether she can provide us with any information that might assist *us* in tracing Kim to see if she was prepared to give a statement. We appreciate her assistance is perhaps unlikely, but in any event client has not provided any information which could lead to tracing her. (28.3.2001)

Three months later and without any such witness recruited, the account turns into the official "defence case". It provides the basis for the defence statement disclosed to the prosecution and the court to trigger the secondary disclosure:

The defendant states that this would be about 15 minutes after they had left the house to buy the cigarettes. They came across these people having just crossed a wooden gate on the way back to X-Street. The Defendant did not know the other two people until Kim informed her that the woman was called Lucy. The Defendant thought Lucy was with her boyfriend, but now believes the other male present to have been the complainant. An argument ensued between Kim and Lucy and the male adopted an aggressive stance. She believed the male to be called Andy. The Defendant did not take part in the argument, but stood close by. (13.4.2001)

Once announced as an alibi, the account called for further evidence: the alibi witness. Linda's account needed the support of the 'friend' who accompanied her. Would Kim confirm the account? The secondary disclosure delivered some surprising evidence: Kim, when initially interviewed by the police as the prime suspect, heavily incriminated 'our client'. The defence seemed trapped: it was bound to the repetitively stated alibi and at the same time exposed by the only alibi witness. The only plus: Kim's evidence was not admissible in court since she was at that point interviewed and pressurized as a suspect.

### 3. Modes of transformation

The three stories suggest new answers to our leading question: How are utterances turned into statements? It matters, first of all, where and when something is uttered in



the procedural course. In other words, not every communication enters and matters as procedural history. It makes a difference whether Kim, in the third story, delivers her alibi in the witness box, at the police, or in the law firm. Or think of Steve Striker in the first story: What happened to his answer “I was not finished yet” given to the police officer? What would have happened if the jury received the same answer simply via the protocol? Or take the second story: How was it possible to cut back the police protocol that represented Tim Blue’s account of what happened that night in his (former) friend’s bedroom?<sup>22</sup>

In the following, I elaborate a range of modes of transformation in accordance with the three case studies. There are, I argue, three different ways and courses to transform utterances into discursive facts. The differences have their bearing on how the procedural past is present at a given moment. Only by including all three modes of transformation, the analysis of legal discourse can explicate how contributions are bound to prior stages. The three modes alter, generally, the analytical status of the two concepts launched at the outset of this paper: of the procedural history and of the field of presence. This table shall introduce the three modes of transformation:

<i>What is the</i>	<i>Staging</i>	<i>Reiteration</i>	<i>Mobilisation</i>
<i>Paradigmatic situation?</i>	Testimony under oath	Repeating a question	Drafting a statement
<i>Site of transformation?</i>	Public arena	Series of procedural events	Internal public/back region
<i>From utterance to statement?</i>	A jump/indistinguishable	Referring to authoritative sources	Composition of modules
<i>Supportive materiality?</i>	Courtroom/speaker’s body	File as archive/protocols	File as scrapbook/drafts
<i>Resulting case representation?</i>	Fresh talk	Archival speech	Scripted speech

Statements do not arise, as Foucault implies, from direct transformations of discursive events into discursive objects only. They do not arise only by means of an archive that remembers everything said during the procedure, as Luhmann implies. As the table suggests, the transformation of utterances into statements takes place at different sites, in different temporalizations, and with various effects. Depending on the chosen mode, case-representation is understood differently. Speech may refer to the very event itself (“fresh talk”), to a whole array of related iterations (“archival speech”), or to rehearsed and coached performance (“scripted speech”).<sup>23</sup>

<sup>22</sup> One could expect a simple explanation in the temporal order of occurrences. One could work out such explanation by means of Schütz (1971), who stressed that the same (e.g. experience) can be different simply because its parts emerged in a different order. This idea, however appealing and relevant for the study of discourse formation, does not suffice to tackle multiple temporalizations.

<sup>23</sup> The notions remind of the modes of speech-production as developed by Goffman (1981) in his article on “the lecture”. Despite all similarities, I had to include one important change. The “archival speech” replaces Goffman’s notion of “memorised speech” in order to emphasise the semi-public character of memory in the legal context. The archive is not simply a memory that guides the case-representation. At the same time, it equips the adversary’s assessment of the case in the light of the procedural past.

In the following, I spell out the three modes in light of the above cases. Each mode, I suggest in the conclusion, entails safeguards that shield the participants from the strong procedural dynamics.

### 3.1. *Staging*

The first mode is commonly conceived as the major one. The theatrical metaphor is applied to criminal trials within a wide range of sociolegal approaches.<sup>24</sup> These may explain the absence of the procedure as sociological category together with the widespread talk-bias in sociolegal studies.<sup>25</sup> In the mode of staging, utterances are turned into statements ‘right away’. The immediate transformation makes it impossible to clearly separate one from the other. The mode of immediacy fosters the impression that utterances were in fact statements *per se*. They are, within this mode only, identical with embodied and staged performances.<sup>26</sup>

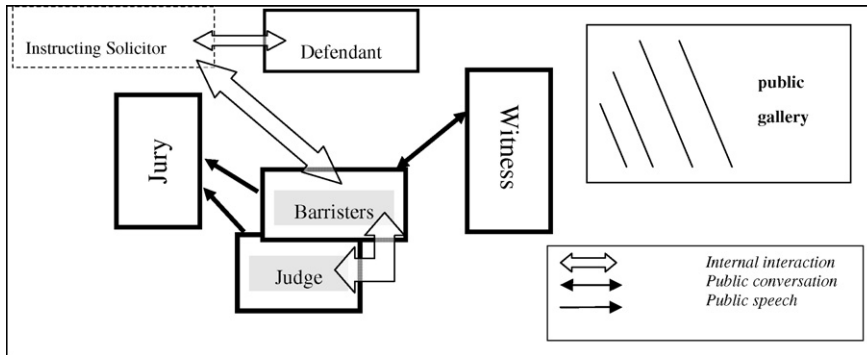
But how is this possible? In order to understand this mode, one has to study the site of its enactment in detail: the court. The court provides the defined arena for the cases to materialise. The court defines speech positions, the focus of attention, and the relevant audience. It grants a voice to the few and excludes the noise of the many. It introduces a multiplicity and hierarchy of participants: bystanders in the public gallery, mobile service personnel on the site, seated assistants (clerk, recorder) in the centre, appointed decision-makers (judge, jury) in prominent ranks, competent ‘asking’ in-court-lawyers (barristers) in the inner circle, and the called and ‘answering’ contributors (witnesses) in the stand. The court frames a centred but complex social situation.<sup>27</sup>

<sup>24</sup> This is true especially for critical approaches: see Carlen (1976, p. 18 *nn.*), who defines theatrical as the merging of “mundane and puzzling” effects of the setting; see Pizzi (1998, p. 125), who ascribes an extreme theatrical attitude especially to American trial lawyers and their witnesses: ‘Witnesses are not just witnesses in our system: they are performers who need to be coached to give their best performance from the point of view of the lawyer calling the witness.’ For an example of rather applied literature using the theatre metaphor, see Ball (2003).

<sup>25</sup> See amongst others Atkinson and Drew (1979), Drew (1990, 1992), or Matoesian (1993).

<sup>26</sup> In 2004 the *Journal of Empirical Legal Studies* published a debate on the phenomenon of “vanishing trials”, which was foremost observed as statistical terms. For Friedman (2004, p. 699 *n.*), the drop in trial figures is ‘a sign of the diminished role of legal process as theatre. There is nothing theatrical about depositions and discovery process. Nothing is more boring than an anti-trust case. The big criminal trial – the show trial, the Lizzie Borden case, or O.J. Simpson in the dock – is the chief survivor of the theatrical element in the law. The public, didactic elements have otherwise vanished. ... In fact, this was one of the functions of the courts: they were institutions that had the job of making public various facts, events, and the situations.’

<sup>27</sup> Carlen (1976) commented on the Magistrates Court in a rather narrow, critical perspective. How, she asks, is “spatial dominance achieved”? Some answers would fit as well to the Crown Court: ‘Spatial dominance is achieved by structural elevation, and the magistrates sits raised up from the rest of the court.’ (23) Or by means of distances that ‘are certainly greater than those usually and voluntarily chosen for disclosure of intimate details of sexual habits, personal relationships, and financial affairs.’ (Carlen, 1976) Rock (1993) analyses the divide which exists between professional insiders and public outsiders and provides some details of how this division is built into the court architecture.



The Crown Court is a discourse automat.<sup>28</sup> The court demarcates who speaks when, to whom, from where, etc. The speech exchanges are governed by observable traffic rules. Some of these rules: witnesses do not talk to the jury directly. They answer the barristers' questions. Only from the witness box and as a witness, one is permitted to address the court.<sup>29</sup> The jury is supposed to receive the cases solely from inside court, meaning from the exchanges between barrister and witness and from the closing speeches. All these rules are in place independent from the cases, issues, participants, etc. This is true not despite but because of strictly defined exceptions.<sup>30</sup> The general frame processes countless cases and remains in place as the same. The general automat is inevitably co-enacted as factual and proper while conducting the hearing. The automat constitutes "framed interactions" (Latour, 1996) for all practical purposes. It may well be called a "political machine" (Barry, 2001) that ritualises and standardises proximity.

The traffic rules introduce an alien kind of interaction: everything seems slower, repeated, explicated, explained, etc.<sup>31</sup> The resulting rule-bound performance makes it, interestingly enough, easier to follow the matters than a pub talk or a table talk. How does this automat contribute to the many hearings passing it? The courtroom displays a centre of attention; the positioning of voices does signify defined relevancies (such as being in the stand, on the dock, on the bench); the automat eases the reception of the dealings (for the

<sup>28</sup> The idea of discourse automat links our study closely to the scientific experiment, designed to create standardised observation on controlled changes. Some scholars in the history of science could show similarities between the courtroom and the laboratories in early modernism. See Shapin (1994) or Shapiro (1991).

<sup>29</sup> See Langbein (2003) on how the "accused became silenced", while the trial hearing became dominated by professional lawyers.

<sup>30</sup> See the Criminal Justice Act 1988, p. 32 (Blackstone's, 1998, appendix 1). In a number of exceptional cases, witnesses may be permitted by the court to give evidence using a "television link". Other variations may refer to the atmosphere in court (relaxing the dressing code to suite young offenders) or to safeguards to protect a witness (by dividing screens). The court can sit "in camera", meaning the public can be excluded from the trial (see Blackstone's, 1998: D 2.48). See Matoesian (1993) for exceptions granted to vulnerable witnesses.

<sup>31</sup> This becomes apparent in the practices to deliver some extra information from the defendant to the judge via first the assistant, second the solicitor, and third the barrister. This Chinese Whisper is necessary because the defendant is not allowed to address the judge directly.

jury as well as for the researcher),<sup>32</sup> the individual set-up of the hearing is freed from case-related discourse-ethical deliberations (the set-up is generally agreed upon). The inflexibility facilitates the immediate and pertinent discoursivation. Only here, embodied utterances are turned into discursive facts right away.

One point is often forgotten and important for our concern of discursive transformation: the automat is not only crucial as a general format. It gives room for stable expectations as well. It enables preparation and provides an orientation point to weigh the cases during the plea bargaining. The court provides a stable frame of orientation for both, the defending and the prosecuting party. This is how a potentially disastrous utterance (“I’m just not feeling bad about it!”) can be ‘disarmed’ (1st case). This is how a weak defence (2nd case) can be measured in advance. This is how future demands (3rd case) can be anticipated.

### 3.2. *Reiteration*

Reiteration involves various sites, moments, and media. It is enabled by a series of procedural events and by a range of communicative formats. Reiteration stabilises issues already prior to the trial hearing and, thus, enables the ‘premature’ measuring and balancing of cases in the procedural course. In the three micro-histories, we find the repetitive concern of ‘what really happened’ at different sites and in different forms: in the police interview, in the written police protocol, in the circulating copies, in the quoting letters and conversations, in the friendly and hostile witness examinations, and in the closing speeches. The series is even more composite and specific. An issue is already repeated in the course of just the interview. The same is true for the court hearing: the same questions are asked various times to various witnesses in order to produce repetition and (observable) differences.

Reiteration can be understood as a clever move by the interrogator. It can be studied as meticulously prearranged. However, reiteration is first of all a procedural accomplishment. Only the standard series of events and exchanges allows reiteration to take place at all. Accordingly, we find arrays of events where somebody is expected to speak out ‘again’, to deliver his ‘identical’ defence, and to announce what was already known. Reiteration is organised by:

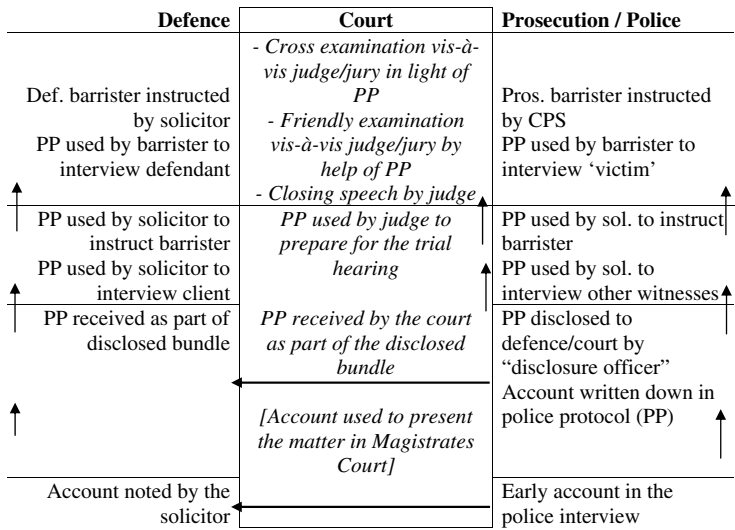
- *Archived and disclosed evidence.* During the police inquiries, interview protocols are collected and analyzed. They serve as contrasts for the reception of statements in court.
- *Questionnaires by the court.* The adversaries are asked to provide information on the probable defence, the likely witnesses to be called, or the facts in debate.
- *Linkages of procedural rights and obligations.* For instance, in order to activate secondary disclosure, the defence has to enter a “defence statement” containing the line of defence.
- *Series of administrative pre-trial hearings.* The hearings are recorded and filed. They are set to confront the parties on early stages and to facilitate resolutions outside of court.

<sup>32</sup> So does the dressing code. The Lord Chancellor only recently clarified the ‘the requirements of Practice Direction (Court Dress) [1994] 1 W.L.R. 1056 of 19 July 1994’: ‘Queen’s Counsel wear a short wig and silk (or stuff) gown over a court coat; junior counsel wear a short wig and stuff gown with bands; solicitors and other advocates authorised under the Courts and Legal Services Act 1990 (Blackstone’s, 1998, p. 1039) wear a black stuff gown and bands, but no wig.’

Analysing reiteration means to include the entire line of preliminary, archived sessions, which furnish any later occasion with contrasting versions. The participants conduct these sessions on the basis of what is already known. There seems no start from scratch. There is always already a version in place that an answer can be contrasted against and that an answer has to take into account.<sup>33</sup>

However, not every reappearance of an issue carries the same weight and binding effect. Important is the variation of binding to invite ‘first entries’. Accordingly, there are some announcements that are just guesswork (in the court’s questionnaire); some declarations officially define the case for now (the defence statement); others set-up the frame of representation for the plea bargaining session and the trial hearing (the solicitor’s brief for the barrister). No matter the variation of binding, the reappearances will add to some kind of stabilising function. Something ‘naturally’ turns into the official position that any following representation will have to account for.

The procedural conditions for reiteration become apparent when tracing the police protocol (PP) of the questioning through the pre-trial and trial. The PP reappears at different junctions, in various regions, and to different audiences. Its trajectories criss-cross the discursive zones of the two adversaries and the Court:



The police protocol circulates horizontally from the prosecution to the defence, often after some delay. The PP circulates vertically from the police to the CPS and from there

<sup>33</sup> Pizzi (1999, p. 124) identifies and praises this mode of discoursovation for the European jurisdictions: ‘If a defendant has offered two different accounts of what happened on the evening of the crime, the judges will know that and will take the inconsistency into account.’ In the US regimes, this mechanism is undermined by too many protections in favour of the defendant. Pizzi gives an example that reminds of our 3rd case: ‘(…) if the defendant decides to withdraw the alibi and offer a completely different defence at trial, the prosecution can’t cross-examine him or point out to the jury that this is now the second of two inconsistent defences that the defendant put forward.’ Pizzi (1999, p. 123)

to the prosecuting barrister. The PP circulates, moreover, to the court administration and the judge. The circulations serve the legal contest that should be fair and truthful and a temporal and functional division of labour that should be efficient and reliable.

Due to reiteration, giving evidence in court turns into a strange event. The interviewee answers questions that he/she already answered elsewhere;<sup>34</sup> the interviewer asks questions to which he/she knows already the answers. Reiteration provides a powerful procedural mechanism, which is, however, limited in some respects. Earlier questions and answers are not fully available in court. Practical restrictions are pertinent here:

- (a) Before documents are used in court, the barristers conduct some close reading in order to prevent inadmissible parts from being put to the jury. Inadmissible are, generally speaking, inferences that can not be tested in court such as hearsay or assumptions.
- (b) Due to the principle of orality, the jury receives evidence from the friendly and hostile examinations only. Documents are not distributed on paper. Exceptionally, meaning once they are called as evidence, documents can be read out.<sup>35</sup> The authoritative source is kept away from the jurors in order to promote a fresh reception.<sup>36</sup>

The import restrictions interrupt the free circulation of past contributions. In court, it takes a further translation – this time back into spoken words – for the interplay of ‘repetition and difference’ to be prolonged.

### 3.3. Mobilisation

The analysis of legal discourse usually pays attention to facets of staging and reiteration: on staged speech exchange and on strategic documentary interrogation. The mobilisation by means of file work (Scheffer, 2003), in contrast, remains rather unexplored. The three cases above reported on a whole range of mobilising work on the back stage of the procedure. Witnesses are recruited, statements drafted, ideas tested, tactics changed, pleas

<sup>34</sup> This is the basis to qualify ‘good witnesses’ and ‘good clients’. As the solicitor in the 1st case told me: “It is always helpful to the defences, or any defence that the client gives a version of events to police when he’s charged and interviewed on tape that he basically sticks with throughout the case. If he says something in interview and then changes it when he comes to see us a week later, or when he goes to Crown Court 2 months later, the inconsistency is no great.”

<sup>35</sup> The governmental Auld Report discussed this restriction: ‘But it is common place for juries, having retired to consider their verdict, to return to court to ask the judge to be reminded of what a witness has said and, often, for a copy of his written statement. In most instances they know that there is such a statement because the advocates and the judge were plainly following their copies of it as he gave his evidence, the witness may have referred to it, or the advocates have cross-examined and reexamined him by reference to it. All the leading players in the courtroom have one, but not the jury.’ (2001, p. 520) Lord Justice Auld defended this rule: ‘(...) even with a proper warning and further reminder by the judge of the witness’s oral evidence, they [the jurors] would be likely to give the statement more weight than their recollection of what he said.’ (ibid.)

<sup>36</sup> This is the case for other ‘misleading influences’ as well. The jury is kept in separation from public comments, from media coverage, or from the neighbours’ opinion. The court, it seems, mistrusts the ‘credulous’ jurors.

discussed, etc. Accounts no longer jump on stage into the discourse. They are fostered in the protected sphere of the client–lawyer relationship and of the confidential defence file.<sup>37</sup>

This mode of discoursivation has various consequences for our understanding of files and file work. Crucial transformations take place in the lawyer's interaction with the file. Here we find practical efforts to recruit an alibi witness (3rd case), to limit the extent of the early admission (2nd case), or to prepare excuses for the early slips (1st case). In this mode, the defence file is not used primarily as an archive, but rather as a scrapbook that provides a wide range of valuable entries: speculations, ideas, plans, projects, to-do-lists, drafts, etc. The scrapbook is the launch pad for multiple becomings to be mobilised and assembled. It hosts and facilitates the careers of legal arguments.<sup>38</sup>

The file's inscriptions do not obtain authority the way archival records do. They do not constitute relations between something original and something copied. The scrapbook rather relates 'in time' something imperfect, not finished, and unstable to something tested, completed, and presentable. It constitutes an ongoing writing process that is completed only once a piece is irreversibly published. The archive, in contrast, emphasises the independence and the authority of the document. The scrapbook-file is a quarry to work with (rather than to study or interpret), while the archive-file hosts rigid and closed documents (to refer to, or to quote).

The mode of mobilisation differs from the two models introduced above: Luhmann's concept of the procedural history, for instance, consults by and large the archival form. Everything uttered is recorded and potentially exhibits binding effects. The defence file, in contrast, emphasises the reversal nature of statement-becomings that are 'in construction' on the backstage of the procedure. Foucault's formation misses mobilisation because it offers no place for becomings. Everything is already part of a discourse and underlies its dynamics, forces, and laws. Mobilisation, in contrast, highlights the temporary unavailability and protection. Something is not yet part of the discourse.

The defence file is the device by which the case worker accumulates points not only for the day in court, but for the series of procedural events that demand for positions and decisions. The defence file is the instrument, with which the solicitor methodically develops a case, reassesses its potentials, identifies its weaknesses, and tries to overcome them. The file is the basis of "impression control",<sup>39</sup> in so far as legal arguments can be guided step-wise into the procedural limelight.<sup>40</sup>

<sup>37</sup> One solicitor explained to me the distinction of the official defence statement and the statement taken in the law firm: "The longer statement of which this is the handwritten amendment to is kept in our file and sent to his barrister for the purpose of giving evidence before the Crown Court jury. But the defence statement – to distinguish between them – that we could say is a witness statement, is his formal witness statement. Whereas the defence statement is the shorter one that just has basically the relevant bits narrowed down, sent to the Crown – trying not to give too much away ..."

<sup>38</sup> The career metaphor is widely used in ethnographic studies. See Meehan (2000) on police statistics or Limoges et al. (1991) on political drafting. See for the practice of legal discourse (Scheffer, 2004, 2005a).

<sup>39</sup> For new developments to increase impression control see Kressel and Kressel (2002).

<sup>40</sup> Most of the file's content and most of the work that went into it remain unvoiced. See Star and Strauss (1999) for the distribution of voices in work processes.



What's more, the file is the basis from which the exchanges are initiated. The file is the domicile of the evolving case. It is the centre of calculation<sup>41</sup> for the defence ensemble. From here, members are supplied with suggestions, instructions, and information.<sup>42</sup> The file creates an internal public, from which contributions are distributed to specific addressees and publics. The pre-trial correspondence is, in this line, the integrating factor of the adversarial procedure. The parties, in the course of their exchanges, define the grounds for shared as well as debated issues. And they are enabled to do so due to the backstage that is conceded by rules of confidentiality.

Mobilisation represents procedural protectionism that is commonly undervalued in sociolegal research. The shielded mobilisation does not replace but rather moderates the two other modes of discoursivation. But mobilisation is not simply driven by protection. It takes place under time pressure, in anticipation of the upcoming events, and on the grounds of the disclosed facts. It is heavily occupied with staging and reiteration.

#### 4. Conclusion

How are utterances turned into discursive facts? This seemingly simple question revealed quite a complex picture of legal discourses. Legal discourses are not plain, transparent, and monological units. Instead, they unfold as decentred formations that are internally differentiated and divided.<sup>43</sup> There is no position from which legal procedures are fully accessible. There are, rather, multiple socio-logics in different time-spaces at work: a number of modes of discoursivation. I presented three modes, which I believed are most pertinent for English Crown Court cases: the ritualistic staging, the organised reiteration, and the shielded mobilisation.

But is it enough to just enumerate these modes and to identify their workings? Is it enough to specify comprehensive discourse models such as Luhmann's "procedural past" and Foucault's "formation"? After I analysed three consequential modes of discoursivation, it seems necessary to link them together. The modes clearly do not appear in isolation. The modes, furthermore, seem to appear in a hierarchy. Simply put, they are combined and ordered. The way this ordering emerges is, however, not easily grasped.

<sup>41</sup> For Latour (1987, p. 223) "centres of calculation" are essential for acting at a distance: '... how to act at a distance on unfamiliar events, places and people? Answer: by somehow bring home these events, places and people. How can this be achieved, since they are distinct? By inventing means that (a) render them mobile so that they can be brought back; (b) keep them stable so that they can be moved back and forth without additional distortion, corruption or decay, and (c) are combinable so that whatever stuff they are made of, they can be cumulated, aggregated or shuffled like a pack of cards.'

<sup>42</sup> This only within limits: the barrister, according to the Code of Conduct for the Bar of England and Wales, must not 'rehearse, practice or coach a witness in relation to his evidence or the way in which he should give it.' (Section 607 (b), Blackstone's, 1998, p. 2262) Before this, any contact between barrister and witness prior to the trial was rendered unethical. To my knowledge, barristers rarely meet witnesses prior. It is the solicitor's task to obtain a written testimony prior to the trial. See Tague (1996) for the division of labour between barrister and solicitor and for the numerous problems that arise from it.

<sup>43</sup> As Pizzi (1999, p. 122) shows for the US, the lack of transparency becomes an issue within the legal discourse itself: "(...) arguments may carry over into the trial with one side or the other claiming that it did not receive the proper information from the advocate on the other side prior to trial and that therefore (1) the court ought not to permit certain information to be presented at trial, or (2) the jury should be told of this failing by the other side, or (3) the judge should grant continuance to permit the 'surprised' lawyer time to better prepare to examine the 'surprise' witness, and so on."



The following conclusion may serve as a first attempt to join the several courses of discoursovation.

One pattern seems evident. The modes work in pairs. What is meant by this? Witnesses are invited to give a fresh view on “what really happened” in the stand, while at the same time they are assessed in light of former versions. The defence ensemble prepares its case in the protected sphere of the law firm while being forced to anticipate the upcoming trial hearing. Reiteration provides materials for the mobilisation of statements and, hence, binds even the internal affairs to the procedural history. But to what effects do these pairs work? They create, I suggest, a mix of pull-factors and push-factors, a mix of invitation and obligation, of promise and threat.

The duplicity of event and process, of truth-telling and fact-confrontation, of orality and inscriptions, of proximity and history is highly prolific. It makes people speak of what cannot be expressed. It makes people write of what cannot be actualised. It creates a constant deficit that is filled with more of the same. As a result, procedures fill files, meetings, and hearings with an overload of discursive facts of first order (“Then I went to ...!”) and second order (“But before you claimed ...!”). They amass hints, contrasts, and clues that eventually turn the non-decidable into something decidable. The legal discourse provides countless ‘internal’ resources to take a decision on something that generally cannot be decided: the irreversible past.

Is this the way in which Luhmann imagined the legal procedure to be so forceful? Is this the mechanism that made Foucault’s “I” hesitate before entering the field of presence?<sup>44</sup> Duplicity, it seems, traps people in their own choices. It twists around utterances and aims them against their authors. But is the procedure well grasped as a trickster? Is it well described as a double play that invites and undermines ‘naïve’ contributions?

Such a characterisation would, indeed, lead right back to where we started. Luhmann and Foucault emphasised the threats that go along with systematic discourses. Speakers who enter the discourse full of hope and aspiration quite likely leave it disappointed and thwarted. While both theorists seem clear about the immense powers of transformative communication,<sup>45</sup> they seem to disregard the regulations that protect participants (as authors) from their own words. Suspects are warned, allowed to remain silent, or freed from their illegitimate pasts. Witnesses are protected from misleading questions, from gossip, false burden, or undue standards of truth. The one charged is granted the right to remain silent, is approved time to prepare the case, is provided with legal advice and representation, and is guaranteed several (minimal) standards (and legitimate expectations) to rely on.

These protections, one may criticise from the point of view of procedural sway, are not sufficient to counter the procedural powers. They may not be sufficient to reinforce the shattered “impression management” (Goffman, 1959, pp. 208–212) of those held account-

<sup>44</sup> ‘Inclination speaks out: “I don’t want to have to enter this risky world of discourse; I want nothing to do with it insofar as it is decisive and final (...)” Institutions reply: “But you have nothing to fear from launching out; we’re here to show your discourse is within the established order of things, that we’ve waited a long time for its arrival (...)”’ (Foucault, 1971, p. 7).

<sup>45</sup> None of which is mentioned in the book by Conley and O’Barr (1998) on legal discourse. There is, generally speaking, a lack of approaches that take the materiality of communication into account. Relevance arises not simply from exchanges in different legal contexts, but from the spatiotemporal transformations attached to them. See Tuitt (2005).

able. The protections, furthermore, bear problems themselves such as self-interested lawyers, misleading information, overregulated hearings, etc. Because of the protections, participants may be bound even tighter to the carefully mobilised version. Within the concept of procedural supremacy, protections can easily be turned into ‘slippery’ ingredients whose only function is to create free *and* binding choices. Again, are the protections nothing but resources that add to the procedural supremacy?

In light of the modes of discoursivation and in light of the manifold ruptures, I hesitate to ascribe one single rationale to the procedural regime. Perhaps, the regime’s power is as little centred as the related discourse formation itself. The regime presented here, I conclude, does not follow one monological order. It can not be reduced to a single *raison d’être*. This does not exclude but rather promotes discursive unity. The three modes, in changing combinations, provide the legal procedure with discursive facts that turn ‘all these problems’ into one determinable matter.

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