PAVIA, 1249. PUBLICA FAMA AND CULPA IN THE TRIAL AGAINST THE PRISON WARDERS

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Abstract: The essay regards the study of a verdict in Pavia dating back to 1249. The trial took place in a crucial period of the history of criminal law and criminal procedure and testifies of some changes taking place in the years around the mid-13th century which invest, on the one hand, the themes of imputability and the subjective elements of the crime and, on the other hand, strictly procedural aspects.

Keywords: Inquisitio; fama facti; infamia facti; culpa; history of criminal justice

Summary: 1. The trial. – 2. Publica fama and the ex officio start of the trial. – 3. Publica fama and testimonies in the conviction. – 4. Wilful misconduct and negligence in the judge’s evaluations. – 5. Conclusive observations
The contribution that follows regards the study of a verdict in Pavia dating back to 1249. Regulatory and doctrinal sources will be quoted that would require a deeper study of the multiple profiles of a general nature that underlie them, if only we think of themes and issues that require much textual analysis. Nonetheless, it is worth noting that the author intends to focus the attention primarily on the judicial events in Pavia.

1. The trial

In the first months of 1249, on an unspecified day, in Pavia seventeen prison warders were sentenced for the escape of some prisoners. Of the trial, the verdict issued by the imperial potestas Filippo Barbavaria remains, copied on plain paper in a Register of Convictions held in Pavia’s Archivio Storico Civico. Although some pages have been damaged, the crucial moments of the trial can be reconstructed with close accuracy.

Regarding the initial phase of the proceedings, the anonymous notary states that the judgement of the accused - then convicted - was started ex officio based on publica fama. The fama of which we speak is, naturally, that of fama facti. In fact, the warders were «infamati» of having been responsible for the escape of prisoners whom they were supposed to be guarding. No personal evaluation, regarding their reputation, good or bad, was considered by the judging authorities at the start of the trial.

The verdict also holds some information regarding the preliminary inquiry carried out by the potestas. We know that many witnesses were called and that based on their testimonies and the fama that already existed against the accused, it was decided that they would have to pay a
financial fine. Three warders were also punished with the *bannum* of two hundred Pavian lire for failing to appear in court. As the judge would explain, only by paying the above sum could the offenders escape the condition of *banniti*. Until that moment, they could be offended in their person or property with impunity.

Even though no certain facts regarding the duration of the trial can be found in the surviving documentation, we can hypothesise that it was, in a word, a rather complex *iter*, given the considerable number of the defendants – the majority of whom were constituted in judgement – and the witnesses heard. On the trial process and the articulation of the preliminary investigation a vital part was the fact that the judge wanted to ascertain what would be defined by the modern criminal code as the ‘criteria of subjective imputation’ of the crime. The judging authority was, in fact, not limited to clarifying the criminal responsibility of the accused: it dwelled upon the criteria of the accusation, distinguishing in the verdict those warders who were guilty of wilful wrongdoing from those who were merely negligent, and grading the respective punishment consequently.

2. Publica fama and the ex officio start of the trial

As we can see, there are many profiles of interest that underlie the trial in question. One of the first aspects worthy of attention regards the role of publica fama. As mentioned, this element above all has given impetus to the process. The *potestas* started the trial against the prison warders after *fama* got out of their responsibility for the prisoners escaping. With a lack of accusation or charge, *fama facti* acted as prosecutor.

When the warders of Pavia were tried and condemned, publica fama had acted as the element that initiates the trial in ecclesiastical courts for several decades, ever since Innocent III ‘personified’ it, «facendole prendere il posto di un accusatore reale»

3 and replacing it with the various forms of witness groups, previously necessary in order to proceed without

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a prosecutor\textsuperscript{4}. The Innocentian decretals that transformed the role of \textit{fama}, granting it a central role in the canonical trial, have for a while been subject to attention by historiographers. Authoritative contributions have been published in recent years, which have given worth to the fundamental relationship that the papal legislation in place between the end of the 12\textsuperscript{th} century and the beginning of the following century have brought to the history of criminal proceedings\textsuperscript{5}. This legislation has given rise to a wealth of literature, represented by the works of many canonists, among them Tancredi da Bologna\textsuperscript{6}, Giovanni Teutonico\textsuperscript{7}, and Egidio Foscarari\textsuperscript{8}.


\textsuperscript{7} About the German canonist, see Aimone, \textit{Il processo inquisitorio} (nota 5), pgs. 596-599.

In the mid-1200s, some civilists also started to take on *inquisitio*, probably encouraged by the need for clarity called for by the towns’ judges. As a way of becoming aware of and following crimes, the *inquisitio*, far from remaining confined to ecclesiastical courts, started to find a place also in municipal courts. And to this end, it is interesting to observe how even the civilists, when writing about the *inquisitio*, insist on the role of *publica fama* as the element that initiates the trial. This is, for example, what Martino da Fano does in his *Summula super materia inquisitionum*.

Martino, who is a «man of school, science, forensic practices, politics and also a canonist» in giving it a definition, in fact writes that the «*inquisitio est illa quam facit iudex ad famam publicam de crimine aliquo clamantem*».

That the *inquisitio* of council towns was born as an imitation and re-elaboration of the ecclesiastical inquisitor process is a fact upon which historians, even in recent years, have often dwelled. What the verdict with which we are dealing here adds to that reflection is the statement that certain elements sometimes considered typical and exclusive to the canonical procedure, in reality also penetrate municipal courts, and that was already the case in the mid-13th century. The personification of *fama*,

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13 E. Dezza, *Accusa e inquisizione dal diritto comune ai codici moderni*, Milan 1989, pg. 10 note 13 had already referred to the repercussions that the inquisitor model elaborated by the canonical right had on the «toria del processo penale nell’età del diritto comune». See also Idem, *Lezioni di storia del processo penale*, Pavia 2013, pp. 5-7.
sanctioned on the regulatory level by papal decretals, legitimated on the theoretical level by the doctrine and endorsed by the usual procedure of the ecclesiastical tribunals, where the justice practiced in the Italian municipal courts should also be considered a characterising element. In an essay published approximately twenty years ago, Severino Caprioli highlighted the almost literal contiguity between some capitula of the statute of Perugia in 1287 and canon 8 of the IV Lateran Council. Furthermore, Caprioli demonstrated how in the months immediately preceding the promulgation of that statutum in Perugia’s courts, fama was granted the same role as a propelling element of the trial. And yet, the Pavia situation, which should be «considerata rappresentativa per la sua non provata singolarità», brings forward the phenomenon of the penetration of institutes and rules of the canonical rite in municipal courts by at least four decades.

This also gives us the chance to highlight some aspects of the criminal justice system in Italian cities of the 13th century. With very few exceptions, regarding nonetheless judicial cases of the late 1200s, in the middle of the historical research the links between the canon law and the criminal procedure remain fairly unclear. Even those who have dedicated themselves ex professo to studying the verdicts pronounced by the judges of some Italian cities have not particularly dwelled on the role of fama facti as an element sufficient to start up the inquisitio. Of Perugia, for example, it has been written that «sebbene le inquisizioni non abbiano un’intestazione fissa, omologata, in genere il primo atto che segna l’inizio effettivo della causa è la denuncia della parte lesa, o dei suoi rappresentanti, non molto diversa dalle normali accuse».

Within the overview of the extremely copious literature specifically dedicated to the procedure, only Severino Caprioli, in the essay mentioned

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15 I refer to Pavia the same consideration carried out by Caprioli, *Evoluzione storica* (note 14), pg. 40 for Perugia.

already, and Massimo Vallerani, in a recent essay\textsuperscript{17}, have highlighted this role. Their contribution, however, as mentioned above, regard trials dating back to the end of the 1200s, when the presence of the \textit{inquisitio} in town tribunals is confirmed by the doctrine of the time.

It is also for these reasons that we believe that the verdict of Pavia of 1249 offers a contribution to the current historiographical debate that is anything but negligible. And, beyond testifying how in town trials elements that have until now been little valorised end up having a noteworthy importance, it also allows us to mitigate some recent lines. If, in fact, the relationships between criminal practice and canonical law have not particularly attracted the interest of historical research, the latter has actually insisted on the debt of certain doctrine regarding the \textit{ius canonicum}. The reference is clearly made to Alberto da Gandino and his \textit{Tractatus de maleficiis}. Faced with a part of historiography that mainly considers the weight of civil law and the knowledge of procedures within the work of the Lombard judge\textsuperscript{18}, some historians consider the contribution of canon law in the chapters that Gandino dedicates to the inquisitor process, on the other hand, as «strategico»\textsuperscript{19}. Even without going into the matter of such differing positions deeply, there is a passage in the \textit{Tractatus} that in fact verdicts such as that subject to these investigations help to interpret. As is well known, it is in the \textit{capitula} regarding \textit{fama} that we find the idea of a very close relationship between Gandino’s work and the \textit{Liber extra}. And regarding \textit{fama} in its role as prosecutor, it has been written that the Crema jurist « riprendendo quasi integralmente i testi canonistici, arriva a dare alla fama del fatto un ruolo inedito per i tribunali cittadini, facendone il momento iniziale di ogni procedimento \textit{ex officio}»\textsuperscript{20}. Now, though, thanks also to the trial of Pavia,


\textsuperscript{20} \textit{Ivi}, pg. 48.
we know that when the *Tractatus de maleficiis* was drawn up in the town tribunals the role of *publica fama* was at least four decades old. And Gandino, who boasts a long career as a judge, is fully aware of it.

With the observations carried out until now, we do not intend to deny that town courts know more forms of *inquisitiones*: general ones, to those started up *ex officio* based on general news of crimes, to those started by a *promotor*, of whom traces remain in other Pavian registers. What the verdict in question seems to mainly bring to light is the image of a town justice system which, while in the variety of its forms, from the moment of the first early applications of the *inquisitio* knows and uses many institutions belonging to the ecclesiastical criminal process. If it is perhaps excessive to talk of a slavish and integral imitation of the canonical procedure by secular justice, nevertheless the relationships that are set up between this and the *ius canonicum* are perhaps deeper than what *prima facie* appears.

3. **Publica fama and testimonies in the conviction**

Those relationships are what the situation of the prison warders lets us sense also in the light of other procedural moments.

In Pavia, in the mid-1200s, *publica fama* was not only that which legitimated the *ex officio* beginning of the trial. It was also an element considered by the judge for conviction. In fact, it can be confirmed that *fama* is given a precise probatory value in the course of judgement. To this regards, the verdict is clear in the part in which the judge considers the behaviour of Pietro *Rasus* and his son *Carbonus*, warders – among others – of the prison from which the prisoners escaped. Having reconstructed the fact subject to the charge, the judge refers to the fact that many witnesses were heard. Although their depositions were not reported integrally, the main part of their contents can be seen with a certain precision, in that it is summarised by the recording notary. In this way, we know that no witness stated having seen the *custodes* helping the prisoners in their escape. On the other hand, the convivial relationships that the fugitives had installed with those who should have been watching them are proven, as is the fact that the prison stood in front of the house in which Pietro and *Carbonus* lived. In the light of these considerations, the witnesses declared that the evasion could not have happened unless the warders were at least aware
of it. The depositions gathered were not however considered sufficient to legitimise a conviction, so much so that the judge in motivating his decision did not limit himself to referring to the results of the preliminary examination but endorses his decision with the mala fama existing against the accused. And he does so with a reasoning that I find worthy of interest. Remembering the testimonies, in fact, he clearly states that

«predictis de causis et quia dictus Carbonus infamatus est et est fama publica contra eos (...), ideo dictus potestas ex probacionibus et presu(m)pcionibus et indicis (...) conde(m)pinat ipsos in libris centum Papien(sium)»21.

It would seem that in this part of the verdict, the Pavian judge wove together the two different types of fama: what the sources define fama alterius rei inter homines existentis and fama hominis. The first may be defined as an uncertain, unguaranteed knowledge of the facts22. This is fama facti, the same that gave the impulse to the process and on which we have focussed our attention until now. The second is the reputation that others have of each of us. It is what in most dating glosses was defined as «inlaesae dignitatis status, moribus ac legibus comprobatus, et in nullo diminutus»23.

The above mentioned fragment tells us in fact that a publica fama exists against both Pietro and Carbonus. This is reasonably the fama facti, the element that legitimated the beginning of the trial against all the accused. The judicial document also tells us that Carbonus, and he alone, «infamatus est». Here, most likely, the judge alludes to the other type of fama or rather infamia and therefore to the fact that Carbonus did not have status inlaesae dignitatis, he had a bad reputation, he had lost his bona fama.

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21 ASCPv, ACPA, RC, chart. 6 (280).11, f. 2r.
22 See Migliorino, «La Grande Hache» (note 2), pg. 8.
It is well known how, based on the latter type of *infamia*, medieval jurists created the doctrine of *infamia facti*. Although subject to a first theoretical elaboration by the civilists, this was however very important in the work of decretists and decretalists. In those writings, this is considered a prerequisite of the canonical *purgatio*. It was the latter – as known – the swearing of innocence that was requested of the accused *infamatus* in the absence of a prosecutor. Various surveys have been carried out around this institute and its origins, even in recent years, which we refer to for more current information. Here we will limit ourselves to remembering those aspects of the speculations of the *doctores* who seem closely linked to the topic under discussion. We refer precisely to Bernardo da Pavia and to the turning point he impressed in the tide, destined to influence the most general problem of the probatory worth of the praeumptiones. Exceeding in fact the traditional relationship between *purgatio* and praeumptionis probabilis, Bernardo introduces the latter into the category of half-full evidences. In this way, clearly, *infamia* is given the same probatory value as an *inditium*.

As for *fama facti*, the doctrine – clearly of civil law – attributes the probatory worth of an *inditium* to this too. Towards the end of the 1200s, Tommaso da Pipera, starting with the opinion that *in criminalibus* evidence must be «luce clariores», denies that a conviction can be given...
based solely on *fama*. *Fama*, which if anything should be equated to a piece of evidence if associated with another piece of evidence, such as the declaration of a single witness, could legitimise the use of torture. If, on the other hand, it is in addition to a lot of evidence and together they make up that which is defined «indicia ad probationem indubitata», the judge may give a conviction\(^{28}\).

Returning to the Pavian trial, as mentioned above, there is more to the imposition of the punishment against Pietro and *Carbonus Rasus*: the depositions of «*quamplures testes*», *fama facti* against both the accused, which in late 13\(^{th}\) century civil law doctrine will be considered worthy as evidence, *infamia facti* which so markedly affected *Carbonus* and which already in canonical works is considered equal to a piece of evidence. An interlacement, therefore, of evidence, presumption and proof, as the recording notary writes.

4. **Wilful misconduct and negligence in the judge’s evaluations**

Until now, the procedural profiles underlying the events in question in these pages. There is, however, a further aspect of the Pavian trial of 1249, which invests not so much in the procedure as the themes and problems that today belong to the criminal law, and on which I would like to say a few words. As mentioned briefly above, in the conviction, the judge was concerned with distinguishing the position of the warders responsible for wilful misconduct from that of the warders who were merely guilty of negligence. Undoubtedly, the language used is uncertain. There are plenty of overlapping terms and concepts, which betray a clear difficulty in setting and distinguishing the categories of wilful misconduct and negligence. Nonetheless, above and beyond these comments, the judge’s will is clear. He wanted to investigate the subjective element of the crime and propose

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an evaluation of the guilt of the accused, which to me is anything but negligible. In this way, the prison warders Saliotus and Otto are ordered to pay two hundred Pavian lire, as they had been «dexides et negligentes in custodia dicti carceris et carceratorum facienda» and «ipsam custodiam secundum quod facere debebant non fecerunt diligentemente». Despite the general reference to negligence, the two warders are convicted for intentional conduct. The judge believed that they helped the prisoners escape, having eating with them on several occasions, so much so that «infamati sunt culpam habuisse et fraudem commississe»29. More precise is the reconstruction of the criminal responsibility of eight other warders, tried at the same time, in that all «in ipsa custodia facienda eam diligenciam et curam non habuerunt, quam habere debuerunt et promiserunt». Their behaviour was considered less serious than that of Saliotus and Otto, which is why they were ordered to pay the lesser fine of one hundred Pavian lire «propter eorum culpam et negligenciam (...) mitigata ipsis pena quia non inveniuntur de tanta culpa quanta predicti Saliotus et Otto»30. Although the distinction between intentional behaviour and negligent conduct is not always clear in terminology, what is important is that the judicial authority poses the problem on imputability and in the decision identifies the form and level of the guilt of each of the accused.

There is no Pavia’s statute for the period of the trial in question31. It is, therefore, impossible to verify if the ius proprium contemplated the case in point of the accusation and if, where this is the case, it imposed the same punishment issued by the judge in the mid-13th century.

29 ASCPV, ACPA, RC, chart. 6 (280).11, f. 1r.
30 ASCPV, ACPA, RC, chart. 6 (280).11, f. 1v.
Around the same time the doctores meditate on the *l. Ad commentariensem*\(^{32}\). That constitution, after establishing at the head of the *commentarienses*\(^{33}\) the duty to guard and take care of the people imprisoned, states in the event of escape that the warders have a type of objective responsibility, and that they should therefore be convicted with the same punishment as the fugitives. The glossators, from the first generations, posed the problem of the subjective element of crime. So Piacentino distinguished the hypothesis in which the evasion happened due to simple negligence on the part of the custodes meaning they were responsible by wilful misconduct\(^{34}\). The evaluation of the psychological element is then completely deployed in the Accursian Gloss. Here, in fact, we can clearly state that the warders had to comply with the same punishment contemplated for the escaped prisoners if found guilty of «nimia negligentia», or rather *culpa lata*, which in reference to D. 50, 16, 223 pr. allows it to be equated to intent\(^{35}\). In the other cases, on the other hand, the *commentarienses* are responsible «pro modo culpae ut ff. eo. l. milites [D. 48, 3, 12]». The *l. milites*, with which Adriano established the punishment for soldiers who lost their guard over captured persons, makes provisions for the death penalty for *milites* guilty of «nimia negligentia» and degradation if the evasion occurs «per vinum aut desidiam custodis». The glossators, developing evaluations that were already included in that rescript, once more reflect on the need to investigate the subjective element of crime in order to inflict the punishment.

On the *l. Ad commentariensem* there would still be much to say, likewise on the interpretation given by the glossators on Adriano’s rescript. What I want to highlight here is therefore the attention that in the mid-13\(^{th}\) century the towns’ judges as much as the doctores – not only of *ius civile* and not only specifically regarding the point of the topic in hand – dedicate

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\(^{32}\) C. 9.4.4. For a study, see L. Minieri, *I commentarienses e la gestione del carcere in età tardoantica*, in [www.teoriaestriadeldirittoprivato.com](http://www.teoriaestriadeldirittoprivato.com), [number IV – 2011].

\(^{33}\) See gl. *Ad commentariensem* in C. 9.4.4: «id est principem carceris (...) et dicitur commentariensis quia comitari debit eum quem custodit».


\(^{35}\) See gl. *Qui fugerit* a C. 9.4.4: «Hoc si nimia negligentia fuit in eo, quia tyrioni commisit, ut. ff. eo l. fin. in principio [D. 50.13.223pr.]». See gl. *Latae culpae* a D.50.13.223 pr.: «quae dolo comparatur».
to the theme of imputability.\footnote{36}

5. **Conclusive observations**

Our judicial history took place in a crucial period of the history of law and criminal procedure. Regarding the trial, the years around the mid-13th century were marked by a «precoce pubblicizzazione», meant as an entrance «del soggetto pubblico nella dinamica ancora privatistica» of practices of justice.\footnote{37} Regarding the substantial law area, in the first decades of the 13th century the first seeds of a public criminal law were sewn. On one hand, legists and canonists reflected on the themes of the crime, the punishment, imputability and the subjective elements of the crime.\footnote{38} On the other, in towns and cities punishment in the modern sense was established. We witness an increase in incrimination and a consequent increase in punishment.\footnote{39}

The trial carried out in Pavia in 1249 against the prison warders gives us a clear picture of both the profiles represented, and also highlights a phenomenon of the penetration of regulations and institutions elaborated by the legal science within the praxis of town courts. This is above all the case in the more procedural area, for which the more obvious connections


\footnote{38 For bibliographical references, see *supra* note 36.

are with the canonical *inquisitio*. Similarly to that provided for by canonical law, also in Pavia in the mid-13th century, *fama facti* is at the same time an element that legitimises the *ex officio* start of the trial and evidence that the judge evaluates at the time of conviction. *Infamia facti* is also given evidence status. Regarding that which today is substantial criminal law, the phenomenon of publicisation affects less and not only the sanctionary profile but more the side of the crime and the criminal. The Pavian *potestas*, in a context marked by a more general interest in doctrine for the problem of imputability, investigates the subjective element of the crime and, though between caution and uncertainty, distinguishes fraud from negligence.