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LET JUSTICE BE DONE: A PERFORMATIVE VIEW ON PORTUGUESE CRIMINAL TRIAL PROCEDURES

Peter Anton Zoettl

Peter Anton Zoettl is postdoctoral researcher at the Centre for Research in Anthropology, University of Minho (CRIA-UM), Portugal. His main research interests lay in the fields of visual and legal anthropology. He has carried out research (in Portugal, Brazil, Germany and lusophone Africa) on the social uses of images and the employment of film and photography as a medium for the representation of anthropological knowledge; the power relations immanent in image production and consumption; dynamics of power and performativity within the juridical field; juvenile marginality, offending and justice; marginality, empowerment and artistic practices; indigenous minorities, indigenous image production, indigenous rights and justice. Correspondence to: CRIA, Av. Forças Armadas, Ed. ISCTE-IUL - sala 2n7, cacifo 237, 1649-026 Lisboa, Portugal. Email: antropaz@t-online.de. The research for this article was funded by a postdoctoral scholarship from the Portuguese Foundation for Science and Technology (FCT, SFRH/BPD/99782/2014).

Based on fieldwork at criminal courts in the metropolitan area of Lisbon, the article examines the "performativity" of criminal justice. The written and unwritten rules of criminal trial procedures are analysed as judicial "scripts" that guide the "making" of Justice. The formalities of the criminal trial, like those which prescribe the correct behaviour of defendants in Portuguese courts, are tied to the liminality of their social standing and their betwixt-and-between position in the court and in society. Script-compliance is discussed as a central element within the production of criminal justice. Finally, the article suggests a "performative" view of justice, drawing on Butler's ideas regarding the enactment and construction of notions of gender.

Keywords: body, criminal justice, criminal proceedings, legal anthropology, performance, Portugal

Lawsuits have often been referenced as "performances", that is, theatre-like enactments of juridical "scripts", involving different actors such as judges, prosecutors, barristers and, last but not least, defendants. Such characterizations have come from historians, legal scholars and social scientists alike. Johan Huizinga, for instance, in his 1938 study *Homo Ludens*, points to the "play-elements" in adjudicating "the justice of a person's claim" in old Germanic legal customs, and emphasizes the proximity of the notion of *agon* (struggle) within ancient Greek drama and litigation.[1] Georgia law professor Milner S. Ball has remarked that Rolf Hochhuth's tragedy *The Deputy* would "not differ greatly from a prosecutor's case, played in

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a theatre to an audience sitting as a jury" and concurs in Jeremy Bentham's naming of courtrooms as "theatre[s] of justice".[2] The criminal trial, we are told by the lawyer and later associate justice of the Minnesota Supreme Court John E. Simonett, "has a protagonist, an antagonist, a proscenium and an audience, a story to be told and a problem to be resolved, all usually in three acts".[3]

But what does it actually mean to say that that trials and courts resemble plays and theatres? Legal scholars like Ball or Simonett have generally not gone far beyond the ascertainment of the fact itself, pointing out, for instance, that "performance" is as important for the judicial system as it is for drama.[4] However, social scientists such as Dwight Conquergood have demonstrated how the forms and procedures of legal drama relate to the "abstract principles and inchoate concepts" of justice.[5] Other scholars (like Pat Carlen or Nigel Eltringham) have examined how the theatrical elements of trial procedures and the "staging" of criminal trials are employed to exercise symbolic control of defendants, or how the "spectacle of law" marginalizes the public while, at the same time, using it for the purpose of validating court proceedings.[6] Then again, various authors (like David Evans, Clare Graham, Julienne Hanson, Linda Mulcahy or Katherine Fischer Taylor) have anatomized the history of court architecture and its impact on the way justice is conceptualized and administered, pointing to the importance of spatial arrangement for the distribution of power among legal actors.[7]

In this article, I will attempt to empirically demonstrate how the "performativity" of justice expresses itself in the way the behaviour, and particularly the body and bodily posture of trial actors, is "orchestrated" through a multiplicity of explicit and "hidden" rules, the "choreographic" trial direction of the judge and other court employees, and a court's spatial layout. My discussion of the performative elements in the "making" of justice is primarily based on fieldwork notes on the "dramaturgy" of criminal trials at two courts of the Lisbon Metropolitan Area responsible for judging cases arising from crimes committed in the periphery of Portugal's capital city. I will, however, also take advantage of research carried out at two criminal courts in Berlin, Germany, to highlight some of the peculiarities and differences of the "staging" of Portuguese procedures.[8] Finally, I will attempt, in a somewhat intuitive way, to place my observations in relation to some of Judith Butler's ideas on gender constitution,[9] in order to outline a possible framework for a "performative" perspective within the anthropology of justice.[10]

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A trial's script

The typical script of a criminal trial at a Portuguese criminal court begins with the calling of the case. An official of the section of the court to which the case has been assigned and who, during the court hearing, will function as both court clerk and court usher, reads out "in a loud voice" the number of the case and the names of the defendant (if not in custody) and his/her defence lawyer.[11] The persons called will now direct themselves to the courtroom and wait, first to be let into the courtroom by the usher (together with eventual onlookers), then for the arrival of the judges and the prosecutor.

The waiting of the persons involved in the trial (apart from "monopolizing" the timing of the proceedings)[12] is clearly part of the dramaturgy of the trial itself, as the highly scripted nature of the order of appearance of the bench shows: When the door behind the judges' bench opens, it is always the presiding judge who enters first, followed by the two associate judges and the prosecutor. On a few occasions, I have witnessed cases where the prosecutor was the first to step through the door, turning back after having noticed that the judges had not yet arrived. I do not, however, remember cases where the associate judges entered the courtroom before the presiding judge, which is all the more curious as the criminal courts are organized in sections with teams of judges who take turns as chief and associate judges. Such rigour regarding the protocol for the order of appearance of the bench and the prosecutor is, of course, only worthwhile if there is somebody to watch it, and points to the public dramatization of hierarchy in Portuguese criminal trials, which I will return to later.

By way of comparison, in German criminal trials the general public enter the courtroom *after* the judge and the other trial participants are already seated. The German ritual of the entry into the court also differs in that the prosecutor waits for the judge *together* with the defence counsel. One could interpret the joint appearance of the bench and the prosecutor in Portugal as an expression of a closer proximity between judicial power and the powers of accusation and prosecution, embodied by the judges and the state's agent who brings the accused up before the court (the prosecutor). This proximity between judge and prosecution makes itself evident on other visual and procedural levels as well: judges and prosecutors in Portugal, for example, are seated on the same, uninterrupted bench. They are also both saluted by defence lawyers in a way that other persons involved in the trial are not, that is, by shaking hands at the end of the trial (something that generally does not happen between lawyers, or even between lawyers and defendants). More importantly, it is the judge and not the prosecutor (as in Germany) who reads the charges, thus publicly "accusing" the defendant.

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After the entry of all legal "actors", the trial continues with the questioning of the defendant. For this, the defendant in Portugal has to stand up, if he has not awaited the beginning of the trial already standing. Once the questioning of the defendant is concluded, the trial proceeds to the examination of witnesses and, eventually, the oral pleadings of both prosecution and defence. Eventually, the defendant is asked by the chief judge if "he has something else to state in his defence"[13] and finally declares the hearing closed. For the defendants, the initial questioning and the few final remarks they may choose to utter (often to express "regret") are, in the great majority of all the cases I have witnessed, their only intervention during the court hearing. Although, according to the Portuguese penal code, defendants are entitled to issue a statement "at any point of the court hearing",[14] defendants seldom exercise this right in judicial praxis. Moreover, defendants in Portugal do not have the right to defend themselves and are obliged to nominate (and pay for) a lawyer or else accept a court-appointed legal defender.[15]

Within the trial's script, the defendant in Portugal is thus more the object of his/her criminal trial than a subject in it. As an "actor", his appearances are limited to the beginning and the end of the judicial "play". Although inquisitorial in nature (as in most Continental jurisdictions), given the central position of the judge in the taking of evidence during the trial, Portuguese proceedings are thus rather "adversarial" from the point of view of the defendant, whose agency during the court hearing is generally limited to that of a witness on his own account (a witness considered unreliable, as it were). While defendants in Germany (and the United States)[16] are seated next to their lawyers and close to the judge, Portuguese defendants are seated (or standing) in a separate area that is physically delimited by a barrier from the court and from the audience, more or less in the middle of the courtroom. Portuguese defendants thus share the fate of their fellows at British magistrates' courts who, as Carlen observed, of all court protagonists are "placed farthest away from the magistrate".[17]

Mulcahy has remarked how the "zoning" of modern court houses has rendered the modern trial "more staged than ever before". Separate circulation routes for the different categories of persons involved in a trial, introduced (in England and Wales) over the course of the 17th and 18th century, augmented the dramaturgical impact of the arrival of protagonists of the trial.[18] The "selective revelation of key figures" (like the judge, "who enters last of all and without whom the spectacle can not proceed"), Mulcahy affirms, engenders suspense in modern courts in the same way as in 19th-century British courthouses the "differentiation of the defendant from others beyond the bar" came to strengthen the effect of his/her entry, focusing the public's "attention on the danger" the defendant might eventually pose to others.[19] In turn,

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Hanson has pointed the historical continuity of the "spatial syntax" of law court design, comparing the modern courtroom to a theatre in which the actors "confront one another across an unbreachable physical divide".[20]

Referring to the usual course of a court hearing in Portugal as a "script" (of which I have given here only a very fragmentary account), is not only a metaphor which aims to tie the judiciary to the performing arts. Judicial scripts for criminal trials have a more than a metaphorical existence, on various levels. To start with, they exist as part of the codification of the due criminal procedures suspects and defendants are subjected to, by force of law. In inquisitorial systems (within which the judge is not only weighing evidence presented by prosecution and defence, but is independently directing the taking of evidence during the trial), this is often done in a very detailed manner. Visitors to Portuguese courts, for example, are bound by law to "behave well, keep silent and sit down with their heads bare".[21]

As mentioned before, the court clerk in Portugal not only elaborates the transcript of the court proceedings but also carries out the functions of a court usher, acting as a kind of stage manager during the trial. For instance, he/she instructs the inexperienced defendant when to sit down and when to stand up in the course of the proceedings. The rules concerning the "standing up/sitting down" procedure are, of course, not part of the official (that is, codified) script as laid down in the Portuguese CPP. Nevertheless, they are given great importance at Portuguese courts, and judges are mindful of their strict observance. The court clerk is, furthermore, responsible for personally calling the witnesses from an adjoining room and accompanying them to their correct position within the courtroom. Especially in more complex trials with a large number of witnesses and/or defendants, the agility and expertise of the court recorder may be decisive – together with the behaviour and experience of others involved in the trial – for the "smoothness" of the court's performance as a whole.

An unsuspecting visitor to a criminal trial will probably only become aware of the existence of the "hidden" parts of a trial's script when something goes wrong, that is, when incidents of (generally unintentional) non-compliance to the script oblige the court recorder or the judge to verbally express a rule that, from the court's perspective, goes without saying. The chief judge's standard question to witnesses "Do you swear, upon your honour, to say the truth and only the truth?" may be invoked as a, seemingly trivial, example for this. At the grand criminal court of Sintra it happened, every now and then, that a witness responded to this question with a simple "Yes!" ("*Sim*!") – which, within the implicit trial's script, is considered an unacceptable answer. Although only the judge's question and not, to draw on

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Austin,[22] the "felicitous" way of answering it, is codified in writing,[23] the "hidden" Portuguese criminal trial's script determines that a witness has to reply by saying "I do!" ("*Juro*!"). In Sintra, in such a case of receiving an "unhappy" reply, the judge repeated the same question several times, until finally (and unwillingly) explicating the rule itself to the witness: "You have to answer with 'I do'!"

The judge's insistence on the "proper" execution of the script not only points to Austin's notion of performative utterances, it is also evidence of the importance of trials' scripts for the smooth procedural "making" of justice. Carlen cites a similar example of a defendant at the magistrates' court (accused of theft of £1 from Swan and Edgar's Department Store) pleading guilty in the "wrong" manner ("Yes, I did it"). Carlen interprets the joint effort of the judge, the clerk and the probation officer to make the accused utter her plea in "the language of the court" as an example of techniques of "formal symbolic control" which seek to "deprive defendants of their usual mode of communication", thus preventing them from defining "the situation on their own terms".[24]

In his discussion of the "Lethal Theatre" of the death penalty in the USA, Conquergood has likewise noted the "careful and elaborate staging of props, participants, and players" during executions, in an effort to succeed in "controlling the performance" and "making sure that it proceeds smoothly without a glitch. "Inasmuch as possible", Conquergood observes, "spontaneity and improvisation are foreclosed in the execution scenario. Everything is carefully scripted, choreographed, rehearsed, and directed – micro-managed right down to the tiniest of details, nothing left to chance". It is when things go wrong ("[s]ometimes the needle pops out under the pressure of execution, spewing the toxic drugs and spraying the witnesses") that the "ritual frame" of just executions is "knock[ed] down", exposing the "gruesome reality of actually putting a human being to death" – a "botched" execution, as Conquergood puts it.[25]

In most criminal trials, "botched" scripts obviously have much less dramatic consequences. Usually, it is rather a certain "atmospherics" within the noiseless execution of a trial's script that makes the existence of the script itself and the theatrical character of the trial conspicuous to the audience. When, for example (as it once happen at grand criminal court of Sintra), the door to the adjoining room where the witnesses wait to be called jams, the court proceedings get "out of step" in the same way as a theatre play in which one of the actors fails to appear on stage. Although such incidents (the breakdown of a video link could be cited as a further example) may delay the sentencing of the defendant, just as a popping

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needle may temporarily delay an execution, they are normally not the consequence of a (if implicit or unintentional) calling into question of the written and unwritten rules of the trial by one of the participants. They thus differ from what Carlen has called "breakdowns" in the course of magistrates' court trials, which threaten to "reveal legal processes as being ephemeral, negotiated, situational, contingent and arbitrary", and which call for "remedial routines" on the part of the bench to re-establish the reputed "logic of the law".[26]

Up and down: the body in court

Apart from ensuring that all trial participants (and particularly the defendant) use the appropriate "language of the court", at the criminal courts of Sintra and Amadora it was first and foremost the rules that dispose of the bodily positions of defendants, witnesses and visitors which were meticulously enforced by the presiding judge. Such rules lay down (if implicitly), for instance, at what point in time the defendant or a witness should be seated or standing up.

This particular rule seems to be relatively simple: defendants have to stand upright throughout their examination and whenever they wish to make a statement, while witnesses are allowed to sit down after having been questioned as to their identity. Defendants and witnesses alike, however, frequently appear to feel uneasy in relation to this rule, the existence of which they somehow seem to know about, though unfamiliar with its correct execution. This uneasiness is especially noticeable with defendants as, unlike with witnesses, non-compliance with that part of the trial's script may be considered (or thought to be considered) a demonstration of lack of respect for the court. Summoned defendants who arrive at the court of their own accord thus often remain standing in the defendants' area long before the judge(s) enter the courtroom. Pre-trial detainees, on the other hand, are sometimes ordered by the prison guards to await the arrival of the court standing and sometimes are allowed to wait seated. From time to time, it happened in the course of the trial that the chief judge "forgot" to instruct a defendant to sit down after his first examination, allowing him to sit down only later on. Whenever he is questioned again (or in the rare cases where he asks leave to speak on his own account), the defendant is told to stand up and step forward, as he is at the end of the hearing, even if he decides not to say any "final" word.

While the ups and downs of the defendants themselves normally do not pose many problems, it is their bodily posture which frequently incurs the disapproval of the court. If, for

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instance, the position of the hands or the arms of the defendant do not correspond to the "hidden" trial's script, the defendant is immediately censured by the judge. Defendants are not allowed to put their hands into their trouser pockets and are equally reprimanded when they cross their arms *in front of* their chest. They are, however, permitted to cross their hands *behind* their back (which is, anyhow, the position in which remand prisoners, being handcuffed, enter the courtroom). A defendant who stands upright, his hands crossed behind his back, could be considered to incorporate an "ideal" bodily position in court, as this posture automatically keeps him from eventually holding on to the railing of the dock. Whenever a defendant comes to hold on to this railing in a way that may be interpreted as him *leaning* against it, he is instantly told by the judge that he is not supposed to do so, an observation sometimes accompanied by the phrase that the courtroom "is not a *café*".

Betwixt and between: court, prison and society

The "stage directions" given to the defendant at Portuguese courts recall Carlen's remarks on the "organisational efficiency" of magistrates courts, "in whose service body-movement and body-presentation are carefully circumscribed and regulated". Once placed inside the dock, Carlen notes, the policeman calling the case "acts as a kind of personal choreographer" to the defendant, ready to instruct him to "take his hands out of his pockets, chewing-gum out of his mouth, his hat off his head and the smile off his face".[27] The importance given to the bodily position of the defendant in criminal trials in Portugal is, however, more than a simple question of showing respect for the court. In fact, the Portuguese term *café* can be tied to a whole local imagery of the realm of the street, of *conversas de tasca* (pub gossip) and the, at the same time, private and semi-public but always unofficial character of encounters in such locales. It points to what Roberto DaMatta has called (for the Brazilian case of "street" vs. "home") the differing "social roles and ideologies, specific acts and objects" linked to different social spaces.[28] The judge's claim "We are not in a *café*!" is meant not only to stress the official character of the defendant's statement, but also to delimit the courtroom's social space and the differing roles played by a trial's actors from the undifferentiated nature of the "street". It thus serves a similar objective to the use of a specialized language at court, that is, to reinforce certain forms of social relationships between court actors (e.g. to "speedily socialise […] the defendant into his proper role", in Carlen's words) or to institute a "duality of mental spaces" (Bourdieu) within the judicial space.[29]

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The rules that regulate the bodily postures of court actors differentiate the participants in the trial and are usually left unspoken as long as they are observed, being rendered explicit only when disregarded. Crossing the arms in front of the body, for instance, is forbidden only to defendants. Portuguese prison guards (who bring remand prisoners before the judge), to the contrary, may frequently be seen to adopt this posture in court which, as it were, contributes to their often "cinematographic" menacing appearance. It is therefore not a certain posture (like crossing arms) itself which is considered inappropriate in court, but a presumed lack of correspondence between the *status* or *role* of a person involved in the trial and the bodily posture he/she takes on. The same is true of the standing/sitting rule: while the defendant is not allowed to sit down while being questioned, visitors are obliged to be seated throughout the trial. Prison guards, on the other hand, must remain standing at all times. One could tie the guards' authority, within the trial's script and apart from their physical strength, to their spatially superior (upright) position in relation to the sitting (while not being questioned) defendants. On the other hand, the judges' authority is first conferred on them by law. Their sitting is rather the expression of their more "comfortable" position in relation to that of the defendant, than it would be a spatial expression of superiority/inferiority as in the guard/defendant dyad. Still, even the judges' position is not void of such spatial connotations: the chief judge in Sintra, for example, is seated in an armchair which is a little bit higher than that of the assistant judges (who are all seated higher than the other parties to the case), and which is furthermore equipped with a headrest, adding to the judge's comfort.

Ball has emphasized the importance of a courtroom's stage-like physical features, pointing out that "that their absence may raise doubts about whether a court which lacks a properly theatrical aspect is really a court at all". The absence of "courtlike features from the place in which a prisoner was convicted for contempt of court", for example, was enough to see the defendant's conviction overturned in *Thompson vs. Stahl*, as Ball relates.[30] Evans, in his work on the "Theatre of Deferral" of the medieval Inns of Court, evokes the "extraordinary meaning" conferred on ordinary space by the Inn's architecture, which provided a "ritual framework" for the "revelation" of law, inducing an "experience of displacement" in the visitor and provoking an identification of the Inns with law itself.[31] Concomitantly, Mulcahy has emphasized the growing importance of architecture in modern legal proceedings, which would partly "undermine" the significance formerly given to ceremony and ritual for "marking out specific spaces as dedicated to law".[32]

As mentioned earlier, modern Portuguese and German criminal trial courts, notwithstanding their common inquisitorial orientation and history, differ slightly in their

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spatial layout. Basically, German courts could be described as two-tiered and Portuguese courts as three-tiered. The only physical barrier in a German courtroom is between the audience and the court "stage", which includes separate benches for the judges, the prosecutor and defendants/lawyers, in a rectangular alignment. In Portugal, the defendant's place is not to the side (where his lawyer is seated), but within a kind of elongated rectangular dock delimited by a barrier, situated more or less in the middle of the courtroom. The visitors' area, unlike in Germany, is itself not delimited from the courtroom as a whole, and there is only one public entrance for defence lawyers, defendants (who are not on remand) and the audience alike. The defendant's dock thus divides the room visually (and physically) into three separate areas: the "public" area (where the visitors are seated), the defendants' area, and the "court" area proper (which comprises the seats for judges, prosecution and defence).

The physical separation of the Portuguese defendant is not only a visible expression of the fact that the trial deliberates *on* (and not with) him, it also hinders the defendant, very effectively, from communicating with his lawyers. In theory, defence lawyers should communicate with their defendants before the trial actually starts, either in the lawyer's office or, in the case of remand prisoners, in jail. In practice, when defendants do not have a privately contracted lawyer but are defended by a court-appointed lawyer (the great majority of cases), consultation between a defendant and his lawyer is often reduced to a minimum, or even non-existent. In the case of remand prisoners, lawyers sometimes ask the prison guards the "favour" of being allowed to talk to their defendant "in passing", that is, when the defendant steps out of the door of the adjoining room where he waits to be let into the courtroom. Or, alternatively, they take the opportunity when the court sitting ends to talk to the defendant over the barrier of the defendants' area (in the case of remand prisoners) or in the corridor in front of the courtroom.

The defendant is thus in a quite isolated position in the midst of a trial of which he is, after all, the *raison d'être*. As a matter of fact, he is far from being the leading actor in his own cause. The separation of defendants from their counsel in Portugal resembles the British case where, according to Mulcahy, defendants became increasingly isolated from their counsel in the course of the early 19th century, when the "courtroom contest became strikingly more adversarial".[33] The Portuguese defendant, after having been identified, *sub poena*, at the beginning of his examination, soon transitions into a state of near namelessness. Silently watching the proceedings from within the enclosed defendants' area, he resembles a bystander of the proceedings more than a party to his trial. Judges, the prosecutor and witnesses will refer to him as "the defendant" or even as "the person" ("*o indivíduo*", in Portuguese). Or

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else, when referred to by his name, only his forename is mentioned, like, for instance "Mr. José" or "Mr. Pedro" (cf. Carlen's note that the defendant at magistrates' courts "too often becomes just 'this man', unentitled, 'Smith'").[34] Only his lawyer will usually insist on calling him by his family name, using the form of address that would be considered correct outside the confines of court ("Mr. Santos", etc.).

While Huizinga affirms that the "playful" and "contending" nature of judicial life continues to manifest itself in today's lawsuit, characterizing courts as spaces "where the customary differences of rank are temporarily abolished" and within which whoever steps inside is considered "sacrosanct for the time being", Mulcahy argues that the arrangement of the courthouse has become "increasingly hierarchical", contradicting the advance of social ideals of democracy.[35] As a matter of fact, the hierarchization of court actors and the "incarceration" (Mulcahy)[36] of the defendant in the modern dock are both clearly evident in Portuguese criminal courts. Modern trial procedures, from the point of view of the defendant, meet a number of conditions for what Garfinkel has named "successful degradation ceremonies",[37] exacerbated by current court design standards.[38] I want to suggest, however, that the role of defendants in criminal trials is better understood by focusing not on the ways he/she is being symbolically "diminished" in relation to other court actors, but on how his/her position in trial represents the *liminal standing* of the defendant in relation to society at large.

Though it is fair to say that judges "about to administer justice step outside 'ordinary' life as soon as they don wig and gown", as Huizinga remarks,[39] they do not do so more than, say, the chimney sweeper. Their social standing and their relation to society as a whole do not change during or as a consequence of the trial. While wig and gown confer on them the insignia of authority within the courtroom, they enter the law courts as judges and leave them as such. Not so defendants. A defendant may enter the court as a free person, and leave it as a convicted criminal. Or he may attend the trial as a remand prisoner and leave the courtroom as a free person. As it were, this is what most proceedings at the grand criminal court of Sintra were all about: sending a defendant to or releasing him from prison. What is being judged is thus not only the social standing of the defendant (guilty vs. innocent, sentenced vs. acquitted, "good guy" vs. "bad guy") but his *belonging* to society itself. Being sent to prison, notwithstanding all efforts eventually undertaken for the purpose of his rehabilitation, he will be, at least temporarily and as a consequence of his infraction of social norms (if we consider, for the moment, legal norms to be representative of social norms), ostracized from society, behind bars.

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From within this perspective, we can interpret the defendant's spatial position in the criminal trial as an expression of his status of liminality, that is, his betwixt-and-between position in relation to the two poles of the court's imminent verdict: left within/readmitted to or expelled/kept away from society. The enclosed rectangle of the defendants' area becomes a *liminal space*, within which the defendant is considered neither part of nor segregated from society. It is the "inquisition" by the court's judge that will decide how the defendant's in-between status will be resolved: either he will be allowed to leave this liminal space through the front door of the courtroom, or else forced to leave through the side entrance where the prison guards are already awaiting him. Hanson, in her study on English law court architecture, has likewise tied the discrete and segregated territories of the courtroom to the "rite of passage" to which a defendant is submitted to, "separat[ing] him or her in custodial space" until being either "reincorporated into society or expelled and re-categorised as a criminal".[40]

As the presence of evidence that a suspect has committed an offence which may result in more than five years of imprisonment is a sufficient condition for remanding him/her in custody,[41] most defendants at the Portuguese grand criminal courts (responsible precisely for trying offences which may result in more than five years of imprisonment) enter the courtroom as remand prisoners. Pre-trial custody being equivalent to, as Pakes and others have noted, "the incarceration of innocent people",[42] the social standing of these defendants is liminal only under the law (that is, on paper). In the public trial (in contrast to the invisible realm of prisons), symbolic action must thus be taken to restitute to the prisoner, at least formally (and visually), the status of a "real" defendant, that is, a person accused (an *arguido*, as defendants are called in Portuguese) but yet to be convicted (or acquitted). Consequently, the Portuguese code of criminal procedure provides that the prisoner-defendant attends the trial "as a free person",[43] that is, relieved of his handcuffs. He will not be allowed to leave the liminal space of the dock, however, until his trial has come to an end, when he will either be handcuffed again (and sent back into confinement) or allowed by the judge to continue to "ply his trade" ("*ir a sua vida*"), possibly taking along well-intentioned words of advice or measures of probation.

Justice as a performative act

In correspondence with this "horizontal" liminality of the accused within the defendants' area of the courtroom, we could interpret his standing up and sitting down as a "vertical"

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expression of his liminal status. The unstable, upright position of the defendant during examination in fact corresponds to his still volatile situation as an *arguido*. As mentioned, judges often make an effort *not* to allow the defendant to stabilize himself physically. During long examinations, defendants frequently seek to support themselves by holding on to the railing of the barrier. However, even elderly defendants are forced to remain standing while being questioned. As the examination goes on, the betwixt-and-between position of the *arguido* becomes physically noticeable as, given time, he often begins to sway from one side to the other, having difficulties keeping a "model" upright posture. Curiously, occasionally it happens that a defendant who has been "forgotten" by the judge and left standing after the initial questioning, is told to take a seat when the "atmosphere" of the trial clears (for instance, when the judge, as consequence of a witness's statement, suddenly seems to believe in the assertion of innocence of the accused).

Assuming that the position of a defendant's hands is in fact prescribed by a hidden script of the criminal trial, and that his physical standing, vertically and horizontally, may be considered an expression of his liminal social standing, do these details tell us something about the way justice works? Is it possible to attribute a meaning to such formalities of criminal procedure that goes beyond the simple assertion that trials resemble carefully rehearsed theatre plays? What I suggest here is neither taking the performative elements of criminal justice as a disguise for power relations (to the contrary, as I tried to exemplify above, they are rather expressions of them), nor identifying the outward forms of judicial trials with the legal system itself. My argument is that the performative elements of criminal trials, that is, precisely the seemingly superficial details of how trials are enacted in courtroom practice, form an important part in the *making of justice*, not only in the sense of dispensing sentences, but in producing and reproducing a legal system of (criminal) "truth".

Comparing criminal trials to theatre performances, and the open and hidden rules behind them to a script, does not mean denouncing criminal trials as the result of an arbitrary acting out of a troupe of professional juridical actors to the detriment of amateur defendants. The majority of all the rules that govern criminal trials are made explicit (in inquisitorial systems) in codes of criminal procedure, and the repertoire of all formally conceivable trials is prescribed by the penal code in force at a certain point in time. Rather than enumerating theatrical elements of criminal trials and identifying the uncoded parts of trial scripts, reasoning about the performative character of justice seeks to relate the *process* of "saying the law" (Latour)[44] to the *constitution* of criminal "truth", in other words, the definition of what

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kind of social behaviour should be taken – by force of a court's decision and validated by a public (if an imaginary one) – as "wrong" or "right".

Foucault has repeatedly pointed to the importance of procedure for the production of what he names "penal truth".[45] Although Foucault's analysis mainly refers to the pre-modern "state of justice",[46] his deliberations on the "hermeneutic function" of the judicial "master of truth" still apply to the modern trial, and Foucault has himself emphasized the continued dependence of law on "discourses of truth".[47] As Foucault notes, the "function of the public torture and execution was to reveal the truth […]. A successful public execution justified justice, in that it published the truth of the crime in the very body of the man to be executed".[48] Though the modern defendant, in most jurisdictions, is no longer subjected to an excruciating "liturgy of punishment" to "sign" the court's verdict by his/her confession and the marks left behind on the tormented body,[49] the defendant's body still plays an important part in the validation of criminal procedure. One could argue, for instance, that the humble or repentant bodily postures an *arguido* is expected to produce (in contrast to, for example, the rather defiant, self-assured postures of the prison guards) are likewise meant to visually acknowledge the court's authority to deliver a sentence over the person accused and thus the validity of the sentence itself.

In what follows, I will outline some possible paths towards a "performative" view on criminal justice. For that purpose, I will distinguish two meanings of the term "justice": I will refer to the capitalized "Justice" as the ensemble of abstract ideas of justness, rightness, etc., as, for instance, symbolized by the figure of "Lady Justice". With "justice", to the contrary, I mean the actual, concrete praxis of enacting Justice by the judiciary, that is, the act of administering, dispensing, pronouncing, etc. Justice. From a performative point of view then, Justice is being performed (enacted) by justice. More importantly, I suggest that the performance of Justice is, to a certain degree, *constitutive* of the notion of Justice itself. That is, the judicial praxis of Justice is performative, in my understanding, also in the sense that "it contributes to the construction of the reality that it describes", to draw on Callon's definition of performativity.[50]

Judith Butler's early writings offer an intriguing discussion of gender performativity that also proves useful for the conceptualization of the justice/Justice dyad. Butler affirms that notions of gender are only real to the extent to which they are performed as such. Gender, according to Butler, is not expressive but performative: it does not exist prior to its enactment. Gender performance *constitutes* the gender identities it apparently reveals. Gender, Butler

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notes, appears to the "popular imagination as a substantial core which might well be understood as the spiritual or psychological correlate of biological sex". If one considers gender attributes as performative, however, then "these attributes effectively constitute the identity they are said to express or reveal".[51]

Applying Butler's distinction between ideas of gender and gender performance to the realm of Justice (leaving aside the question of gender itself in the "making" of Justice), we may formulate our basic assumption in the following way: criminal justice does not simply enact an a priori existent Justice, but it constitutes Justice (notions of justness etc.) through the *performance* of Justice (e.g. through the acts of criminal courts). It is thus at the same time expressive of Justice as it is constitutive of it. To distinguish "between expression and performativeness", Butler stresses, is crucial in the realm of gender notions: if gender acts are considered performative, "then there is no preexisting identity by which an act or attribute might be measured; there would be no true or false, real or distorted acts of gender".[52] Correspondingly, in as much as we consider the acts of criminal justice as performative, we would have to admit that there are no true or false, no right or wrong judicial acts. The axiomatic postulation of a just Justice would thus be revealed, to use Butler's words, "as a regulatory fiction", similar to the postulation of a true gender identity.[53]

Again, this is not to suggest that judicial acts are arbitrary, in the sense of not being bound to the societal consensus of what is, and what is not considered "just" in the common-sense usage of the word at a certain point in time. As Bourdieu has noted, the judgments of a court belong to "the class of acts of naming or of instituting". They are "magical acts" in so far as they have "the power to make themselves universally recognized". But, as Bourdieu himself cautions, law's power to "create" the social world is limited by the fact that it is the social world which first creates the law.[54] From a performative perspective, it is precisely the totality of all judicial acts which enacts (establishes, constitutes) Justice, and thus guarantees that the individual act is tied to the general notions of justness which underlie the concept of Justice.

Butler's view of gender (re)production may help again to make this distinction more palpable: gender acts, Butler says, are acts that have "been going on before one arrived on the scene". The history of gender act performances creates a script which "survives the particular actors who make use of it, but which requires individual actors in order to be actualized and reproduced as reality once again". Butler compares the restriction imposed on the performances of the gendered body to theatre scripts that "surviv[e] the particular actors who make use of it, but which requires individual actors in order to be actualized and reproduced

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as reality once again".[55] Similarly, Justice has to be actualized and reproduced by individual acts (e.g. individual criminal trials), which are nevertheless bound to the corpus of scripts "written" by acts performed in the past (the jurisprudence of criminal law). As guidelines for the actual performance of a criminal trial, the penal code, the criminal code of procedure and the unwritten rules that direct the enactment of a trial form a framework for every single performance, that is, every single judicial act.

Curiously, Bourdieu has, from a quite different perspective (that of the logic of practice), pointed likewise to the way the body "enacts the past": bodily performance, Bourdieu affirms, does not "represent" (imitate) past bodily experiences/postures but *enacts* the past by way of being. Body postures *recall* past states of mind. They are "values given body", that is, they embody "the most fundamental principles of the arbitrary content of a culture in seemingly innocuous details of bearing or physical and verbal manners".[56] Drawing on Bourdieu, the bodily postures taken by the defendant in court (spontaneously or at the judge's behest) may thus be seen to be recalling a whole universe of social inferiority experienced by the accused in the course of life or, for example, as a remand prisoner or a suspect at the police station.

Bourdieu compares the procedural aspects of justice to a ritual, designed "to intensify the authority of the act of interpretation" and thus evidence "that the decision expresses not the will or the world-view of the judge but the will of the law or the legislature".[57] I would suggest, though, that the ritual aspects of trials, manifest pre-eminently in the unwritten scripts that govern criminal procedure, do more than assert the authority of the court and the legitimacy of its sentences. While, undoubtedly, they are, at the same time, expressions and enactments of power relations (Bourdieu's main concern), they are also constitutive of the notion of Justice itself. The performance of the judiciary, as prescribed by the codified and the unwritten rules of a criminal trial's script, cannot be separated from the notion of Justice. Justice and justice depend on each other, and generate each other, mutually: there is no Justice without the acts of justice. However, like gender acts, the acts of justice appear to be not constitutive but only expressive of Justice. They *conceal* their genesis, as Butler names it (for the case of gender) through "the credibility of [their] own production".[58]

To link the sitting or standing of a defendant at the criminal courts of Lisbon Metropolitan Area to the *making* of Justice itself (that is, to the making of notions of "penal truth" as Foucault would call it) may, arguably, seem far-fetched. If we look at the ensemble of procedures that make up a criminal trial, there is, of course, a difference in the way the various rules in effect at court impact on the making of a sentence. While the penal code

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(defining the universe of possible trials) has certainly the most immediate say in defining criminal truth, the importance of codes of criminal *procedure* must not be underestimated. Codes of criminal procedure are central for defining the legal "standing" of a defendant and, consequently, the outcome of many criminal processes. As scripts, they resemble the "hidden" rules that govern the behaviour of court actors and, as mentioned, may come to codify even seemingly subsidiary rules (like stating that visitors to Portuguese courts should "sit down with their heads bare").[59]

Notwithstanding their different functions and significance within the process of truth-finding (and truth-making), both codified and uncodified rules intermingle and interact in the making of Justice. The behaviour of the defendant, that is, his compliance with the (in that case mostly unwritten) rules of the trial's script, for instance, at times clearly influenced the very outcome of the trial at the grand court of Sintra. In particular, convincing performances of repentance seldom missed being positively noted by the prosecutor, and could result in a sentence that would send a defendant back into society (on probation) instead of sending him for years behind bars. Infringements of behaviour-related scripts, to the contrary, were seldom overlooked. And even within the more informal German criminal court praxis, I witnessed a female juvenile defendant (the mother of a young child) being sentenced, on the spot, to one week of *Ordnungshaft* (imprisonment for contempt) for having repeatedly disturbed the trial's progression by talking to her co-defendants.

Conquergood has noted the great importance of formally sticking to the script for attaching an impression of justness to the execution of death sentences. Protocols "of civility and the pretense of courtesy", Conquergood states, serve as a veil to mask the "real violence of state killing". But Conquergood also points to the "dynamic performance genealogy" of execution scripts in the United States, which have "undergone profound shifts in feeling, form, and dramaturgy" over the course of time. Ritual performance (like the "interlocking rituals of criminal punishment"), Conquergood affirms, "always plays with, and plays off and against, the performance genealogy that it recites".[60] The relation Conquergood suggests between the (execution) script and its enactment is thus analogous to Butler's analysis of gender performance. Just as a gender-script "may be enacted in various ways", as Butler claims, "so the gendered body acts its part in a culturally restricted corporeal space and enacts interpretations within the confines of already existing directives".[61] And, much as Conquergood stresses the importance of execution scripts for "uplifting" state killings to "a sacred plane of performative metaphors, images, and symbols", so Butler denounces the performative mechanisms that make the "authors of gender become entranced by their own

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fictions whereby the construction compels one's belief" in necessity and naturalness of gender notions.[62]

But even if notions of Justice are *fictĭo* (made), they are not fictitious. They are "real" not only in terms of the factuality of criminal proceedings, but also in relation to the efficaciousness of judicial pronouncements. Whenever a defendant is sentenced, the deed for which he is sentenced is socially reaffirmed as "wrong", as much as the sentence itself is reaffirmed as "just". To sentence a suspected murderer to death not only reaffirms (private) murder as crime, it also renders (state) murder, under certain circumstances, "just". The impression of justness, deduced from the script-compliance of judicial proceedings, thus does more than veil a "state killing", as Conquergood calls it. If one considers the non-existence of any "natural" or transcendental criminal norms, it is ultimately the "felicitous" (Austin) performance of Justice (that is, "felicitous" justice) which *makes* a certain judicial act (as much as a certain social behaviour) "just" or iniquitous – even a death sentence.

Geertz once advocated the premise "that legal thought is constructive of social realities rather than merely reflective of them" as a starting point for the comparative study of law. The view that "legal facts are made not born", that is, socially made "by everything from evidence rules, courtroom etiquette, and law reporting traditions, to advocacy techniques, the rhetoric of judges, and the scholasticisms of law school education", as Geertz writes, suggests it is worth taking a close look at the procedural enactment of notions of Justice.[63] The point is not to discredit judicial proceedings as merely theatrical acts from a functionalist perspective, but to give meaning to them within a complex, entangled framework of procedural and social construction of notions of justness. Particularly in the confines of the courtroom, there is a marked willingness *not* to see in the criminal trial a theatre play, staged with the help of professional and lay "actors". Ball, for instance, observed a "willing suspension of disbelief" among participants in judicial proceedings, comparable to that of playgoers who do not see just "an actor and a bare stage when presented with Macbeth and Birnam wood come to Dunsinane".[64] As it happens, one of the judges of the grand criminal court of Sintra, irritated by a lawyer's numerous applications to produce evidence, loudly exclaimed "We are not in the theatre!" While Huizinga compares the judges' wigs to the "dancing masks of savages", Bourdieu sees the "relatively weak tendency of the legal habitus to assume prophetic poses and postures" and a judge's inclination "to prefer the role of lector, or interpreter" as a strategy of taking "refuge behind the appearance of a simple application of the law", concealing the fact of "judicial creation".[65] Discussing the performativity of criminal justice, particularly from an empirical point of view, is not meant to impute base motives to the

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judicial system, however. But, just as laws have to interpreted, trials have to be performed and, this being so, a review not only of their final sentences but also their apparently outward forms may help to give insights into the tortuous paths of Lady Justice.

Notes

[1] Johan Huizinga, *Homo Ludens: a study of the play-element in culture*, (London: Routledge, 1980), 82; 76.

[2] Milner S. Ball, "The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater," *Stanford Law Review* 28, no. 1 (1975): 100; 86.

[3] John E. Simonett, "The trial as one of the performing arts," *Amercian Bar Association Journal* 52 (1966): 1145.

[4] Ball, "The Play's the Thing," 82.

[5] Dwight Conquergood, "Lethal Theatre: Performance, Punishment, and the Death Penalty," *Theatre Journal* 54, no. 3 (2002): 343.

[6] Pat Carlen, "Remedial Routines for the Maintenance of Control in Magistrates' Courts," *British Journal of Law and Society* 1, no. 2 (1974); Pat Carlen, "The staging of magistrates' justice," *British Journal of Criminology* 16, no. 1 (1976); Nigel Eltringham, "Spectators to the Spectacle of Law: The Formation of a 'Validating Public' at the International Criminal Tribunal for Rwanda," *Ethnos* 77, no. 3 (2012).

[7] David Evans, "Theatre of Deferral: The Image of the Law and the Architecture of the Inns of Court," *Law and Critique* 10, no. 1 (1999); Clare Graham, *Ordering law: the architectural and social history of the English law court to 1914*, (Aldershot, Hampshire: Ashgate, 2003); Julienne Hanson, "The architecture of justice: iconography and space configuration in the English law court building," *arq: Architectural Research Quarterly* 1, no. 04 (1996); Linda Mulcahy, "Architects of Justice: the Politics of Courtroom Design," *Social & Legal Studies* 16, no. 3 (2007); Linda Mulcahy, *Legal architecture: justice, due process and the place of law*, (New York: Routledge, 2011); Katherine Fischer Taylor, *In the theater of criminal justice: the Palais de justice in Second Empire Paris*, (Princeton, N.J.: Princeton University Press, 1993).

[8] While I hope that complementing my observations from Portugal with isolated references to German trials (and other authors' findings, mainly from England) will help to elucidate the diversity in the ways criminal trials are staged, the main reason for having chosen both jurisdictions is that I know them at first hand.

[9] See Judith Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory," *Theatre Journal* 40, no. 4 (1988).

[10] Fieldwork for this research was undertaken during three months each at the criminal courts of first instance of Amadora, the courts of first instance and appeal of Sintra (both near Lisbon, Portugal), and the local and regional courts of Berlin, Germany.

[11] Código de Processo Penal (CPP), DL 78/1987, Art. 329. All quotes originally in Portuguese have been translated by the author, unless otherwise stated. As nearly all of the defendants I encountered in Sintra, Amadora and Berlin were male, I will henceforth use the masculine gender form.

[12] Cf. Carlen, "The staging of magistrates' justice," 52.

[13] CPP, Art. 361.

[14] Ibid., Art. 343(1).

[15] Ibid., Art. 64.

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[16] See Mulcahy, *Legal architecture*, 60.
[17] Carlen, "The staging of magistrates' justice," 50.
[18] Mulcahy, "Architects of Justice," 397.
[19] Mulcahy, *Legal architecture*, 52; 70-71.
[20] Hanson, "The architecture of justice," 56-57.
[21] CPP, Art. 324.
[22] John L. Austin, *How to do things with words*, (Cambridge, MA: Harvard Univ. Press, 1975).
[23] CPP, Art. 91.
[24] Carlen, "Remedial Routines," 103; 107.
[25] Conquergood, "Lethal Theatre," 360; 361.
[26] Carlen, "Remedial Routines," 104; 116; 111.
[27] Carlen, "The staging of magistrates' justice," 49; 53.
[28] Roberto DaMatta, *Carnavais, malandros e heróis: para uma sociologia do dilema brasileiro*, (Rio de Janeiro: Rocco, 1997), 96.
[29] Carlen, "Remedial Routines," 104; Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38, no. 7 (1987): 828-29.
[30] Ball, "The Play's the Thing," 84.
[31] Evans, "Theatre of Deferral," 7; 17.
[32] Mulcahy, *Legal architecture*, 29.
[33] Ibid., 59; 63.
[34] Carlen, "The staging of magistrates' justice," 54.
[35] Huizinga, *Homo Ludens*, 76-77; Mulcahy, *Legal architecture*, 38.
[36] Mulcahy, *Legal architecture*, 10.
[37] Harold Garfinkel, "Conditions of Successful Degradation Ceremonies," *American Journal of Sociology* 61, no. 5 (1956).
[38] See Mulcahy, *Legal architecture*, 78.
[39] Huizinga, *Homo Ludens*, 77.
[40] Hanson, "The architecture of justice," 57.
[41] CPP, Art. 202.
[42] Francis J. Pakes, *Comparative criminal justice*, (Cullompton, UK: Willan Pub., 2010), 64.
[43] CPP, Art. 325.
[44] Bruno Latour, *The making of law: an ethnography of the Conseil d'Etat*, (Cambridge, UK; Malden, MA: Polity, 2010), 53f.
[45] Michel Foucault, *Discipline and punish: the birth of the prison*, (New York: Vintage Books, 1979), 38.
[46] Cf. Alan Hunt and Gary Wickham, *Foucault and law: towards a sociology of law as governance*, (London: Pluto Press, 1994).
[47] Michel Foucault, *The history of sexuality*, (New York: Pantheon Books, 1978), 67; Michel Foucault, "The Order of Discourse," in *Untying the text: a post-structuralist reader*, ed. Robert Young (Boston: Routledge & Kegan Paul, 1981), 55.
[48] Foucault, *Discipline and punish*, 44.
[49] See ibid., 38; 34.
[50] Michel Callon, "What does it mean to say that economics is performative?," in *Do economists make markets? On the performativity of economics*, ed. Donald A. MacKenzie, Fabian Muniesa and Lucia Siu (Princeton: Princeton University Press, 2007), 316.
[51] Butler, "Performative Acts," 528.
[52] Ibid.
[53] Ibid.
[54] Bourdieu, "The Force of Law," 838; 839.

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[55] Butler, "Performative Acts," 526.
[56] Pierre Bourdieu, *The logic of practice*, (Stanford, CA: Stanford Univ. Press, 1992), 73; 35.
[57] Bourdieu, "The Force of Law," 828.
[58] Butler, "Performative Acts," 522.
[59] CPP, Art. 324.
[60] Conquergood, "Lethal Theatre," 360; 343.
[61] Butler, "Performative Acts," 526.
[62] Conquergood, "Lethal Theatre," 347; Butler, "Performative Acts," 522.
[63] Clifford Geertz, *Local knowledge. Further essays in interpretive anthropology*, (New York: Basic Books, 1983), 232; 173.
[64] Ball, "The Play's the Thing," 108.
[65] Huizinga, *Homo Ludens*, 77; Bourdieu, "The Force of Law," 823.