

## From Oral Custom to Written Law: The German *Sachsenspiegel*

Maria Dobozy

Two notable events occurred between 1220 and 1235. First after a 300 year hiatus, a law-book, the *Sachsenspiegel* or *Saxon Mirror* was written for the territory of Saxony. Second, a decision was made that this law-book, written in Latin, be translated into the vernacular. Apparently a need for a written codification of custom was felt, and that need had to be filled with a vernacular text. These facts raise two questions: How was this transformation from oral custom to a written document accomplished? Why was the vernacular necessary? I shall survey the complexity of this very transformation and attempt to draw a few conclusions.

Written by Eike von Repgow in 1220-1235, the vernacular *Saxon Mirror* is the beginning of German jurisprudence. Since the Carolingian *leges*, nothing resembling a collection of territorial customs or laws much less a collection of national ones had been written in German speaking areas in any language. Eike's book did not appear in a vacuum, however, for many vernacular law-books were written in Europe within 150 years after Gratian's *Decretals* appeared, but Eike's law-book was one of the earliest, and certainly most influential of these. In the thirteenth century a vernacularization in which the *Mühlhäuser Rechtsbuch* and *Saxon Mirror* participated was taking place everywhere in Europe. In France it reached its apex at the end of the century with the *Coutumes de Beauvaisis* by Philippe de Beaumanoir. During this same period, law-books were written in Norway, Sweden, and in Iceland the well-known *Grágás*.<sup>1</sup> But of this entire movement, the German *Saxon Mirror* and its derivatives had considerably broader, even international influence. Within Germany, the southern territories adjusted the *Saxon Mirror* to fit the local customs and to accommodate some Roman and canon law not current in Saxony. Outside of Germany, Eike's work enjoyed excellent reception in central and eastern Europe including Poland, Ukraine, Prussia, and Silesia. The high German translation called the *Schwabenspiegel* influenced law in Hungary, and in Bohemia it became the foundation of Czech law.<sup>2</sup>

Eike first wrote the *Saxon Mirror* in Latin and then translated it into the Elbe-eastfalian dialect (Low German) at the express request of his Lord, Count Hoyer of Falkenstein, a magistrate at the ecclesiastical foundation in Quedlinburg. No one today

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<sup>1</sup> *Medieval Scandinavia. An Encyclopedia*, eds. Phillip Pulsiano and Kirsten Wolf (New York: Garland, 1991, pp. 383-386.

<sup>2</sup> *Lexikon des Mittelalters* (München: Artemis Verlag, 1980-), vol. 7, col. 519-521.

doubts that a Latin version existed, but the territorial law is not extant. Hoyer must have known Latin, so why did he want the law-book in German? Probably a vernacular text codifying territorial law and feudal law was much more useful in some way. Since the law-book was intended as a guide for both the theory and practice of customary law, it would make sense that a vernacular book did indeed offer advantages over a Latin text. However, vernacular is more useful only if a complete set of procedures, rules, gestures and technical language already exists. Everyone knows that oral custom existed and had functioned for three hundred years, but let us see what the concept means in the case of the *Saxon Mirror*.

Eike's starting point was oral custom, an inclusive view of law encompassing mores, customs and habits. At that time the law, called *recht*, encompassed both the subjective and objective aspects of the concept. Since people lived in the law (or outside when outlawed), it follows that their rights and duties were also expressed by the same term. Since no privilege exists without a corresponding responsibility, it was the duty of the community to know the law, support rectitude, and maintain justice in their judicial district. Julius von Planck's summary elucidates the law's breadth:

As far as knowledge of the law is concerned, the view in German law is that the established set of laws had already organized and accounted for all events of life with the result that the single procedure in every case is to determine the *correct* law for each situation.<sup>3</sup>

This statement implies first, that custom, like the spoken word, is a social phenomenon. Further, custom is the participatory process that finds applications for the law and safeguards justice. Eike notes the responsibility of the community members in a maxim formulated in terms of *recht*: *Swar de man recht vorderet, dar scal he rechtis plegen unde helpen* (Wherever a man demands justice there must he answer to the law and foster it. Lndr I 60).<sup>4</sup> Requiring community cooperation, this maxim is based on the fact that all landed free males were members of the judiciary. They attended the regular court hearings and when called upon, rendered a judgment by consensus (Lndr I 18). If consensus on a verdict failed, the law ceased to exist. Thus the law must be understood as an essential element of community life and consists of a great deal more than words or written rules.

Although writing the law gives it enormous authority because its physical instantiation does not change, it is equally important to realize that the law itself was, at that time, not limited by the written word. In this sense, it is correct to say that the

<sup>3</sup> "Was zunächst das Wissen vom Recht angeht, so wird das deutsche Recht durch die Vorstellung beherrscht, dass durch die bestehende Rechtsordnung alle Vorkommnisse des Lebens im Voraus fest bestimmt und geordnet seien, dass es also überall nur darauf ankomme, den bestehenden, richtigen Rechtssatz aufzufinden" [Julius Wilhelm von Planck, *Das deutsche Gerichtsverfahren im Mittelalter: nach dem Sachsenspiegel und den verwandten Rechtsquellen* (Braunschweig, 1879, reprint Hildesheim et al.: Olms, 1973) p. 87 (author's emphasis)].

<sup>4</sup> Citations are from Karl August Eckhardt, *Sachsenspiegel Landrecht. Lehnrecht* (Monumenta Germaniae historica. Fontes juris Germanici antiqui, n.s. 1) (Göttingen: Musterschiedt, 1973 (1933)), 2 vols., p. 116; cited hereafter as Lndr and Lnr.

law of tradition and custom with its community of users remains the foundation of Eike's text. He appears to have been thinking in these very terms when he acknowledged custom in the rhymed preface:

*Dit recht hebbe ek selve nicht irdacht,/ it habbet van aldere an unsik gebracht/ Unse guden vorevaren* (I did not invent this law myself, it has been handed down to us by our just ancestors. Lndr, I. 151-3, p. 41.)

Typical of the *Saxon Mirror* is this essential element of orality – specifically its concept that law is not confined in the space of a book. Although this implies to us that the book is incomplete, the law itself is not, for it endures beyond the law-book. Eike established this concept right in the prologue:

*Dar umme bidde ek to helpe alle gude lude, de rechtes geret, of en ienich rede bejegene, de min dumme sin vermede unde dar dit buk nicht af spricht, dat se dat na rechte besceden na erme sinne, so se it rechtest weten.* (Thus I request the support of all law-abiding people who desire justice. If they encounter a juridical dispute that I have omitted from this book because of my limited knowledge, I request that they reach a determination following the law to their best knowledge and discretion. Lndr, p. 51).

Eike tells us not that he may have omitted a part of the law, but rather, he may have merely omitted an example of a particular type of dispute and for this reason asks that people follow the legal custom based on tacit knowledge. Hence oral custom as a fully equipped formal language and procedure still framed juridical thought and practice for Eike and his contemporaries. This framework leaves a good deal of room for flexibility of judgment even though that flexibility is considered circumscribed by oral custom and way of life passed on by the forefathers. And since the book is based on this concept of law, one expects to find evidence of the various formal linguistic, gestural and behavioral components of custom and law in the text itself.

If what I have just described are the essential elements of legal activity within oral custom, then Eike's German text must have evidence of the transfer of this web onto parchment. In addition to Eike's own statements, what indicators do we have that the *Saxon Mirror* depends on the vernacular oral heritage with its specialized legal language?

The practice of law in the courtroom has maintained its dependency on the spoken word throughout the centuries. Especially when the cost of producing documents was high, all juridical procedures including pleas, charges, contracts, payments, transfers, oaths, and appeals were conducted orally and certified with the appropriate gestures. Evidence was also oral in nature because it had to come from a guarantor, an eye-witness or a witness who recalled information from memory. In addition, judicial functions were all accomplished in German. Formulaic language for oaths, truces, etc. was already established along with the formal actions and gestures required. Thus a working definition of legal custom is an intricate web of acts, gestures and words according to which community members interact and reach judgments about each other. In an oral community this web fully equipped its members to apply the law and

reach judgments according to accepted procedure.

For an examination of the remnants of orality, comparing Anglo-Saxon (AS) legal terminology to the earliest manuscripts of Eike's text is instructive because the AS reflects a period when the two groups still shared a many elements of Germanic law. In addition, AS laws are quite comparable because they were barely influenced by Roman law (in contrast to the *leges*) and continued to be written in the vernacular up to the mid-eleventh century. The goal here is to locate those terms that have a specialized legal meaning and not merely to find cognates that followed a parallel course of phonetic development. This is important because the German legal vocabulary in the *Saxon Mirror* builds completely on popular usage but the legal context has narrowed the meaning of certain words to build specialized juridical terminology.<sup>5</sup> This means that a legal term has an ordinary meaning and in addition, a specialized meaning necessary for legal actions.<sup>6</sup> A number of such Anglo-Saxon legal equivalents appear almost immediately even in a very small sampling of texts. I list only a few core terms.<sup>7</sup> AS *weddian* v. "to make a contract, a promise" corresponds closely to LG *wedde* "pledge, guaranty," and specifically "court fine." AS *bot* "remedy, compensation, satisfaction" and *feohbot* "pecuniary compensation" correspond to LG *buse* "compensation payment." Both also imply "atonement, repentance" in a religious sense. The important concept of guardianship also corresponds in terms like AS *mund-bryce*, "breach of the guardian's charge," MG *balmunden* "to convict for breach of guardianship," and LG *mundele* "the ward." And finally, AS *ordal*, LG *ordel* both meant "verdict, judgment." The purpose of this comparison is not to recover any part of a common Germanic law, as I am well aware of the difference in time between the AS laws and the *Saxon Mirror*. Instead, I wish to indicate, based on the correlations found, the linguistic patterns which preserved specific legal concepts during the oral period of juridical development in the German speaking territories in the thirteenth century.

A statement from Edmund II gives us a typical context that one might have easily found in an eleventh century German document: *Gif hwa heonanforD aenigne man ofslea, Paet he wege sylf Da faehDe* (Robertson 8). AS *wegan* "to carry, weigh, risk or wager" corresponds to LG *dörren* "to dare, wager" *dar he dar sin recht to dun*. Both the cognate verbs AS *ofslean* and LG *slegen* refer to homicide, and the nouns AS *faehDe*, LG *vede*, to the lawful blood feud.

Of particular interest are syntactic and metaphorical constructions such as the ones connected with AS *scyldian* and LG *sculdigen*. The most common occurrence of these verbs is in the meaning "to accuse or charge someone of a misdemeanor or

<sup>5</sup> *Handwörterbuch zur deutschen Rechtsgeschichte*, eds. Adalbert Erler and Ekkehard Kaufmann (Berlin: E. Schmidt Verlag, 1971), vol. 4, col. 345-360.

<sup>6</sup> Ruth Schmidt-Wiegand "Der Rechtswortschatz," in *Eike von Repgow. Sachsenspiegel. Die Wolfenbütteler Bilderhandschrift Cod. Guelf. 3.1 Aug. 2o.* ed. and trans. Ruth Schmidt-Wiegand (Berlin: Akademie Verlag, 1993), vol. 3, pp. 219-232; hereafter cited as Eike.

<sup>7</sup> The following examples are taken from *The Laws of the Kings of England from Edmund to Henry I.*, ed. Agnes J. Robertson (New York: AMS Press, 1925).

felony" and is an act that initiates a legal suit. The noun AS *scyld* "debt, guilt" corresponds exactly to LG *schuld*. The LG verb *verschulden*, "to owe, to become encumbered" is the basic concept behind all the penalties so that when a person commits a harmful or criminal act it encumbers him to make amends or pay in some way. This is expressed as a proverb, but at its foundation lies a metaphor: *Swe des nachtes korn stelet, de verschult des galgen* (He who steals grain in the night owes the gallows. Lndr II 37). Here the thief literally owes his life to the gallows. When adjectival forms are used, parallel genitive construction is common. For example, where the AS states *his feores scyldig* (Robertson 103) the MHG has *so si he der hant schuldig* so that both AS and MHG mean "culpable, liable, obligated."<sup>8</sup> This type of terminology covering some of the salient concepts of law in both languages indicates a complex system of legal language that included specialized metaphor and legal action.<sup>9</sup> Hence the AS examples attest to the age of specialized legal vocabulary. Examples like these are abundant.<sup>10</sup>

Syntax and stock phrases are the second and third characteristics of orality in our text because they are important indicators of oral thinking within the medium of the written word.<sup>11</sup> On the whole, the language of the *Saxon Mirror* tends to be concrete, preferring metaphors and images to abstract concepts. An example of what may well be typical of oral syntax is the promiscuous use of third person singular pronouns stripped of their antecedents. In AS for example:

A man can think on this one sentence alone, that he judges each one rightly; he has need of no other law-books. Let him bethink him that he judge to no man what he would not that he judged to him, if he were giving the judgment on him.<sup>12</sup>

This type of usage is genuinely meaningful primarily in the context of speech acts that are situationally grounded, but they are carried over into written form in the law books. This type of pronoun use is extremely common in the *Saxon Mirror* and much more frequent there than in literary texts, but leads to enormous ambiguity.

*We aver jene sin gut weren eme, er it vor gerichte kome, so bidde he ene weder keren vor gerichte; weigert he des, he scrie ene dat geruchte an unde gripe ene an vor sinen def, alse of de dat hanthafte si; went he sek sculdich hevet gemaket mit der vlucht* (But if he wishes to protect his goods lawfully

<sup>8</sup> This phrase is cited according to the *Mainzer Reichslandfrieden* in the Wolfenbüttel manuscript, in: Eike, vol. 2, p. 46.

<sup>9</sup> Other sources of surviving vocabulary of earlier periods are the *Maulbergische Glosse* containing individual terms and *Schwäbische Trauformel* (12<sup>th</sup> c.) that is comparable in lexicon to AS oaths of the 9<sup>th</sup> and 10<sup>th</sup> centuries.

<sup>10</sup> For a great number of additional examples from the word field of theft, see J. R. Schwyter, *Old English Legal Language. The Lexical Field of Theft* (Odense: Odense University Press, 1996).

<sup>11</sup> See additional examples of oral elements in Ruth Schmidt-Wiegand, "Sprache und Stil der Wolfenbütteler Handschrift," in: Eike, vol.3, pp. 201-218.

<sup>12</sup> Cited according to Dorothy Whitelock's translation, *English Historical Documents*, vol. 1: 500-1042 (London: Methuen, 1979). The interpretation regarding pronouns comes from Edward living, personal communication.

before it comes to court he shall ask him to return to court; if he refuses, then he may raise the hue and cry and seize him like a thief, as if he were caught red handed because he made himself guilty by fleeing.<sup>13</sup>)

Stock phrases like *nu vernemet* ("now hear this") are typical of oral dissemination and were most frequently used as organizational markers. In the earliest manuscript, Quedlinburg, the phrase *nu vernemet* marked the major divisions within the text. The frequency of the phrase drops in the later manuscripts but even so, its continued use is in keeping with the long-continuing practice of orally proclaiming laws, even when they were first promulgated in written form. The phrase *alse hir vore geredet is*, (II 71) refers the reader to a point discussed in a preceding passage but may indicate the oral thinking that a passage is earlier or later than the one currently being read, for it is only the spoken word that exists in time. However, it is dangerous to draw a categorical conclusion from these phrases because it is not certain what the phrases meant for readers at any given point in time. Meanings shift, and it frequently happens that a literal meaning in the medium of speech becomes a metaphor when written.

The same caveat holds for very old terms. Some appear to be falling gradually out of use in Eike's time but when he needs the concept, he provides a definition. For example, *balmunden* (v.) he explains is the formal judgment declaring a person a dishonest guardian. He also defines *ganerbe*, "the group of all eligible heirs" to a property. Attested in a Franconian text of the 9<sup>th</sup> century, *ganerbe* continued in use as a strictly legal term even into the fourteenth century. In addition, terms like MHG *mac*, *sippe*, and *buosem* are also old. Not surprisingly, all these surviving terms express family relations and governance, one of the oldest aspects of law.

Other reflexes of an oral juridical tradition are found in concrete yet visual, and even metaphorical language. Proverbs have been studied as oral reflexes but often their age is difficult to establish. Some were composed during the writing or copying of the *Saxon Mirror* after Eike's lifetime.<sup>14</sup> Other, more graphic phrases, such as terms expressing capital punishment may well be old. For example: *es get im an den hals* or *de verschult des galgen*. These are not merely a *pars pro toto* for a hanging, but a vivid visual insinuation of the punishment for those who had seen such public executions.

<sup>13</sup> The syntactically meaningful translation: "But if the possessor of the article wishes to protect his goods lawfully before the hearing, he shall ask the claimant to return to court. If the claimant refuses, then the possessor can raise the hue and cry and seize him like a thief, as if he were caught red-handed because he has made himself guilty by fleeing" according to the Wolfenbüttel manuscript, Eike, v. I Lndr II 34.

<sup>14</sup> Just such a case is the well known rule for the mill: *de ok erst to der molen kumt. de scal erst malen* ("He who arrives at the mill first, mills first." Lndr II 59). Such a common sense regulation could be very old, perhaps imported from Roman law at a very early date and then become a proverb. Brigitte Janz has found several maxim-like passages to be of recent date; see her *Rechtssprichwörter im Sachsenspiegel. Eine Untersuchung zur Text-Bild-Relation in den Codices picturati* (New York: Peter Lang, 1989) and Ruth Schmidt-Wiegand, "Sprichwörter und Redensarten aus dem Bereich des Rechts," in: *Überlieferung, Bewahrung und Gestaltung in der Rechtsgeschichtlichen Forschung. Festschrift für Ekkehard Kaufmann*, eds. Stephan Buchholz, Paul Mikat, and Dieter Werkmüller (Paderborn et al.: Schöningh, 1993, pp. 277-296).

Indeed the image carries the implication of an entire set of formalized legal procedures culminating in an execution. The metaphor *binnen dudescher tungen* (Lnr 4) stands of course for the German language, but in context it refers to the territorial range of the German language, meaning that the country extends as far as one can go and still find German spoken. The border then of a territory is expressed in terms of the location of speakers, and not according to any geographical boundaries.

These terms do not simply illustrate a pictorial language. Most of them also connect words to formal gestures that fortify or validate the legal action taken. A metaphor that may have a literal action at its source: *tut he is an sine vorderen hant* (I 18). Here *vordere hant* is not simply the right hand, but the one a person puts forward in a legal action when swearing an oath or bringing formal charges or fighting a legal duel. The entire phrase is a linguistic gesture because it requires the person to act with that hand.<sup>15</sup> More obvious examples are true *pars pro toto* expressions definitely specialized for a legal setting: *deme scole sie die were loven mit vingeren und mit tungen* ("they shall pledge him the guaranty with fingers and tongue," Lnr 26). Here the phrase clearly requires appropriate formal gestures to accompany the formal oath.<sup>16</sup> Since the entire action is performed in public, the context of image and word is important for the witnesses, so that they may remember the settlement if they are later needed to confirm it. In stark contrast to canon law where writing was used to confirm all that was decided in a court, in thirteenth century Germany, local courts are still very sparing with written documentation. Instead, formal procedure affirmed and sealed decisions. An oath made with fingers and tongue implies, therefore, an entire ceremony including all proper attributes such as a reliquary. It is noteworthy that in no single passage does Eike ever explain the entire procedure alluded to. It can, however be pieced together because of the variety of phrases indicating an oath or pledge: *op den hilgen, sin recht to dun* ("to fulfill the law with the reliquary"). These examples could be multiplied. Together they build a set of associations pointing to the phrases and gestures prescribed for a legal action. *Anevangen* is another example of a simple action of grasping that narrowed to a specifically legal term meaning to initiate a law suit for recovery of stolen or lost property.<sup>17</sup> These examples illustrate that certain types of formulations reflect the inseparability of word and gesture.

Consequently my point is that Eike's text displays in both syntax and metaphorical phrases a fundamentally concrete, pictorial language still closely connected to actual legal gestures and actions. This means not only that the web of oral custom had been an adequate system for providing just settlements in the community

<sup>15</sup> On the concept of a linguistic gesture with different types of examples, see Ruth Schmidt-Wiegand, "Gebärdensprache im mittelalterlichen Recht," *Frühmittelalterliche Studien*, 17 (1982), pp. 363-379 and Dagmar Hüpper, "Die Bildersprache. Zur Funktion der Illustration," in Eike, vol. 3, pp. 143-162.

<sup>16</sup> See the discussion by Ruth Schmidt-Wiegand, "Mit Hand und Mund. Sprachgebärden aus dem mittelalterlichen Rechtsleben," *Frühmittelalterliche Studien*, 25 (1991), pp. 283-299.

<sup>17</sup> For an excellent discussion of *anevangen* and of other actions developing into legal terms see Schmidt-Wiegand, "Gebärdensprache," p.368.

but also that some of its many aspects are included in the language of the text by explicit or implicit associations. The interconnection between pictorial and metaphorical word and formal public gesture just described was so intrinsic to the language that it could easily be maintained with as little change as possible when a written text was created. Thus an attempt to codify custom in a written form that also took into account formal legal gesture with minimal metaphorical innovation and confusion demanded the vernacular.

Thus far I have stressed the oral components of the *Saxon Mirror's* language, but to gain a little insight into the differences between the lost Latin and the actual vernacular, it is useful to examine a wonderful example of a merger of theological texts and canon law with the entire web of oral custom on the topic of kinship. The most prominent of the Latin authorities Eike drew from are Honorius Augustodunensis, Isidor's *Origines*, and the *Decretals* of Gratian and Burchard von Worms. My purpose is to examine how Eike's passage on kinship integrates Latin discussions of consanguinity and lines of succession with the web of acts, gestures and words that comprises juridical procedure and daily life. Kinship is a key point of comparison because it is the elementary component of social life and a much discussed issue in canon law. Eike's chapter has three parts: the 7 ages, the 7 orders of military shields, and the 7 degrees of kinship. It opens by saying that Origen prophesied the 7 ages but this formulation most likely confuses the church father with Isidor's *Origines*. Isidor's discussion may have reached Eike via any number of writers who have similar passages.<sup>18</sup> Eike aligned these three topics of 7 stages each in order to derive the social order and the family order from salvation history.

Eike explains the levels of knighthood in his own terms, but his discussion of the 7 ages and degrees of kinship is consistent with canon law from which he adds to German law only two new points: 1. Half-brothers are not at the same level of succession as their full brothers and sisters (Schadt 409), and 2. the decision of Lateran IV allowing marriage in the fifth degree of kinship.

Where Eike diverges markedly from his sources, however, is in language. He presents family relations within a metaphorical framework that uses the human body instead of the standard tree of consanguinity found in Justinian's Digest and canon law. When Eike uses *hovede*, *lede*, *nagelmage*, *māc*, and *sippe*, he draws on traditional formulations. He begins his discussion of lineage with the head representing the genitor and genitrix of the clan. Next he locates the children of this union at the neck member (*lede*) and places each generation beginning at the shoulder in a separate joint progressing farther and farther down the arm and away from the head until he runs out of joints and stops at the final level of kinship at the fingemail.

Eike's language demonstrates that the human metaphor expressing kin relations was still functional. Even though the metaphor represents the entire schema, Eike's

<sup>18</sup> For sources and textual parallels, see Eckhardt, pp. 72-74, Guido Kisch, *Sachsenspiegel and Bible* (Notre Dame: University of Notre Dame Press, 1941), and Hennann Schadt, "Zum Verwandtschaftsbild und der Weltalterlehre des *Sachsenspiegels*. Kunstgeschichte als Hilfswissenschaft der Rechtsgeschichte," *Frühmittelalterliche Studien*, 10 (1976), pp. 406-436, here 411-413.



manner of counting is so literal that it certainly appears to provide or to rely on a gestural mnemonic device that might easily have been common practice. This idea is supported by the verb for reckoning the degrees: *stuppen* meaning "to touch with the finger, to count off my tapping with the finger."<sup>19</sup> This language allies the metaphor closely with a possible traditional practice because it is an uncomplicated means of keeping track of direct and lateral lines, something everyone needed to do.<sup>20</sup> Since a great number of terms like *vedem* and *dumelen* also required an action originally, it is certain that Eike's formula for counting kindred by joints was not the only mnemonic gesture existing at that time. Even today, many Europeans calculate the months having 30 and 31 days by counting along their knuckles with a finger. Given the great age of some terms for family relations, the metaphoric language could well have been formulated in connection with a mnemonic gesture that by the thirteenth century gradually became a linguistic gesture containing only a memory of the act.

Important to our study then is the fact that vocabulary and its use identifies and substantiates a close relationship between language, gesture and actions over a long period of time and not the recovery of actual practice per se. The metaphor of the human figure for calculating consanguinity existed long before Eike wrote. Furthermore, it is precisely because this terminology was so well established that Eike's description of kinship did not change from the earliest manuscripts in the thirteenth century to the illuminated ones in the second half of the fourteenth.

But what about the original texts of canon law? In comparison with the standard consanguinity tables, the *Saxon Mirror* description is much more concrete. Latin texts employ a very different metaphor, namely the family tree and use terms like trunk, branch and root:

*Ysidorus sic loquitur: c. 1: Series consanguinitatis sex gradibus hoc modo dirimitur: filius et filia. quod est frater et soror sit ipse truncus: illis seorsum seiunctis ex radice illius trunci egrediuntur isti ramusculi: nepos et neptis, primus; pronepos et proneptis, secundus....*<sup>21</sup>

In addition, the Latin schema is much more abstract and detailed in designating each member of the direct and lateral lines of kinship. Hence it would seem that in producing his Latin text, Eike found it easy to paraphrase or cite his Latin sources. When we examine the German text, the comparison between Latin and German metaphors for kinship makes clear that Eike took great care not to translate but to

<sup>19</sup> Dagmar Hüpper, "Ehe, Familie, Verwandtschaft—Zur Widerspiegelung von Begrifflichkeit in der Bildtradition des *Sachsenspiegels*," in *Text-Bild-Interpretation. Untersuchungen zu den Bilderhandschriften des Sachsenspiegels*, ed. Ruth Schmidt-Wiegand, (München: Fink Verlag, 1986), pp. 128-144, here 140.

<sup>20</sup> Earlier scholars accepted the description and the picture in the illuminated mss. as depicting a mnemonic gesture but Hermann Schadt and Dagmar Hüpper do not. Both rightly point out the abstract nature of Eike's schema. See Schadt, pp. 421; for a recent, detailed discussion of the system for calculating consanguinity and its representation, see Hüpper, "Ehe, Familie," pp. 128-144.

<sup>21</sup> *Decretum Gratiani* C.XXXV 5 cited according to Eckhardt, p. 74, note 40.

reproduce content according to the German conceptual system to create a meaningful text. Therefore, if only a Latin text had been written, the metaphors and gestural associations would have been lost here and elsewhere. Hoyer may well have been objecting to this lack when he requested a German version.

These deliberations underscore the integrity of a vernacular linguistic and gestural system of jurisprudence. Law must have been changing rapidly when Eike and Hoyer felt the need for the written word to stabilize those changes. However, Eike's Latin text was apparently problematic. First of all, any judge referring to a Latin text would still have to conduct all legal business in German, meaning that any formulae for oaths, etc, would have to have had to be retranslated into German unless Eike had cited them in the original. Second, relying heavily on formulations in Gratian or Burchard and possibly several others, the Latin version was likely to be much more abstract than comparable German formulations. But most importantly, the Latin would not have reproduced the traditional web of gestural associations and connections to daily life that was intrinsic to German jurisprudence. I maintain, therefore, that the German text could be applied in practice much more easily because Eike recorded to a greater or lesser extent the web of legal custom. In turn, this achievement of the German text is one of the major reasons for its rapid and widespread reception. Consequently this extensive transmission, attested by over 450 extant manuscripts and fragments, was so influential it ensured the development of German jurisprudence in the vernacular (in spite of translations and glosses produced in Latin) so that when Roman law was adopted, the vernacular was only minimally affected.

The importance of this development in Germany is instructive, for jurisprudence and vernacular took a very different turn in England. Even though my comparison of AS vocabulary with LG corroborated a close correlation of precise legal terms in both vocabularies and demonstrated a well developed legal language. This correlation ended with the Anglo-Saxon kingdom. Many of those AS terms were transformed or replaced as a new vocabulary arrived along with Roman law from France and imposed itself upon the Anglo-Saxon customs and written laws. This meant that the average person who had previously understood the proceedings in a court of law now needed legal training to understand the special language of law. Consequently, the profession of lawyers or advocates blossomed because they were the only ones who learned the new, French lexicon. In Germany on the other hand, the profession of lawyer did not develop until the 16<sup>th</sup> century because the language of law remained completely accessible.<sup>22</sup> The fact that oral custom in Germany was set into vernacular written form that sustained participation of all levels of society in the legal process had a far-reaching result: Germans even today use largely a German vocabulary inherited from the early Middle Ages for legal transactions whereas the English must resort to French.

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<sup>22</sup> Ruth Schmidt-Wiegand, "Der *Sachsenspiegel* Eikes von Reggow als Beispiel mittelalterlicher Fachliteratur," *Zeitschrift für Literaturwissenschaft und Linguistik*, 51/52 (1983), pp. 206-226, here 208.

ORAL HISTORY OF THE MIDDLE AGES  
THE SPOKEN WORD IN CONTEXT

Edited by Gerhard Jaritz and Michael Richter

**MEDIUM AEVUM QUOTIDIANUM**

SONDERBAND XII

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**CEU MEDIEVALIA**

VOLUME 3

# **Oral History of the Middle Ages**

## **The Spoken Word in Context**

Edited by Gerhard Jaritz and Michael Richter

Krems and Budapest 2001

**GEDRUCKT MIT UNTERSTÜTZUNG DER ABTEILUNG  
KULTUR UND WISSENSCHAFT DES AMTES  
DER NIEDERÖSTERREICHISCHEN LANDESREGIERUNG**

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Cover illustration: The wife of Potiphar covets Joseph: "... erat autem Joseph pulchra facie et decorus aspectu: post multos itaque dies iecit domina oculos suis in Ioseph et ait dormi mecum." ("... And Joseph was [a] goodly [person], and well favoured. And it came to pass after these things, that his master's wife cast her eyes upon Joseph; and she said, Lie with me."), Gen. 39: 6-7 (KJV). Concordantiae Caritatis, c. 1350. Cistercian abbey of Lilienfeld (Lower Austria), ms 151, fol. 244v (detail). Photo: Institut für Realienkunde des Mittelalters und der frühen Neuzeit (Krems an der Donau).

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## Preface

Oral culture played an instrumental role in medieval society.<sup>1</sup> Due to the lack of any direct source evidence, however, research into the functions and importance of oral communication in the Middle Ages must confront a number of significant problems. Only indirect traces offer the opportunity to analyze phenomena that were based on or connected with the spoken word. The 'oral history' of the Middle Ages requires the application of different approaches than dealing with the 20<sup>th</sup> or 21<sup>st</sup> century.

For some decades Medieval Studies have been interested in questions of orality and literacy, their relationship and the substitution of the spoken by the written word.<sup>2</sup> Oral and literate culture were not exclusive and certainly not opposed to each other.<sup>3</sup> The 'art of writing' was part of the 'ars rhetorica' and writing makes no sense without speech.<sup>4</sup> Any existing written statement should also be seen as a spoken one, although, clearly, not every oral statement as a written one. Authors regularly wrote with oral delivery in mind. 'Speaking' and 'writing' are not antonyms.

It is also obvious that "the use of oral communication in medieval society should not be evaluated . . . as a function of *culture populaire* vis-à-vis *culture savante* but, rather, of the communication habits and the tendency of medieval man

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<sup>1</sup> For the late Middle Ages and the early modern period, cf. Willem Frijhoff, "Communication et vie quotidienne à la fin du moyen âge et à l'époque moderne: réflexions de théorie et de méthode," in *Kommunikation und Alltag in Spätmittelalter und früher Neuzeit*, ed. Helmut Hundsbichler (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1992), p. 24: "La plupart de gens vivait encore pour l'essentiel dans une culture orale et les procédés d'appropriation des idées passaient de préférence par la parole dite et écoutée, quand bien même on était capable d'une lecture visuelle plus ou moins rudimentaire."

<sup>2</sup> See Marco Mostert, "New Approaches to Medieval Communication?" in *New Approaches to Medieval Communication*, ed. Marco Mostert (Turnhout: Brepols, 1999), pp. 15-37; Michael Richter, "Die Entdeckung der 'Oralität' der mittelalterlichen Gesellschaft durch die neuere Mediävistik," in *Die Aktualität des Mittelalters*, ed. Hans-Werner Goetz (Bochum: D. Winkler, 2000), pp. 273-287.

<sup>3</sup> Peter Burke calls the construct of "oral versus literate" useful but at the same time dangerous: idem, "Mündliche Kultur und >Druckkultur< im spätmittelalterlichen Italien," in *Volkskultur des europäischen Spätmittelalters*, eds. Peter Dinzelbacher and Hans-Dieter Mück (Stuttgart: Alfred Kröner Verlag, 1987), p. 60.

<sup>4</sup> Michael Clanchy, "Introduction," in *New Approaches to Medieval Communication*, ed. Marco Mostert (Turnhout: Brepols, 1999), p. 6.

to share his intellectual experiences in the corporate framework.”<sup>5</sup> Oral delivery was not “the sole prerogative of any socioeconomic class.”<sup>6</sup>

For all these reasons, it is important to analyze the extent of and context, in which ‘speech acts,’ auditive effects, and oral tradition occur in medieval sources.<sup>7</sup> Research into the use of the spoken word or references to it in texts and images provides new insight into various, mainly social, rules and patterns of the communication system. It opens up additional approaches to the organization and complexity of different, but indispensably related, media in medieval society, and their comparative analysis.<sup>8</sup>

The spoken word is connected with the physical presence of its ‘sender.’ Speech may represent the authenticity of the given message in a more obvious way than written texts or images. Therefore, the use of ‘speech acts’ in written or visual evidence also has to be seen in context with the attempt to create, construct, or prove authenticity. Moreover, spoken messages contribute to and increase the life-likeness of their contents, which may influence their perception by the receiver, their efficacy and success. Being aware of such a situation will have led to the explicit and intended use and application of the spoken word in written texts and images – to increase their authenticity and importance, too.

If one operates with a model of ‘closeness’ and ‘distance’ of communication with regard to the level of relation of ‘senders’ and ‘receivers,’ then the ‘speech acts’ or their representation have to be seen as contributors to a ‘closer’ connection among the participants of the communication process.<sup>9</sup> At the same time, however, speech might be evaluated as less official. One regularly comes across ‘oral space’

<sup>5</sup> Sophia Menache, *The Vox Dei. Communication in the Middle Ages* (New York and Oxford: Oxford University Press, 1990), p. 19.

<sup>6</sup> Ibidem, p. 21. Cf. also Jan-Dirk Müller, “Zwischen mündlicher Anweisung und schriftlicher Sicherung von Tradition. Zur Kommunikationsstruktur spätmittelalterlicher Fechtbücher,” in *Kommunikation und Alltag in Spätmittelalter und früher Neuzeit*, ed. Helmut Hundsichler (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1992), p. 400: “Offensichtlich sind schriftliche und nichtschriftliche Tradierung von Wissen weiterhin relativ unabhängig voneinander, nachdem die Schrift längst dazu angesetzt hat, Inseln der Mündlichkeit oder praktisch-enaktiver Wissensvermittlung zu erobern. Die Gedächtnisstütze kann die Erfahrung nicht ersetzen, sondern allenfalls reaktivieren. Sie ist sogar nur verständlich, wo sie auf anderweitig vermittelte Vorkenntnisse stößt.”

<sup>7</sup> Cf. W.F.H. Nicolaisen, ed., *Oral Tradition in the Middle Ages* (Binghamton: Center for Medieval and Renaissance Studies, 1995).

<sup>8</sup> See, esp., Horst Wenzel, *Hören und Sehen, Schrift und Bild. Kultur und Gedächtnis im Mittelalter* (Munich: C.H. Beck, 1995), passim.

<sup>9</sup> See also Stefan Sonderegger, “>Gesprochen oder nur geschrieben?< Mündlichkeit in mittelalterlichen Texten als direkter Zugang zum Menschen,” in *Homo Medietas. Aufsätze zu Religiosität, Literatur und Denkformen des Menschen vom Mittelalter bis in die Neuzeit. Festschrift für Alois Maria Haas zum 65. Geburtstag*, eds. Claudia Brinker-von der Heyde and Niklaus Largier (Bern et al.: Peter Lang, 1999), p. 665: “Jedenfalls darf man sich bewußt bleiben, daß auch in den Texten des deutschen Mittelalters die Reflexe gesprochener Sprache eine bedeutende Schicht ausmachen, die besonders dann immer wieder hervortritt, wenn es um einen direkten Zugang zum Menschen geht, um ein Verstehen aus unmittelbarer Partnerschaft heraus ...”

that has become institutionalized or more official by the application of 'written space.'<sup>10</sup> Simultaneous employment of such different levels and qualities of messages must often have had considerable influence on their efficacy.<sup>11</sup>

The papers in this volume are the outcome of an international workshop that was held in February, 2001, at the Department of Medieval Studies, Central European University, Budapest. Participants concentrated on problems of the occurrence, usage, and patterns of the spoken word in written and visual sources of the Middle Ages. They dealt with the role and contents of direct and indirect speech in textual evidence or in relation to it, such as chronicles, travel descriptions, court and canonization protocols, sermons, testaments, law-books, literary sources, drama, etc. They also tried to analyze the function of oral expression in connection with late medieval images.

The audiovisuality of medieval communication processes<sup>12</sup> has proved to be evident and, thus, important for any kind of further comparative analysis of the various levels of the 'oral-visual-literate,' i.e. multimedia culture of the Middle Ages. Particular emphasis has to be put on methodological problems, such as the necessity of interdisciplinary approaches,<sup>13</sup> or the question of the extent to which we are, generally, able to comprehend and to decode the communication systems of the past.<sup>14</sup> Moreover, the medievalist does not come across any types of sources in which oral communication represents the main concern.<sup>15</sup> Instead, she or he is confronted, at first glance, with a great variety of 'casual' and 'marginal' evidence.

We would like to thank all the contributors to the workshop and to this volume. Their cooperation made it possible to publish the results of the meeting in the same year in which it took place. This can be seen as a rare exception, at least in the world of the historical disciplines. The head, faculty, staff, and students of the Department of Medieval Studies of Central European University offered various help and support. Special thanks go to Judith Rasson, the copy editor of

<sup>10</sup> This, e.g., could be well shown in a case study on the pilgrimage to Santiago de Compostela: Friederike Hassauer, "Schriftlichkeit und Mündlichkeit im Alltag des Pilgers am Beispiel der Wallfahrt nach Santiago de Compostela," in *Wallfahrt und Alltag in Mittelalter und früher Neuzeit*, eds. Gerhard Jaritz and Barbara Schuh (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1992), pp. 277-316.

<sup>11</sup> Cf. Bob Scribner, "Mündliche Kommunikation und Strategien der Macht in Deutschland im 16. Jahrhundert," in *Kommunikation und Alltag in Spätmittelalter und früher Neuzeit*, ed. Helmut Hundsblücher (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1992), pp. 183-197.

<sup>12</sup> Wenzel, *Hören und Sehen*, p. 292.

<sup>13</sup> Cf. Ursula Schaefer, "Zum Problem der Mündlichkeit," in *Modernes Mittelalter. Neue Bilder einer populären Epoche*, ed. Joachim Heinze (Frankfurt am Main and Leipzig: Insel Verlag, 1994), pp. 374 f.

<sup>14</sup> Frijhoff, "Communication et vie quotidienne," p. 25: "Sommes-nous encore en mesure de communiquer avec la communication de jadis?"

<sup>15</sup> Michael Richter, *Sprache und Gesellschaft im Mittelalter. Untersuchungen zur mündlichen Kommunikation in England von der Mitte des elften bis zu Beginn des vierzehnten Jahrhunderts* (Stuttgart: Anton Hiersemann, 1979), p. 22.

this volume, who took particular care with the texts of the many non-native speakers fighting with the pitfalls of the English language.

Budapest, Krems, and Constance  
December 2001

Gerhard Jaritz and Michael Richter