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**How to Cite:** Popić, T 2019 Traces of the Past and Social Realities: Late Medieval Court Records from Dalmatian Cities. *Open Library of Humanities*, 5(1): 33, pp. 1–17. DOI: <https://doi.org/10.16995/olh.368>

**Published:** 25 April 2019

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## NEW APPROACHES TO LATE MEDIEVAL COURT RECORDS

# Traces of the Past and Social Realities: Late Medieval Court Records from Dalmatian Cities

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Based on research of archival material from Dalmatian cities, the article aims to provide a framework for understanding the circumstances in creating medieval court records. The key questions are: why were records simplified, and what was their purpose? In order to answer these questions, the author relies on Niklas Luhmann's study concerning the legitimization of social order, and further studies by James C. Scott on power relations and the simplification of social reality. Considering the key questions from these perspectives shows that court records offer only one version of reality by prioritizing information that was of some practical value to authorities.

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This article aims to provide one possible framework for understanding the circumstances which underpinned the creation of late medieval civil court records, taking as its examples the Dalmatian cities of Zadar and Trogir. The discussion addresses the fact that court records from these cities appear in a simplified and pragmatic form and that certain disparities exist between the records and the events that actually took place in trials. The article addresses several key questions, including: why were notaries selective in their recording of information, and what determined their selections? Why did notaries record only procedural steps and other information (i.e. names, dates, replacements of judges) on which litigation directly depended to function? Why are court records devoid of detail concerning motives for initiating litigation, as well as the complexity of social context, human relations, strife, hostility, envy, hatred and processes of negotiation? All of these were undoubtedly present in the process of litigation, but did not make it into the record itself. In order to elaborate on these issues for the case of late medieval Dalmatia, I will draw from Niklas Luhmann's work on legitimizing social order and on James C. Scott's studies of power relations and the simplification of social reality.

A long-standing trend in European historiography has seen a shift in focus away from courts as agents for resolution of disputes through concepts of infrajudicial, extrajudicial and parajudicial practices of settling disputes (Dean, 1997; Garnot, 1996; Garnot, 2000; Kuehn, 1987; Kuehn, 1991; Lonza, 2002). This article is mainly focused on power-holders and judicial institutions, as they were primarily responsible for the creation and maintenance of written records. By pursuing this focus, I hope to show what medieval court records represent and to explore some methodological concerns that surround them. In words of Simon Roberts:

The historian who wishes to feel his way back to real life from the court record must therefore know a lot about the way in which a court recruited and organized its business before he can feel sure what the trouble really was (1983: 22–23).

Along with a few examples from other Dalmatian cities, the article mostly deals with court records from Zadar from the second half of the fourteenth century. This period saw not only a simplification of surviving judicial records, but also major changes in the organization of the local government and judiciary. These are the result of political changes based on 1358 Zadar Peace Treaty, which saw Venice withdraw from all Dalmatian cities and the rule of the Hungarian King Louis I of Anjou re-established. This change resulted in greater autonomy and freedom of action for the cities in question. Developments in Zadar were reflected not only in the ascendancy of the local political elite to a position that was nearly equal to the king's representative in the city, but also in the fact that local authorities effected considerable changes in the judicial system by employing professional lawyers from Italy. In 1361, a doctor of Roman law named Anthony of Marostica (a town near Vicenza in northern Italy) arrived in Zadar. His influence in shaping the new judicial system and reorganizing the courts' administration is evident in the creation of separate civil and criminal courts, accompanied by new structure of court registers, and, most importantly for the present discussion, enforcing a new means of handling disputes through the use of documents. This process was accompanied by significant investment by local authorities in administrative apparatus, resulting in each court acquiring its own notary.

Working as a civil court judge in Zadar, Anthony soon realised that because detailed records were not being kept, it was difficult to monitor the status of ongoing disputes and to determine whether legal procedure was being followed. Court records produced prior to his arrival in Zadar in 1361 show there was no practice of systematically recording procedural steps in court cases: the records are generally messy with numerous crossings-out and subsequent insertions. Notes on procedural steps are rare, but, if recorded at all, were written down by notaries in the form of short marginal entries. From 1361 this practice completely changes. Often incomprehensible marginal entries disappear and notaries began to produce more detailed accounts of procedural steps as a matter of course. This change is best

tracked in court records from a transitional period which points to an initial inability of court personnel to assess how much space was needed for each case. In a number of places, the notary occasionally leaves less space for an entry than actually needed and starts to note further hearings on pages that were already reserved for some other case. One civil court record from the second half of the fourteenth century will illuminate this new practice of registering cases in court records.

On 13 August 1386, pharmacist and spice merchant Colanus, son of the late Guido, brought a suit to the Zadar civil court against testamentary executors of the draper Luca, son of Leon, regarding a house and a vineyard (CMC, vol. 2, fasc. 7, fol. 48–49). On 12 December 1379, Colanus sold to Luca his house in Zadar for 120 gold ducats and his vineyard in the village of Petrčane (near Zadar) for 100 gold ducats. Zadar's notary, Peter Perençanus of Padua, composed two separate contracts concerning these transactions. Shortly afterwards, on 21 December 1379, two further contracts were drawn. In these, Luca promised to return both properties to Colanus, but only if 220 gold ducats were repaid within a period of one year. The impression here is that the aim of these transactions was not a simple sale of property, but so that Colanus could receive a loan by means of mortgaging two properties. The premise is confirmed by a new contract made on 4 October 1380. Since Colanus could not pay off the loan within one year, he made another agreement with Luca. Under this new agreement Luca rented both properties to Colanus for a period of three years and in return Colanus had to pay 20 gold ducats per year as rent. Although concealed behind the rent agreement, this contract clearly reveals the payment of interest on a loan. On the same day, one more document was drawn up. This one shows that Luca promised once again to return both properties to Colanus in the event that he was able to repay 220 gold ducats within three years. When Luca died, and his executors intended to sell both properties, Colanus was forced to bring suit to court against Luca's executors.

Following the lawsuit, the record reveals several notes on the court's procedure entered by the notary. The first shows that the judges ordered a deadline for both parties to submit evidence on their capacity to act as litigants. After this step had been

taken, the judges confirmed this capacity to sue and to be sued, and thus litigation had begun. The judges gave litigants a limit of five days to submit the evidence of their claims. This was repeated one more time, but as the litigants had already submitted all of their evidence after the first call the judges quickly concluded the litigation by ruling in favour of Colanus.

This example offers a view of Zadar trial records in civil disputes during the second half of the fourteenth century, one which is similar to other Dalmatian cities of the time. Disputes were entered in the court registers yet noted only the procedural steps conducted during the court proceedings. These notes pertain to: court-assigned deadlines for defendants to acquaint themselves with lawsuits and to hire lawyers; defendants not responding to court summons; and deadlines for submitting evidence about individuals' legal capacity to act as litigants (and the court's confirmation of this capacity), following which litigation could continue. These procedural notes are followed by records of litigating parties' answers about the subject of a dispute and by deadlines for submission of evidence supporting their claims. As well as this, court notaries also recorded all of the evidence submitted to courts for consideration. Finally, notaries would register anything that could affect the legitimacy of litigation, for example, the replacement of a judge due to conflict of interest. This information was added by notaries to the court registers. Notaries reduced the verbal statements of the judges, litigants, their legal representatives and lawyers to a simplified written form. Such practice is also noticeable in the written witness depositions, which were generally more difficult to abstract or reduce into a simple predefined form (Pegg, 2001: 57–62).

To return to the questions posed earlier regarding the simplification of civil court records, we should start with the fact that procedural law was becoming an increasingly important factor in the resolution of disputes during the High Middle Ages. Throughout the medieval period, it was considered increasingly important to conduct court trials following a predefined procedure, because any potential irregularities could result in rejection of lawsuits. The increased conviction in the merits of procedural law saw the establishment of Romano-canonical procedure in

European ecclesiastical and secular courts, and a proliferation of legal discussions and treatises on court procedure between the twelfth and fourteenth centuries (Pennington, 2016: 125–59).

The legitimacy of court proceedings thus depended on implementing certain norms of procedural law and authorities had their own interests in this process. Luhmann's work on legitimizing social order through legal procedure explores this notion in depth. His key contention is that the purpose of legal procedure is to offer a means of producing legitimate and binding decisions (Luhmann, 1983: 41). Luhmann's understanding of procedure is not limited to procedural law, however. It also takes into account several social mechanisms that helped to achieve this goal, including the differentiation of court proceedings, the right of litigants to make decisions independently during court proceedings, the maintenance of uncertainty in the outcome of a given dispute and the public resolution of disputes (Luhmann, 1983: 38–135).

By differentiating court proceedings, Luhmann (1983) claims that court proceedings can be distanced from social aspects of a dispute. This offers a means of controlling social aspects of the case and reduces a dispute to a specific number of controllable scenarios. Zadar's surviving late medieval court records reveal this kind of process in action, which saw the elimination of all non-relevant legal and social factors from the court proceedings and court records.

A further case from Zadar's civil court illustrates this practice. On 10 March 1404, Radacius, son of late Paulus, brought a suit against George, son of late Radoslav (CMC, vol. 5, fasc. 10, fol. 193–193'). From the record of the suit we learn that the two men had earlier founded a trading company (*societas*) into which Radacius had invested money. However, George had not fulfilled his obligation to repay the capital and the profit to Radacius at the end of their trading venture. This contract was a causal one and as any such explicitly stated that the parties must repay the capital and pay out the profit obtained. Since George had not fulfilled his obligation, both agreed to make an additional contract. This was signed on 15 November 1403. Based on this second contract, George had to pay Radacius 240 libras of small Venetian

denars by Christmas of that year. This second contract is an example of an 'abstract' contract which does not state the basis of the obligation but merely the existence of the debt and the deadline for its return. As a result of such abstract contracts, the court and litigants did not have to go into detail on the social context of the debt and could focus on the contractual obligation alone. The creditors were thereby in a better position to win the case, and the litigants and judges saved time and money.

The initiation of litigation on 10 March shows that George had not fulfilled his obligation to Radacius. During the court proceedings, Radacius only filed the second contract from 15 November in the previous year as evidence. As a consequence, the two men's second contract, not the first, was the only relevant evidence in solving the dispute and judges did not have to unnecessarily check the background of the litigants' relationships with one another. They could focus solely on the existence of the debt which was named in by the November 1403 contract. It is clear that this second contract did not contain information on the actual basis of the George's obligations, because the suit was brought to the civil court, not to a commercial court. If the basis of the obligation had been defined in that contract (payment of profits from a joint trade venture), the dispute would be within a jurisdiction of a commercial court and not a civil one.

The right of litigants to independently make decisions during civil court proceedings is another social mechanism identified by Luhmann that created the perception of legitimate and binding sentences (1983: 91–99). Through this mechanism, the court in effect distanced itself from unfavourable outcomes by shifting the blame onto litigants. Litigants could choose how to engage with court proceedings, could determine their own patterns of behaviour and what kind of evidence to submit (Luhmann, 1983: 93–94). For example, litigants could choose their lawyers, whether to respond to court summons or exploit opportunities to delay, which witnesses to pick, what documents to submit and so on.

In Luhmann's theoretical framework, the procedure is also characterised by uncertainty of its outcome (1983: 107–20). Even when dealing with similar disputes and circumstances, different decisions on the part of litigants can guide



the proceedings towards potentially different outcomes. For this reason, Luhmann considers court proceedings as *Verfahrensgeschichte*, that is to say, as a history of adjudication in which every statement or decision made by litigants, their legal representatives, lawyers and witnesses determines the options for the other party, but does not specify what will actually happen (1983: 44–45). The manner in which court notaries distilled events during the court proceedings into a written form represents in this respect only one part of this *Verfahrensgeschichte*, because notaries were noting only those actions that were relevant from a legal standpoint. Uncertainty of a given dispute's outcome is a powerful social mechanism in perceiving sentences as legitimate, because it creates a strong motivation for litigants. This motivation might be hampered by other factors, for example, if judges are biased; in such a scenario, the resolution of a dispute would no longer be uncertain and litigants would lose interest in participating actively in court proceedings. In Zadar's court records, frequent references to the replacement of judges due to conflicts of interest point to a commitment to ensure that individuals entered into litigation with good faith in procedure and thus a high degree of motivation.

Whilst all of these social mechanisms could affirm the validity of sentences on an individual level, the perception of legitimacy had broader impact too. Implementation of these mechanisms in court proceedings created a belief that each sentence was legitimate and binding, and furthermore that the whole judiciary and system of governance itself also was. An important part of this process was making court proceedings public, as it allowed members of the community to observe courts' activities, creating a belief that they could also rely on the judicial system if necessary (Luhmann, 1983: 121–28). And as Luhmann (1983: 123–24) notes, it does not matter whether people really attended court proceedings; it is important merely to create awareness of the institution. This is why courts' activities often took place in the open during the Middle Ages where everyone could observe the manner in which disputes were resolved. In this manner, the court turned into a public stage and court proceedings into a sort of a ceremonial performance for the public. Through each and every court proceeding, the judicial system legitimised itself in a society, and

individuals who did not accept sentences as binding could not expect support from the majority of population. Legitimation at this level can be interpreted as a process of institutionalization in which a society recognises that solutions obtained in court proceedings should be considered as binding. In other words, the perception that sentences should be considered legitimate and binding becomes a part of general social knowledge.<sup>1</sup>

Of course, the fact that legal and social mechanisms create this kind of knowledge does not always mean that individuals come to terms with defeat. Luhmann (1983: 118–20) mentions this problem without elaborating on it in detail. It is entirely possible for an individual to accept a sentence whilst simultaneously expressing dissatisfaction with the court's decision. The question remains as to when dissatisfaction is expressed, and to whom. James C. Scott's study of power relations and interactions between ruling and subordinate social groups is significant in this regard. Scott (1990) examines power relations and interaction between power-holders and subordinates through categories he refers to as 'public' and 'hidden' transcripts. He argues that both ruling and subordinate social groups interact differently with the same phenomena as a result of their respective power relations. Public transcripts represent the discourse of subordinates in communication with rulers, and vice versa (Scott, 1990: 2). Both sides can express vested interests through this kind of interaction. Those in power can adjust their communication with subordinates in order to strengthen or maintain their position, whereas subordinates adjust how they communicate with rulers out of fear of retribution, because of prudence or simply to gain a particular desire (Scott, 1990: 2–4).

On the other hand, hidden transcripts represent a discourse that takes place away from direct observation of the other side and members of the public (Scott, 1990: 4). It consists of speech, gestures or practical actions that confirm, contradict or distort a public transcript (Scott, 1990: 4). The fact that it cannot only contradict but also

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<sup>1</sup> For institutionalization and the concept of social knowledge see Berger & Luckmann (1967). For application of this concept in study of medieval history, see: Ančić (2003); Ančić (2013); Oexle (2001); and Popić (2007).

confirm public transcript suggests that the latter is not necessarily false, and vice versa; it only means that both public and hidden transcripts are shaped for different audiences resulting in different interpretations of reality (Scott, 1990: 5). Through hidden transcripts, subjects criticise government and avoid entering into direct conflict with the ruling class for fear of retribution or their lives (Scott, 1990: xii). On the other hand, hidden transcripts enacted by those in power represent governmental practices and claims that cannot be openly acknowledged (Scott, 1990: xii).

We can apply Scott's model to the question of dissatisfaction with court decisions. Whilst family and friends offered channels for litigants to express discontent, it was harder for individuals to do so to the authorities, who might interpret it as a threat to social order. The only documented instances of dissatisfaction with court decisions are as appeals. But appeals also represent the public transcript, as they took place through a communication process determined by officials. It is therefore hard to determine how dissatisfaction was shaped beyond the direct influence of authorities, because hidden transcripts rarely find their expression in written documents.

Regardless of this, when court records are considered through Luhmann's theoretical framework it becomes clear they represent only one interpretation of events, or only information that was of some practical value to the authorities. They are records of procedural steps which allowed authorities to establish and maintain control over society and reduce the possibility of manipulation by subordinates. Regardless of the wide array of different conflicts, court records had to be kept simple and written to a template, making it possible to reduce a complex situation into a clear and controllable one, and to resolve disputes in order that court decisions should be legitimate and binding.

Another study by James C. Scott offers further points of reflection. Scott (1998: 11) argues that certain forms of knowledge and social control require simplification: shifting the focus of interest to limited aspects of a complex reality makes the subject more susceptible to precise consideration. When it comes to official or government records, one consequence is that they offer highly simplified impressions of a society. According to Scott, this is largely a result of the impossibility of representing

complex realities in written records and authorities' indifference towards it. Until the nineteenth century, state activities are aimed at small number of objectives typically creating more efficient systems of taxation and political control (Scott, 1998: 22–23). Therefore, administrative records do not represent the actual activities of the society, but only one part of its activities that interested the official observer (Scott, 1998: 3).

Scott's study of the simplification of social realities is applicable to a wide variety of medieval records generated by various institutions. An example can be found in notary documents. Medieval notaries acquired knowledge and skills to compose documents through education and practice. They also had different manuals at their disposal, one of the most famous being *Summa totius artis notariae* written by Rolandino de Passaggeri in the mid-thirteenth century. Preparation of notary documents based on predefined templates that covered a wide array of personal and social relations signifies that agreements were written by notaries in a simplified form. In this way, notaries created a routine that allowed them to do their job faster and more efficiently. But people often made use of this practice to conceal their business or settle their disputes faster and more easily. As regards the first case, between Colanus and Luca (CMC, vol. 2, fasc. 7, fol. 48–49), streamlining social relations and business agreements in a specific notarial document blurred the reality behind the legal record. The case shows that several contracts involving a house and a vineyard served as a way to raise a loan and pay the interest by mortgaging the properties and renting them to the debtor. And in order to settle claims faster and more simply in case of a dispute we can mention the above example of a trial between Radacius and Radoslav (CMC, vol. 5, fasc. 10, fol. 193–193') about money debt from a commercial venture and practical advantages in making abstract contracts.

To make a wider point about late medieval court records, Scott's study provides a means to characterise the one-sided and simplified version of reality contained in them. In addition to manuals for drawing up notary records, separate manuals known as *ordines iudicarii* or *libelli de ordine iudiciorum* were also popular in the Middle Ages (Evans, 2002: 91–104; Fowler-Magerl, 1994; Grazia, 1970; Padoa Schioppa, 2002; Vallerani, 1990: 295–98). These manuals offered forms for drafting legal documents

and court records. Notaries were not required to follow the instructions in these manuals in their entirety. They served as a guide or a reminder only, and notaries often adjusted the instructions they found in them according to their needs and their experience in civic administration. But the principle remained the same: the process of simplification allowed notaries and judges to consider a varying range of diverse and unpredictable scenarios and conflicts through a limited number of models. One historian states that notaries were thus creating public words (*scriptura publica*) that represented 'a legal fiction crafted by the jurists of medieval Europe' (Nussdorfer, 2009: 9). On one hand such simplification facilitated dispute resolution, but on the other it considerably diminished an otherwise complex reality. And that, of course, means that litigants could – and probably did – have their own understanding of a given dispute or a court's activities. Unfortunately, this subjectivity rarely finds its way into written sources.

One further example which illuminates this contrast is a case that has survived in a form of a charter issued by the cathedral chapter (*capitulum*) of Split, which also functioned as a place of authentication (*locus credibilis*), i.e. as an ecclesiastical institution possessing the royal right to witness various public and private affairs and to issue authentic documents which were verified with a chapter seal (Ančić, 2005: 15; Hunyadi, 2003: 25–35; Rady, 2000: 66–74). The charter in question was issued on 20 March 1390 (Fontes, 2014: 133–36) and it witnesses the events that took place in the court of Trogir. A few days before issuing the charter, a noble citizen of Split, ser Duymus de Cuchiulis, came to the chapter as legal representative of Dobra and her daughter Radula, wife of Duymus's brother John. Duymus requested an envoy to travel with him to Trogir and witness the events in court regarding a summons issued by Trogir's court to Dobra and Radula. The charter does not specify the grounds for these two women to appear before the court, but it states that Dobra was summoned as her late husband Bertan's testamentary executor, and Radula as his heir.

The Split chapter appointed the cleric John as an envoy, who then travelled to Trogir, with Duymus, which they reached on 18 March 1390. Upon their arrival, Duymus went straight to the municipal palace where he found the city count's deputy (*vicarius*) Nicola of Rimini along with the judges Nicola and Bivce. Duymus

delivered three documents to them: one appointing him as legal representative of Dobra and Radula; a letter from the authorities in Split guaranteeing the authenticity of that document; and another letter from the same authorities addressed to the authorities of Trogir.

Trogir's notary, Guilelmo, son of Francesco de Dobrolino of Belluno of northern Italy, read all of these documents before the vicar and the judges. John's report, entered in the charter, states that after reading these documents judges Nicola and Bivce simply left the palace, leaving Duymus with the vicar and the notary (*dicti iudices se a dicto palatio absentauerunt*). At that point Duymus asked the vicar why Dobra and Radula were summoned to Trogir's court in the first place, but the vicar offered no precise answer, merely telling him that he was unable to do anything without the judges present (*scias ser Duyme quod solus et sine iudicibus nichil possum facere*). Having not received a clear answer, Duymus asked the vicar to bring the judges back, but the vicar told him to summon them himself if he had need of them (*si tibi necesse est congrega tumet eos et voca*). Duymus responded that it was not up to him to summon the judges, because they would not respond to his call, and it was up to the vicar who was the head of the city and its power (*mea non est congregare eos et vocare quia ad meam vocationem non venient nec congregabuntur, sed tua est qui es caput regiminis et ciuitatis*). In return the vicar said that they would refuse even to answer his call at that point (*scias pro certo quia nec pro nunc ad uocationem meam venient*). Duymus asked him why that should be so (*cur hoc est*). The vicar finally restated that he could do nothing alone (*ego solus nichil possum facere*), after which Duymus demanded that Guilelmo, Trogir's notary, should write a statement recording the details of his arrival to the court and the vicar's responses. Guilelmo refused to do this, telling Duymus he was not allowed to work against the city authorities. At this point Duymus had no choice but to ask cleric John to notify the Split chapter about everything he had witnessed in Trogir, following which the chapter issued a charter based on his report. In this charter we are given the litigant's version of events of what happened in Trogir's court, rather than the official record. The report's purpose was to put down in writing a charter that might be used in future actions.

As this evidence from Dalmatian cities has shown, simplified civil court records offer only clues for a historian to reconstruct certain aspects of social reality, based on the content recorded which was of interest only to the authorities. The process of simplifying court records cannot be attributed only to notaries, however, a fact which becomes clearer when Luhmann's insights into legitimation through procedure are taken into account. Notaries took part in the process as intermediaries between a dispute and the written record, but authorities supported such efforts and expressed their own interests via notaries. Simplification of court records abstracts them from a complex reality and creates a system that is uniform and can be reproduced routinely. Reality that is chaotic and unordered is turned into a fine construct of jurisprudence that allows judges to establish control over disputes. In a broader social context, this leads to a perception that uniform and ordered court records, reflect well-conducted court proceedings and indicate a well-ordered government and society.

Simpler and more comprehensible court records were easier for legal professionals and litigants to control because judges and other court officials could quickly and easily check for facts they considered to be important. But it also means that, from a present-day historian's perspective, late medieval court records reveal only one segment of social reality, one that was of interest to authorities. Of course, this does not mean that the purpose of judicial institutions was purely ideological. It is necessary to consider the interests of the power holders in simplifying reality through court records; it is also true that people regarded the courts as useful, whether in pursuit of material or emotional satisfaction, revenge, further incitement of hostility, humiliation, dishonoring or discrediting an opponent.

## Competing Interests

The author has no competing interests to declare.

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**How to cite this article:** Popić, T 2019 Traces of the Past and Social Realities: Late Medieval Court Records from Dalmatian Cities. *Open Library of Humanities*, 5(1): 33, pp. 1–17. DOI: <https://doi.org/10.16995/olh.368>

**Published:** 25 April 2019

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