

Erste europäische Internetzeitschrift für Rechtsgeschichte
<http://www.forhistiur.de/>

Herausgegeben von:

Prof. Dr. Rainer Schröder (Berlin) †
Prof. Dr. Hans-Peter Haferkamp (Köln)
Prof. Dr. Christoph Paulus (Berlin)
Prof. Dr. Albrecht Cordes (Frankfurt a. M.)
Prof. Dr. Mathias Schmoeckel (Bonn)
Prof. Dr. Andreas Thier (Zürich)
Prof. Dr. Franck Roumy (Paris)
Prof. Dr. Emanuele Conte (Rom)
Prof. Dr. Massimo Meccarelli (Macerata)
Prof. Dr. Michele Luminati (Luzern)
Prof. Dr. Stefano Solimano (Milano)
Prof. Dr. Martin Josef Schermaier (Bonn)
Prof. Dr. Hans-Georg Hermann (München)
Prof. Dr. Thomas Duve (Frankfurt a. M.)
Prof. Dr. Manuel Martínez Neira (Madrid)
Prof. Dr. D. Fernando Martínez Pérez (Madrid)
Prof. Dr. Marju Luts-Sootak (Tartu)
Prof. Dr. Heikki Pihlajamäki (Helsinki)

Artikel vom 06.04.2016

© 2016 fhi

Erstveröffentlichung

Zitiervorschlag

<http://www.forhistiur.de/2016-04-motta/>

ISSN 1860-5605

Franco Motta

Evidence, Truth, and Sovereignty in Late 16th Century Demonological Literature

1

Historiography has long been familiar with the key role witch-hunting played in the early modern State-building process, and more specifically in the process of “juridical centralization” by which centrally appointed law courts gained a monopoly over second instance criminal trials.¹

The general contours of this process were quite similar throughout most of the European regions involved: lower courts set up massive waves of trials with disregard for the rights accorded to the defendant while princely courts increasingly sought to establish their authority over appeals. The core issue of these dialectics was the particular juridical nature of witchcraft. Due to the influence of the *Malleus maleficarum* (1487), witchcraft was counted among the *crimina excepta* or ‘exceptional crimes’ (including homicide, heresy, and the counterfeiting of currency), in which judges were allowed to suspend conventional legal regulations in identifying and punishing the culprits.²

Indeed, the fact that in these trials a greater recourse to torture was permitted meant that the investigations extended to involve dozens of people, often leading to death sentences. In this perspective higher courts exerted constant pressure on the lower ones in an effort to assert their own authority over the proceedings and held second instance trials that generally ended in acquittal. To cite just one well-known example, Robert Mandrou’s research on witch-hunting in 17th century France has shown how the *Conseil du Roi* interfered ever more frequently with provincial court proceedings in order to stop ongoing trials, a state of affairs that continued until the 1682 judicial reform abolishing satanic crime. Similarly, the provincial magistracies of the *Parlements* frequently took over cases that had been autonomously prepared by the lesser judges of the *bailliages*.³ Comparable dynamics have been documented for other areas, including Lorraine, Flanders, Austria and Scotland, where sovereign courts and councils steadily restricted the autonomy of local tribunals.⁴

¹ *Hexenverfolgung und Herrschaftspraxis*, ed. R. Voltmer (Trier: Paulinus – Spee, [2006]); Peter Elmer, *Towards a Politics of Witchcraft in Early Modern England*, in *Languages of Witchcraft. Narrative, Ideology and Meaning in Early Modern Culture*, ed. S. Clark (London – New York: MacMillan – St. Martin’s Press, 2001), 101-18; Jonathan L. Pearl, *The Crime of Crimes. Demonology and Politics in France 1560-1620* (Waterloo, Ontario: Wilfrid Laurier University Press, 1999); Stuart Clark, *Thinking with Demons. The Idea of Witchcraft in Early Modern Europe* (Oxford-New York, Oxford University Press: 1997), 549 ff.; Michel Carmona, *Les diables de Loudun. Sorcellerie et politique sous Richelieu* (Paris: Fayard, 1988). Further titles will be cited below.

² Vincenzo Lavenia, “Crimen exceptum”, in *Dizionario storico dell’Inquisizione*, ed. A. Prosperi (Pisa: Edizioni della Normale, 2010), 1:430-31.

³ Robert Mandrou, *Magistrats et sorciers en France au XVII^e siècle. Une analyse de psychologie historique* (Paris: Plon, 1968), 425 ff., 541 ff. S. also Alfred Soman, “The Parlement of Paris and the Great Witch Hunt (1565-1640)”, *The Sixteenth Century Journal*, 9/2 (1978): 31-44, showing how in the same period the Parliament of Paris tended to repeal the capital punishments for witchcraft delivered by lower magistratures.

⁴ Christine Petry, “Das Parlement de Metz und das Ende der lothringischen Hexenverfolgung”, in *Hexenprozesse und Gerichtspraxis*, eds. H. Eiden – R. Voltmer (Trier: Paulinus – Spee, 2002), 227-51; Jos Monballyu, “Die

In reality, however, this general trend was not completely unrivalled. In many regions of Catholic southern Germany, for instance, the opposite tendency prevailed, albeit for limited periods, with princely courts taking a leading role in the persecution campaigns. The most striking case is that of the Duchy of Bavaria in the 1590s and the 1600s, where the court of Munich imposed its own central jurisdiction on the inquiries – not to contain them but rather to promote them, despite the reservations of local magistrates.⁵

The Jesuit Grégorio de Valencia, theological adviser to the Bavarian duke William V, played a prominent role in the events. In this article I will focus primarily on his theses regarding witch trials in order to shed light on a widely neglected aspect of the relationship between witch-hunting and public sovereignty, namely the tendency to discipline the judge as a figure of sovereign power.

2

In most late mediaeval judicial systems, lower judges enjoyed a high degree of decisional autonomy, a freedom denied to those judges who were directly subject to princely authority. Indeed, the way that sovereign powers assumed an exclusive right over life and death represented a key element of the State-building process in Europe, together with the increasingly standardized character of administrative procedures.

Due to the inquisitorial method governing trials for sorcery and other exceptional crimes, the individual conscience of the judge, that is, his personal position regarding evidence of innocence or guilt, became a crucial element of the process. According to demonological literature, in witchcraft trials judges were asked to conduct a severer evaluation of the clues that would have legitimized the use of torture in questioning the defendants in order to more readily obtain the ‘Queen of evidence’, confession.

In other words, by strengthening criminal jurisdiction over witchcraft the inquisitorial process implicitly extended the scope of the judge’s discretion.⁶ The most striking example was that of public ill-fame, an element of presumptive guilt that granted judges greater room for discretion, thus essentially making them sovereign figures in themselves.⁷

It is no coincidence then that the late 16th century theologians and jurists who laid down the basic legal framework for the repression of witchcraft repeatedly addressed the issue of the judge’s individual conscience, insisting that rulings must be made on the objective grounds of concrete evidence rather than the subjective grounds of the judge’s personal opinion. To argue this position

Hexenprozesse in der Grafschaft Flandern (1495-1692). Chronologie, Soziographie, Geographie und Verfahren”, *ibid.*, 279-314; Johannes Dillinger, »Böse Leute«. *Hexenverfolgungen in Schwäbisch-Österreich und Kurtrier im Vergleich* (Trier: Paulinus – Spee, 1999), 281 ff.; Brian P. Levack, “Absolutism, State-Building, and Witchcraft”, in *id.* *Witch-hunting in Scotland. Law, Politics and Religion* (New York – London: Routledge, 2008), 98-114, 105 ff.

⁵ Wolfgang Behringer, *Hexenverfolgung in Bayern. Volksmagie, Glaubenseifer und Staatsräson in der Frühen Neuzeit* (München: Oldenbourg, 1988).

⁶ Massimo Meccarelli, *Arbitrium. Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune* (Milano: Giuffrè, 1998), 279 ff.

⁷ Massimo Vallerani, “Modelli di verità. Le prove nei processi inquisitori”, in *L’enquête au Moyen Âge*, ed. C. Gauvard (Rome: École française de Rome, 2008), 124-42, 134.

they frequently referred to a brocard of the medieval *ius commune*: *Iudex secundum allegata et probata, non secundum conscientiam iudicat*, «the judge judges according to the evidence presented, not according to his conscience».

This principle is at the foundation of Western trial law given that the role of witness and the role of judge are mutually incompatible. Nonetheless, its achievement has a long story and different implications, a part of which will be studied here.

This topic has been brilliantly explored in a well-known book by James Whitman, which paints a fascinating picture of the evolution of the formula “beyond any reasonable doubt” in the Western judicial system.⁸

According to Whitman, factual evidence became increasingly central to trial theory and practice in the historical development of modern juridical doctrine as the basic means for overcoming areas of doubts in the judgment – a move that paralleled the broader transition from religious to secularized society.

Canonists and theologians took leading role in this process. From the 13th century onward, canon law began to frame the figure of the magistrate as consisting of two distinct persons, the private person and the public one; in this arrangement, only the latter was responsible for establishing penalties and issuing condemnations.⁹ According to Whitman, this move was not motivated by an effort to safeguard the rights of the defendant, but rather to protect the judge from the mortal sin of condemning an innocent.

At this point I would like to build on Whitman’s thesis to argue that the doctrine of the judge’s conscience may have had a second, parallel branch that developed more fully in the late 16th century.

Whitman explains the secularization of modern judicial law in terms of the increasing centrality of legal procedure at the expense of the judge’s freedom to act as his conscience dictates. The process whereby sovereign power set itself up as the sole source of jurisprudence augmented this process of formalization, thereby concealing the original theological core of the issue. When then did this bifurcation between the “political” and the “theological” take place, and what function did the notion of political sovereignty have in this process?

I would argue that, in early modern Europe, the divergence between the element of *allegata et probata* on one side and *conscientia* on the other had little to do with the salvation of the judge’s soul. Rather, it was motivated by an effort to restrict his individual will and subordinate it to the impersonal sphere of law as an expression of public power. Legal proceedings against the crime of witchcraft represented an exemplary case in which sovereignty, aided by theological reasoning, sought to establish itself as the sole arbiter of judicial truth.

⁸ James Q. Whitman, *The Origins of Reasonable Doubt. Theological Roots of the Criminal Trial* (New Haven – London: Yale University Press, 2008).

⁹ Whitman, *The Origins of Reasonable Doubt*, 114 ff.

3

As I have noted above, the deep political meaning of witchcraft persecution actually lies in the competition between different levels of power. 17

The Holy Roman Empire with its complex overlapping of jurisdictions represented a sort of testing ground for this issue.¹⁰ Although it is difficult to document a specific theological connection between religious identity and belief in witchcraft, it has been evidenced that witch-hunting became a primary political concern in Catholic Germany since the last quarter of the 16th century.¹¹ One of the most celebrated works of early modern demonology, Peter Binsfeld's *Tractatus de confessionibus maleficorum et sagarum*, printed in Trier in 1589 with further revised editions until 1623, had a crucial impact on this phenomenon.¹² 18

Binsfeld, suffragan bishop of the ecclesiastical principality of Trier, shaped the canon of Catholic demonological science by combining theology, sacred history and criminal law into a science of governance. A judge with widespread experience in sorcery trials, he argued that witchcraft must be persecuted as a political emergency in order to protect the State from destructions of harvests, cattle deaths and human disease.¹³ This call to battle did not go unanswered: panic over the supposed siege by the devil's armies spread out from Trier to overflow south-western Germany. 19

However, despite the *Reichskammergericht* (the imperial court of appeal) and the *Constitutio criminalis Carolina* (Charles V's penal code), the Empire remained politically fragmented and lacking in true juridical uniformity. Judges frequently acted in a vacuum of jurisprudence, resulting in highly arbitrary proceedings and punishments. 20

Trials sprang up all over in the lesser secular and ecclesiastical principalities, where the weakness of sovereign legitimacy was counterbalanced by an obsessive display of judicial control over local subjects, further exacerbated by the lack of precision that surrounded "mixed jurisdiction" crimes such as witchcraft, sodomy, and adultery. Scaffolds and stakes took on ever-greater symbolic strength in representing seigneurial control over the land.¹⁴ 21

¹⁰ S. Rita Voltmer, "Hexenverfolgung und Herrschaftspraxis. Einführung und Ergebnisse", in *Hexenverfolgung und Herrschaftspraxis*, 1-22.

¹¹ Behringer, "Das 'Reichskhündig Exempel' von Trier. Zur paradigmatischen Rolle einer Hexenverfolgung in Deutschland", in *Hexenglaube und Hexenprozesse im Raum Rhein-Mosel-Saar*, eds. G. Franz – F. Irsigler (Trier: Paulinus-Spee, 1996), 436-47, 436; Id., *Witches and Witch-Hunts* (Cambridge: Polity Press, 2004), 90-91.

¹² *Tractatus de confessionibus maleficorum et sagarum. An, et quanta fides iis adhibenda sit* (Augustae Trevirorum: Henricus Bock, 1589; second revised edition 1591). Its importance is underscored by Behringer, "Das 'Reichskhündig Exempel' von Trier", 439 ff.

¹³ Behringer, "Das 'Reichskhündig Exempel' von Trier". On Binsfeld's *Tractatus* and his engagement in sorcery trials s. also Dillinger, »Böse Leute«, 174 ff., 365 ff.

¹⁴ William Monter, "Witch Trials in Continental Europe 1560-1660", in *Witchcraft and Magic in Europe*, eds. W. Monter – Bengt Ankarloo – Stuart Clark (London: The Athlone Press, 1999-2002), 4, *The Period of the Witch Trials*: 1-52, 16 ff.; Walter Rummel – Rita Voltmer, *Hexen und Hexenverfolgung in der Frühen Neuzeit* (Darmstadt: Wissenschaftliche Buchgesellschaft, 2008), 105 ff.; Voltmer, "Hexenverfolgung und Herrschaftspraxis", 3 ff.; Wolfgang Wüst, "Das inszenierte Hochgericht. Staatsführung, Repräsentation und blutiges Herrschaftszeremoniell in Bayern, Franken und Schwaben", in *Bayern von Stamm zu Staat*, Festschrift A. Kraus, eds. K. Ackermann – A. Schmid – W. Volkert (München: Beck, 2002), 1:273-300, 281 ff.

In the Duchy of Bavaria, one of the Empire's most powerful States, the trials were set up directly by central tribunals instead of peripheral magistracies and witchcraft trials became the object of heated political debate at the court of Munich, the very heart of the State.¹⁵ 22

After Duke William V (1579-97) came to power, witch-hunting acquired a more systematic character. William, an archetypal Counterreformation prince, populated his court with Jesuit confessors and advisers: the Bavarian State came to represent a pillar of the catholic re-conquest of Germany, and control over its people was central to the political-religious strategy of the Society of Jesus. In this context, witches came to constitute a key political issue.¹⁶ 23

William's decrees of 1590 classified the persecution of witchcraft as an affair of State and granted the relevant competence to sovereign courts, mandating the use of the special procedures reserved for *crimina excepta*. From that point on, and especially in the early years of Maximilian I's reign (1597-1651), the repression of satanic crime became the object of an internal struggle between opposing parties inside the Munich court. These parties, named after the terminology of the French religious wars, were known as the 'zealots' (*Eiferer*), those in favor of adopting emergency legislation, and the 'politicians' (*Politiker*), who advocated for following ordinary investigative procedures.¹⁷ 24

In reality, a new criminal law was required to effectively stamp out witchcraft. The lower magistrates were suffering from a lack of jurisprudence in the matter, and, as William's heir Maximilian reported to his father regarding the city council of Ingolstadt in 1589, they sometimes showed «little inclination» to carry out hastily-ordered arrests and tortures. The judges questioned the reliability of confessions obtained as a result of questioning sessions that used torture more often than the three times normally allowed for.¹⁸ 25

The *Hofrat* presented a completely new set of justifications regarding this issue that did not leave room for debate. During a controversial case that occurred in Munich in 1611, the duke's advisers replied to the city court's objections by citing the sovereign right to take over a judgment *ob causam negligentiae* (due to the negligence of a lower magistrate) and *ob causam publicae utilitatis*, as outlined in the legal-political literature of the day: «Princes [...] are believed to hold every power over their lands», since «as Bodin attests in the *République*, they share to a large extent in the imperial rights of majesty».¹⁹ Therefore, «in the case of assuming powers, when the local prince takes over a matter on the basis of his supreme jurisdiction and power [...] the lower jurisdiction is immediately suspended».²⁰ 26

¹⁵ Behringer, *Hexenverfolgung in Bayern*, 3; Monter, "Witch Trials in Continental Europe 1560-1660", 29 ff.

¹⁶ Andrew L. Thomas, *A House Divided. Wittelsbach Confessional Court Cultures in the Holy Roman Empire, c. 1550-1650* (Leiden – Boston: Brill, 2010), 65 ff.; Behringer, *Mit dem Feuer vom Leben zum Tod. Hexengesetzgebung in Bayern* (München: Hugendubel, 1988), 70-71.

¹⁷ Behringer, *Mit dem Feuer vom Leben zum Tod*, 132 ss.

¹⁸ Behringer, *Hexenverfolgung in Bayern*, 213-14.

¹⁹ *Hofratsgutachten* of January 20, 1611, in Michael Kunze, "Zum Kompetenzkonflikt zwischen städtischer und herzoglicher Strafgerichtsbarkeit in Münchner Hexenprozessen", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte - Germanistische Abteilung*, 87 (1970): 305-14, 312, notes 53 and 54.

²⁰ *Hofratsgutachten*, 313.

The juridical conceptualization of the crime of sorcery had been established quite precisely in the *Carolina*, which adopted the theories of late medieval demonology to frame the practice of sorcery as a crime against God, the individual and the community. Nonetheless, problems arose in the area of criminal procedure: how was it possible to precisely ascertain guilt for a crime that was by its very nature so elusive, lying as it did outside of ordinary relations between cause and effect? How should judges evaluate aleatory clues such as the suspects' ill-fame and the presence of the *stigma diaboli* upon their skin, or assess the reliability of commonly used ordeals such as the trial by cold water? 27

The crime of sorcery was governed by three specific articles of the *Carolina*: article 106, punishing *crimen lesae maiestatis divinae*, which covered the pact with the devil; article 116, punishing *crimen sodomiae* and thus including sexual intercourse with the devil; and article 109, punishing *crimen magiae* in cases where evidence suggested that magic rituals had been aimed at causing injury to others.²¹ 28

This last article was both explicit and controversial in that it mandated capital punishment if sorcery could be proved to have effectively caused damage, but left the decision up to the judge's own discretion in ambiguous cases. Moreover, it addressed the crime of *Zauberei*, 'magick' or 'sorcery', but not that of *Hexerei*, 'witchcraft'. 29

Witchcraft itself was not codified until much later, well after the *Carolina*, as a product of late 16th century demonology, integrating new elements like the Sabbath and nocturnal flight derived from scholastic theology and canon law. Evil magick became envisaged as a crime of lese-majesty both divine and human, punishable by death irrespective of the damage it caused.²² 30

The proliferation of the laws governing witchcraft from the 1580s onwards can be read as a juridical manifestation of sovereignty invading the world of the supernatural. And yet the inconsistencies produced by Germany's two juridical levels (imperial and local) continued to provide judges with significant discretionary powers, especially in interpreting the rules for applying torture – and torture did indeed represent a tool for potentially turning any defendant into a criminal, when used indiscriminately to the point of forcing a confession. 31

In this context, the advice drafted in April 1590 by Ingolstadt's Faculties of theology and law at the request of Duke William V represented a major theoretical step in that it established the Bavarian legislation on witchcraft that subsequently governed the massive trials of 1590-91 and the years following 1610. The duke was exhorted to adopt a strategy of outright repression, training judges by having them read the legal proceedings of cases held in the dioceses of Augsburg and Eichstätt, the *Malleus maleficarum* and Binsfeld's *Tractatus*, and preparing exhaustive inquiries characterized by the greatest possible severity. 32

²¹ Christian Roos, *Hexenverfolgung und Hexenprozesse im alten Hessen* (Marburg: Tectum, 2008), 208-9.

²² Marianne Sauter, *Hexenprozess und Folter. Die strafrechtliche Spruchpraxis der Juristenfakultät Tübingen im 17. und beginnenden 18. Jahrhundert* (Bielefeld: Verlag für Regionalgeschichte, 2010), 62 ff.; Dillinger, »Böse Leute«, 14; Behringer, *Hexenverfolgung in Bayern*, 124, arguing of a «starke Spiritualisierung des Hexereidelikts», «strong spiritualization of the crime of witchcraft», through elements previously unknown to penal law such as the sabbath and the demonic pact.

The main author of the advice is thought to have been father Gregorio de Valencia, a Castilian and among the most brilliant theologians of the Society of Jesus. Valencia resided in Ingolstadt from 1575 to 1598, where he was tasked with lecturing on Aquinas' *Summa theologiae*. In the position of court confessor, he also provided guidance for the dukes of the House of Wittelsbach in matters of conscience. 33

In his major work, the *Commentarii theologici* (1591-97), Valencia addressed the nature and content of justice and secular law, the means by which human law might justly coerce and the proper limits of this coercive power.²³ He also contributed to a theoretical position that would later become the modern Catholic answer to the problem of usury, i.e. the justification of loan interest as a share of the profit repayed to the lender *libere et ex mera gratitudine*, 'freely and by mere gratitude'.²⁴ 34

Along seven points, the Ingolstadt advice outlines a general theory of the State's authority and duty in prosecuting witchcraft, and sketches out the implications of this duty in terms of criminal procedure.²⁵ It recommends that judges make more intensive use of torture as witchcraft is a *crimen occultum*, 'invisible crime;' it specifies that torture can also be applied to defendants accused by a previously-tortured suspect if additional clues are available or in cases where an ill-famed person is found in possession of magical objects.²⁶ The document's primary aim is to extend inquisitorial procedures to the crime of witchcraft, establishing a «comprehensive inquiry» (*gemeine Inquisition*) on the sole basis of «common opinion», even in the absence of «specific negative rumor or suspicion surrounding a person». 35

5

Trials based on torture, ill-fame and concealed evidence did indeed constitute the foundation of justice *per inquisitionem* that flourished from the 15th century onward.²⁸ 36

The vanishing point of juridical doctrine regarding torture revolved around the idea of confession as the ultimate proof of guilt. The judge began with the *semiplena probatio*, the "half-full proof" consisting only of clues; the defendant's confession enabled the inquiry to achieve the *plena probatio*, 37

²³ *Commentariorum theologicorum tomi quatuor. In quibus omnes materiae quae continentur in Summa theologica divi Thomae Aquinatis, ordine explicantur* (Ingolstadii: excudebat David Sartorius, 2 ed. 1592-95), 1: "Praefatio ad pium lectorem". Cf. Wilhelm Hentrich, "Gregor von Valencia und die Erneuerung der deutschen Scholastik im XVI. Jahrhundert", in *Philosophia perennis. Abhandlungen zu ihrer Vergangenheit und Gegenwart*, ed. F.-J. von Rintelen (Regensburg: Josef Habel, 1930), 1:291-307, 301 ff.; François Laplanche, "Réseaux intellectuels et options confessionnelles entre 1550 et 1620", in *Les jésuites à l'âge baroque (1540-1640)*, eds. L. Giard – L. de Vaucelles (Grenoble: Jérôme Millon, 1996), 89-114, 96 ff.

²⁴ Bartolomé Clavero, *Antidora. Antropología católica de la economía moderna* (Milano: Giuffrè, 1991), 77 ff.

²⁵ *Responsum duarum Facultatum Theologiae et Iuridicae Academiae Ingolstadiensis, ad quaestiones iussu Serenissimi utriusque Bavariae ducis Guilielmi propositae. In causa maleficarum*, in Behringer, *Mit dem Feuer vom Leben zum Tod*, 97-108.

²⁶ Behringer, *Mit dem Feuer vom Leben zum Tod*, 105-7.

²⁷ Behringer, *Mit dem Feuer vom Leben zum Tod*, 99.

²⁸ Paolo Prodi, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto* (Bologna: il Mulino, 2000), 172 ff.; Isabella Lazzarini, "L'enquête et la construction de l'État princier entre XIV^e et XV^e siècle. Quelques exemples en Italie du Nord", in *L'enquête au Moyen Âge*, 405-27.

the “full proof” of a crime: «Confessio habet vim condemnationis».²⁹ According to Benedikt Carpzov, the most influential German jurist of the 17th century, it was unthinkable to hold a criminal trial without torture; his widely circulated *Practica nova rerum criminalium* (1635) defined judicial torture as «an inquiry intended to extract the truth through torment and bodily pain».³⁰

Needless to say, the judge’s personal viewpoint in assessing the evidence lay at the heart of this process. Indeed, he was called on not only to issue a sentence, but also to evaluate the clues that justified the use of torture, in so doing virtually turning any inquiry into a likely condemnation.

Given these conditions, torture played a key role in transforming the criminal trial into an instrument of power. Indeed, the aberrant logic behind the indiscriminate use of torture with its resultant proliferation of confessions and executions was clearly revealed in the massive witch-hunts that plagued southern Germany at the beginning of the 17th century.

Torture had been brought into German tribunals in the 14th century, legitimated by the restoration of Roman law in the Italian city-States. However, the use of torture in Germany was not restricted by rigid regulations as it was in Italy; rather, it was used at the sole discretion of the judge, particularly in cases involving “dangerous people” (*landschädliche Leute*), namely vagabonds, beggars, adulteresses, prostitutes, and sorcerers.³¹

Before the French revolutionary criminal law reforms that established the moral certainty of the judge as a precondition for fair sentencing, European penal systems were centered around the so-called ‘legal evidence.’ This set of clues, collected during inquiry, was assessed without regard for how closely it corresponded to the specific conditions of the case in question, with judges adding and subtracting ‘proofs’ and ‘half proofs’ until they achieved a mechanistic-type alleged certainty.³²

This mathematical procedure was wholly unable to encompass the endless range of criminal justice cases, of course. The judge’s autonomy, subject to all the limits and uncertainty of human knowledge, still persisted as a fixed element of the trial.

As Massimo Meccarelli and Wim Decock, among the others, have argued, this autonomy of choice on the part of the judge, codified as *arbitrium iudicis*, represented a cornerstone in the process of the *ius commune*. Although it would be later given a negative meaning (especially from the 18th

²⁹ Mathias Schmoeckel, *Humanität und Staatsraison. Die Abschaffung der Folter in Europa und die Entwicklung des gemeinen Strafprozess- und Beweisrechts seit dem hohen Mittelalter* (Köln – Weimar – Wien: Böhlau, 2000), 203, note 113. Thomas Robisheaux, “‘The Queen of Evidence’: The Witchcraft Confession in the Age of Confessionalism”, in *Confessionalization in Europe, 1555-1700*, Essays in Honor and Memory of Bodo Nischan, eds. J.M. Headley – H.J. Hillerbrand – A.J. Papalas (Aldershot: Ashgate, 2004), 175-205, stresses the analogy between the rising symbolic value of confession in early modern criminal procedure for sorcery and the sacramental confession. On the role of witchcraft trials in the debate about the abolition of judicial torture s. Edward Peters, *Torture* (New York: Basil Blackwell, 1985), 79 ff.

³⁰ Ulrich Falk, “De la torture judiciaire en Saxe, en particulier chez Benedict Carpzov (1595-1666)”, in *La torture judiciaire. Approches historiques et juridiques*, eds. B. Durand – L. Otis-Cour (Lille: Centre d’histoire judiciaire, 2002), 2:709-42, 714.

³¹ Jan Zopfs, *Der Grundsatz “in dubio pro reo”* (Baden-Baden: Nomos, 1999), 124 ff.

³² Antonio Padoa-Schioppa, “Sur la conscience du juge dans le *ius commune* européen”, in *La conscience du juge dans la tradition juridique européenne*, eds. J.-M. Carbasse – L. Depambour-Tarride (Paris: Puf, 1999), 95-129, 118 ff. Nicole Dockes, “La loi, l’équité et la paix ou la justice selon Jean Bodin”, in *Le juste et l’injuste à la Renaissance et l’âge classique*, eds. C. Lauvergnat-Gagnière – B. Yon (Saint-Etienne: Publications de l’Université de Saint-Etienne, 1986), 65-89, 71 ff.

century onward, with the enlightened critique to the penal system of the *Ancien régime*), being identified with arbitrariness, in reality it fulfilled the task of finding the best solution to restore the social peace broken by crime, imposing a balance between the different social bodies involved in the trial, and getting oriented in the thick entangling of customary norms.³³

The *arbitrium* was conceptualized within a frame composed by *iustitia*, *aequitas*, and *ratio*; the judge's conscience set the correctness of its exercise: as Meccarelli argues, «the subjective element recognizable in the *arbitrium* is described with the terms *conscientia* and *voluntas*. As for the former, the expression seems to belong to the formula of contribution of discretionary powers; *habere potestatem disponendi et providendi secundum conscientiam*, as the jurists say when explaining the presence and role of the *arbitrium*».³⁴

In the expression *conscientia iudicis*, 'the judge's conscience', the semantic ambiguity of the Latin word – in which *conscientia* refers to moral insight as well as the rational knowledge of a fact – reflected the original aporia according to which a sentence was called on to reflect an overarching idea of justice by guaranteeing moral *conscience* through fallible human *knowledge*.

The *ius commune* inherited certain restrictions limiting the judge's power of interpretation from Roman law. These restrictions involved the criteria used to form a judgment based on the logical inferences associated with every act of knowing; it was therefore not an issue of the judge's conscience, but rather of his ability to know (*scientia iudicis*).

The judge was required to formulate his verdict on the basis of his knowledge of the facts, which was the product of the inferences he drew from the evidence presented at trial. But how could he assess additional information that was not presented in the legal proceedings? More specifically, if the judge was persuaded that the defendant was guilty but lacked sufficient legal evidence to ensure a conviction, was he supposed to acquit or convict? And, adversely, should he convict a defendant who he privately knew to be innocent if the evidence brought to trial was negative or inconclusive?

The *ius commune* had resolved this dilemma through the above-mentioned principle *iudex secundum allegata et probata, non secundum conscientiam iudicat*,³⁵ which established that the judge was required to base his verdict solely on the evidence presented by the parties, excluding any considerations that may have derived from his private knowledge of the facts (the *scientia*) or his inner moral disposition (the *conscientia*).

³³ Massimo Meccarelli, *Arbitrium*; id., "Dimensions of Justice and Ordering Factors in Criminal Law from the Middle Ages till Juridical Modernity", in *From the Judge's Arbitrium to the Legality Principle. Legislation as a Source of Law in Criminal Trials*, eds. G. Martin – A. Musson – H. Pihlajamäki (Berlin: Duncker & Humblot, 2013), 49-67, esp. 59 ff.; Wim Decock, "The Judge's Conscience and the Protection of the Criminal Defendant: Moral Safeguards against Judicial Arbitrariness", *ibid.*, 69-94.

³⁴ «L'elemento soggettivo riconoscibile nell'*arbitrium* è descritto con i termini *conscientia e voluntas*. Quanto al primo, l'espressione sembra appartenere proprio alla formula di conferimento dei poteri discrezionali; *habere potestatem disponendi et providendi secundum conscientiam*, dicono i giuristi quando vogliono spiegare la presenza e il ruolo dell'*arbitrium*»; Meccarelli, *Arbitrium*, 9-10. According to Decock, "The Judge's Conscience", 79, in Francisco Suarez's *De lege* «the symbiosis of the rule and the exception hinge on the *arbitrium iudicis*, which holds this system together by reconciling strict law and equity».

³⁵ Knut Wolfgang Nörr, *Zur Stellung des Richters im gelehrten Prozess der Frühzeit. Iudex secundum allegata non secundum conscientiam iudicat* (München: Beck'sche Verlagsbuchhandlung, 1967). As far as I know, it is the deepest inquiry devoted to this subject.

In contemporary legal systems, this principle applies only to civil law, since penal sentences must arise from the judge's moral certainty. However, early modern judicial systems applied the principle to criminal law as well, and judges pronounced sentences on the grounds of *allegata et probata* that potentially touched on honor, property and the defendant's physical integrity or life. 49

Though the system of legal evidence had been envisaged as a form of guarantee, with the consolidation of the inquisitorial process and the widespread use of judicial torture it became exactly the opposite, a device for securing condemnations, given that the same magistrate was tasked with both gathering the *allegata et probata* and evaluating them. 50

Trials concerning the exceptional crime of witchcraft were thus carried out by evaluating ambiguous or even cryptic clues such as the ill fame of the accused or the supposed effects of a magic ritual. These trials became a testing ground for a new judicial system that, between the late 16th and the first half of the 17th century, experimented with the repressive potential inherent in the concept of 'crime against the community'. 51

6

The doctrine of the primacy of *allegata et probata* over *conscientia* separates a single individual into two distinct figures in that the *persona privata* of the judge is split from his *persona publica* and relegated to silence. This doctrine requires the judge to act impersonally in evaluating the evidence, putting aside the perceptions, inclinations and empirical knowledge that actually constitute an individual. 52

In addressing the circulation of this doctrine among late 12th century canon lawyers, James Whitman argues that the judge «was a triple person. [...] There were things known to him “ut Deus”, “as God”. Other things were known to him in his professional role as judge, “ut iudex”. Finally things were known to him as a witness, as a private person [...]. Of the three, only the judge was permitted to judge». 36 53

Although in contemporary law the issue of the 'judge as a witness' is at best an academic question, in the past it regulated criminal procedure for centuries. According to William Durand's *Speculum iudiciale* (1271 ca.), medieval jurisprudence on this issue was founded on an episode that occurred in Bologna: the *podestà* of the city witnessed a homicide through his window, and as there were no other witnesses he ordered the murderer to be tortured until he confessed, despite the absence of further evidence. According to Azo, Ugolinus and Accursius, the masters of the Glossators' school, the magistrate had committed an illegal act. 37 54

With a few exceptions, this formalistic principle prevailed until the early 16th century. In this period, however, the issue did not revolve around the judge potentially being the only witness to a crime; rather, it was focused on the role his conscience played in collecting and assessing the evidence that could lead to a conviction. Furthermore, the widespread use of trials *per inquisitionem* 55

³⁶ Whitman, *The Origins of Reasonable Doubt*, 112.

³⁷ Nörr, *Zur Stellung des Richters im gelehrten Prozess der Frühzeit*, 31; Schmoeckel, *Humanität und Staatsraison*, 192.

had inverted the nature of the dilemma from the risk that a criminal would go unpunished to the risk that an innocent person would be condemned.

In the *secunda secundae* of his *Summa theologiae*, Thomas Aquinas explores the issue of virtues, including justice and its contrary, injustice. In his discussion of the *quaestio De iniustitia iudicis in iudicando* («On the injustice of the judge in judging») he considers the question of judicial procedure with respect to the doctrine of *allegata et probata*. 56

In expounding the *quaestio*, Aquinas addresses all the judicial elements introduced above, from conscience, knowledge and truth to justice and sin. In article 2, «Whether it is lawful for a judge to pronounce judgment against the truth that he knows», the idea of conscience appears in the fourth statement attributed to his adversaries: «The word conscience [*conscientia*] denotes application of knowledge [*scientia*] to a matter of action [...]. Now it is a sin to act contrary to one's conscience. Therefore a judge sins if he pronounces a sentence according to the evidence [*allegata*] but against his conscience of the truth». ³⁸ The *conscience* of truth is equivalent to the *knowledge* of truth. The moral acceptance of 'conscience' has vanished, thus abruptly changing the semantic frame of the problem. 57

Aquinas' argument in developing his refutation of this statement rests on a specific key element, that of public authority. «It is the duty of a judge to pronounce judgment in as much as he exercises public authority, wherefore his judgment should be based on information acquired by him, not from his knowledge as a private individual, but from what he knows as a public person. Now the latter knowledge comes to him both in general and in particular. In general through the public laws, whether divine or human, and he should admit no evidence that conflicts therewith. In some particular matter, through documents and witnesses, and other legal means of information, which in pronouncing his sentence, he ought to follow rather than the information he has acquired as a private individual». The judge can inspect evidence more carefully but, if he is not able to reject it on legal grounds, he must refrain from ruling on the basis of his personal knowledge of the facts. ³⁹ 58

Clearly, neither sin nor conscience (in its moral meaning) are included in this argument. Again, a few lines below, conscience appears to be necessarily molded by knowledge: «In matters touching his own person, a man must form his conscience from his own knowledge, but in matters concerning 59

³⁸ «Nomen conscientiae importat applicationem scientiae ad aliquid agibile, ut in Primo [q. 79, a. 13] habitum est. Sed facere contra conscientiam est peccatum. Ergo iudex peccat si sententiam ferat, secundum allegata, contra conscientiam veritatis quam habet»: *Summa theologiae*, II-II, q. 67 'De iniustitia iudicis in iudicando', a. 2 Utrum iudici liceat iudicare contra veritatem quam novit'. The *Summa* is quoted here in the translation of the English Dominicans, which is available from several online sources. Nevertheless, in the sentence «it is a sin to act contrary to one's conscience», I translate the original Latin word *conscientia* with 'conscience' instead of 'knowledge' as it appears in the quoted translation, as this latter word is *scientia* in the Latin original. This overlapping of the two meanings of the word in Aquinas has been noted also by Decock, "The Judge's Conscience", 80-81.

³⁹ «Respondeo dicendum quod, sicut dictum est [q. 60 a. 6, «iniustum est si aliquis aliquem compellat ferre iudicium quod publica auctoritate non fertur»], iudicare pertinet ad iudicem secundum quod fungitur publica potestate. Et ideo informari debet in iudicando non secundum id quod ipse novit tanquam privata persona, sed secundum id quod sibi innotescit tanquam personae publicae. Hoc autem innotescit sibi et in communi, et in particulari. In communi quidem, per leges publicas vel divinas vel humanas, contra quas nullas probationes admittere debet. In particulari autem negotio aliquo, per instrumenta et testes et alia huiusmodi legitima documenta, quae debet sequi in iudicando magis quam id quod ipse novit tanquam privata persona»: *Summa theologiae*, II-II, q. 67.

the public authority, he must form his conscience in accordance with the knowledge attainable in the public judicial procedure». ⁴⁰

The “gravitational force” exerted by the *potestas publica* not only separates the judge’s private person from his public one, it also separates his private conscience from his public one: the former conforms to his individual knowledge, which includes empirical information and individual perceptions, while the latter conforms to collective knowledge based exclusively on the evidence presented at trial. **60**

Therefore, the dilemma arising from the judge potentially committing sin by convicting an innocent person has been neatly resolved in that the judge *is not allowed* to have knowledge of the defendant’s innocence if his public knowledge attests to his or her guilt. **61**

7

In the abstract domain of theology Aquinas’ thesis raised a number of objections. In the Middle Ages it was supported by Alexander of Hales and Antonin of Florence, but many scholars of the day also asserted the contrary thesis attaching greater importance to the private knowledge of the judge. Chiefs among these were Nicholas of Lira, the renowned canonist Niccolò Tudeschi, known as Panormitanus, and the compiler of the *Summa angelica*. ⁴¹ **62**

Even when the doctrine privileging *allegata et probata* finally prevailed in the 16th century, there persisted a number of distinctions that indicate many thinkers of the time were still interested in discussing the issue. Soto, Navarro, Francisco de Toledo, Torres, Sánchez, and Azor all supported Aquinas’ position. Francisco de Vitoria held it to be morally unacceptable to condemn an innocent while nonetheless supporting it from a strictly legal perspective. Adrian of Utrecht (later Pope Adrian VI) argued that the conscience could be excluded only for civil cases, a position which gained popularity in 19th century neo-scholasticism. ⁴² **63**

As in many other cases, it was Thomas de Vio, Cardinal Caietan, who effectively reconciled Aquinas’ arguments with the needs of early modern society by explicating conclusions that had previously remained implicit. **64**

Caietan’s discussion addressed the *quaestio* «according to both moral philosophy and law», seeing as, in both disciplines, the evil following from an action depends on the intention behind it. The man who kills his attacker in self-defense with the intention of killing has committed homicide even if there was no other way he could have escaped the attack; however, if his action was not originally intended to kill, there is no sin involved. It is intention first and foremost that generates sin, and this principle applies to the judge as well. **65**

⁴⁰ «Homo in his quae ad propriam personam pertinent, debet informare conscientiam suam ex propria scientia. Sed in his quae pertinent ad publicam potestatem, debet informare conscientiam suam secundum ea quae in publico iudicio sciri possunt»: *Summa theologiae*, II-II, q. 67.

⁴¹ Jacques Delanglade, “Le juge, serviteur de la loi ou gardien de la justice selon la tradition théologique”, *Revue de droit canonique*, 10/2 (1960): 141-64, and 11/2 (1961): 3-31.

⁴² Delanglade, “Le juge, serviteur de la loi...”, 153 ss.

«The judge, who has exerted all of his prudence, diligence, science, authority etc. to free an innocent, does not intend to kill or mutilate or in short commit abuse by his own personal will; however, abuse can be the consequence of how he intends to use or does use his public office. Therefore, there is no injustice in abusing an innocent, since the judge has no intention of doing so by either private or public will». 66

It could be argued that, in view of such a possibility, the judge should simply resign his office. In reality, however, «the person of the judge is obligated to use his office, as this is what the [prosecution] party and the people want, inasmuch as he has a duty to exercise public authority. He is indeed bound to care more for the public office that he has been assigned than for the life of his neighbor, whose care is not his responsibility, at least not as a judge». No one commits harm in acting in accordance with their rights, hence the judge exercising his office «*secundum leges, et iura, et allegata, et probata*» cannot commit any harm.⁴³ 67

So, in considering the risk of executing an innocent, Caietan follows Aquinas in granting primary importance to the authority governing the judge's public person. This is a consequence of the distinction between public and private consciences outlined in the *Summa theologiae*. For Aquinas, conscience and knowledge completely overlapped, and Caietan follows in this track and further develops the point to reach the main theme underlying the entire issue, that of truth. 68

Indeed, the condemnation of an innocent represents an injury against truth; however, Caietan argues that, in public processes, «absolute» truth (*veritas absoluta*) must be distinguished from truth «known to people» (*veritas publica homini*). The first one, that is truth in its integral state, can be grasped by the individual but cannot be treated as evidence if he is the only one to know it; on the contrary, the second form of truth might be incomplete, but it is the only form that potentially constitutes evidence. Therefore, when the magistrate «judges according to what is documented and proven, he judges not according to simple truth but rather according to the public truth of human assessments. In the same way, it can be said that although the aim of justice is to guarantee to each his very own right, the aim of human public justice is to guarantee to each not his simple right but rather [the right that exists] within the reach of authority and public knowledge».⁴⁴ 69

⁴³ «Constat autem, quod iudex, de quo loquimur, qui scilicet omnem suam prudentiam, sollicitudinem, scientiam, potestatem etc. adhibuit, ut liberaret innocentem huiusmodi, constat, inquam, quod non intendit ex privata voluntate occidere, mutilare, et breviter iniustum facere, sed tale iniustum constat sequi ex hoc, quod intendit uti publico officio, et utitur illo. Unde non est iniustitia ex hoc actu, quod iudex faciat iniustum innocenti, cum hoc non intendat privata, aut publica voluntate. Sed videndum restat, si forte esset iniustitia ex hoc, quod teneretur non uti publico officio in tali casu propter talem ex sui officii actione eventum praevisum, scilicet mortem innocentis. Sed, si diligenter consideremus, persona, quae est iudex, tenetur uti officio suo, parte, et populo instante, quoniam sibi incumbit cura utendi potestate publica. Et plus tenetur curam habere publici officii suae curae commissi, quam vitae alterius, cuius cura non spectat ad ipsum, nisi sicut ad iudicem. [...] Et confirmatur, quia nemo damnum facit, nisi, qui id facit, quod facere ius non habet secundum iura. Cum ergo persona iudicis ius habeat utendi publico officio secundum leges, et iura, et allegata, et probata, sequitur, quod non faciat damnum alicui utendo iure officii sui»: In II-II, ad q. 67 a. 2.

⁴⁴ «Ad sextum dicitur, quod finis iustitiae publicae humanae non est veritas facti absolute, sed veritas facti publica homini. [...] Constat autem, quod [iudex] iudicans secundum allegata, et probata, iudicat secundum veritatem non simpliciter, sed publicam in humanis iudiciis, etc. Et simili modo dicitur, quod, licet finis iustitiae sit reddere unicuique ius vere suum, finis tamen iustitiae publicae humanae est reddere unicuique ius suum non simpliciter, sed quantum potestas, et scientia publica se extendere possunt, neque enim plus exigendum ab homine est»: In II-II, ad q. 67 a. 2.

In other words, the duties involved in governing the community, such as the administration of justice, are subject to a truth of their own – a limited truth that belongs to the domain of authority and public science, and potentially deviates from absolute truth. Nonetheless, this public truth must be treated as an absolute truth in the field of social and political action, even if it represents a legitimate justification for executing an innocent. When it is expressed through law, political authority becomes a source of truth, though only in the external forum. 70

Therefore, with the contribution of scholastic theology, in the early 16th century what had been a matter of procedure became a fully legal issue through the spread of an inquisitorial system that granted judges the authority to produce evidence, primarily through the use of judicial torture. 71

By deciding when and how to use torture, judges were almost certain to obtain confessions of guilt – or, in other words, they were able to produce a judicial truth, *veritas publica*, that might actually run contrary to factual truth, *veritas absoluta*. In the case of witchcraft, at the time rejected by many as an illusion – from the celebrated physician Johannes Weyer to the authors of the *Instructio pro formandis processibus in causis strigum* within the Roman Curia –, the judge's attitude toward this crime could transform factual truth into a judicial truth of guilt or innocence: if he believed *in conscientia* that witchcraft was a real crime, he could obtain a confession through torture; if he did not believe in it, he could judge the evidence against the defendant as insufficient basis to apply torture.⁴⁵ 72

The core of the problem then became the possibility of condemning a defendant who was innocent according to 'absolute' truth but guilty according to 'public' truth, a problem invoking systemic notions such as truth, law, and justice. 73

According to the juridical terminology of the *Ancien régime*, it was a matter of a tension between law and equity, with equity embodying the religious, cultural and social values seen as the foundation of all social order. Jean Bodin, who supported the idea of law as «arithmetic justice», defined equity as «geometric justice»: a system for assigning rewards and punishments according to each individual's condition, and saw it as belonging to the sphere of sovereignty.⁴⁶ 74

8

This dualism between law and equity, which can also be read as a dualism between law and justice, became a recurring theme in Counterreformation theological treatises on justice. 75

Leonard Lessius (Leys, 1554-1623), an influential figure in Jesuit casuistry, spoke out most decisively in favor of the superiority of justice. In his *De iustitia et iure* (1605), Lessius argued for a radical conclusion: «The judge must never condemn an innocent to death; he ought sooner resign his office, even if this provides no benefit for the defendant».⁴⁷ 76

⁴⁵ Peter Rushton, analyzing mid-17th century English witch trials from a narratological perspective, also deals with this topic of 'legal truth' and shows how the witnesses' depositions were transcribed according to fixed legal patterns that reflexively legitimated them as 'real': "Texts of Authority: Witchcraft Accusations and the Demonstration of Truth in Early Modern England", in *Languages of Witchcraft*, 21-39.

⁴⁶ Dockes, "La loi, l'équité et la paix ou la justice selon Jean Bodin", 71 ff.

⁴⁷ «Dico primo, haec sententia est probabilis, quia plurimos auctores, eosque doctissimos habet, quorum auctoritas sententiam probabilem et securam reddit. Dico secundo, contraria nihilominus videtur verior, nempe iudicem

Lessius' fellow Jesuit Gregorio de Valencia expressed diametrically opposing conclusions. As far as I know, Valencia is the only early modern commentator on the *Summa theologiae* whose opinion is intended to rule actual jurisprudence in cases where innocents might be condemned, specifically in the context of the policy of repression of sorcery implemented in Bavaria from 1589 onward. 77

Let me return to the Ingolstadt advice of 1590, as it outlines «how and when those people [suspected witches] must be reported, arrested, and punished». The text includes general methodological guidelines for drawing up verdicts, focusing on the antithesis between *allegata et probata* and *conscientia* from a distinctively concrete and menacing perspective. 78

«Even when a person is found not guilty and absolved by the judge, and thereafter declared to be free [...], the right of the authority is nonetheless in force, placing the good of the community before a private offence. From such a *modus procedendi* against the suspected criminals it ordinarily follows that it is not necessary to pay attention to the fact that, on the basis of what has been reported and proved *secundum allegata e[st] probata*, a truly innocent person may have been judged and condemned, because it is more appropriate for the common good that the sentence and judgment be decided according to what was reported and demonstrated, this being grounded upon truth for the most part, *secundum allegata et probata, quae ut plurimum veritate nituntur*, rather than the fact that it may happen or occur that an innocent party is condemned, and this is deemed also true by the majority of theologians and jurists, who consider and take careful account of the fact that the judge must condemn the individual who is proven guilty according to the judicial process even if he has private knowledge that this person is not guilty and has been falsely accused». 48 79

nullo modo posse talem innocentem ad mortem condemnare, sed potius debere officium dimittere, etiamsi hoc modo nihil esset reo profuturus»: *De iustitia et iure* (here in the reprint Lugduni: sumptibus Claudii Lariot, 1630), sect. IV, ch. 29 'De iudice', dub. 10 (commentary to II-II, q. 67, a. 2), 307. See also Decock, "The Judge's Conscience", 86 ff.; Franco Motta, "«Selon les preuves», «selon la conscience». Les deux personnes du juge et la condamnation légitime d'un innocent dans la théologie scolastique du XVI^e siècle", in *La justice entre droit et conscience du XIII^e au XVIII^e siècle*, eds. B. Garnot – B. Lemesle (Dijon: Editions universitaires de Dijon, 2014), 125-37. Lessius' point of view is followed by two of the most influential Jesuit controversialists in the German area, Martin Becanus and Adam Tanner. Cf. Becanus, *Tractatus de iure et iustitia*, in *Opera omnia* (Moguntiae: impensis Ioan[n]is Godefredi Schönwetteri, 1649), 1: 398-529, ad q. 67, 475 (I ed. 1612); Tanner, *Tractatus theologicus de processu adversus crimina excepta* (Coloniae Agrippinae: sumptibus Constantini Munich bibliopolae, 1629), 4. The *quaestio* is also discussed by Harro Höpfl, *Jesuit Political Thought. The Society of Jesus and the State, ca. 1540-1630* (Cambridge: Cambridge University Press, 2004), 218, note 40, and more generally 217 ff. Höpfl underscores the "guarantist" approach of Jesuit juridical thought that prioritized a fixed proportionality of punishment to crime, but his interpretation should be partly reconsidered in view of the stances of Jesuit writers such as Valencia and Delrío.

48 «Wie und wann diese Personen sollen angegeben, gefangen und gesrafft werden. [...] Es ist auch zu achten, wann es vielleicht sich begeben, dass ein Person hernach unschuldig erfunden und vom Richter absolviert und ledig gesprochen wird, dann so sie absolviert und unschuldig erkannt wird, so bekommt sie eben durch dies ihr guet lob wiederumben, so sie was durch die Fenknuss verloren hett, und gesetzt, dass si es nit gar bekäme, so hat doch das rechte der obrigkeit, dass sie den Nutz der gemein dem Privatschaden vorsetze, das dann *ordinarie* folgt aus einem solchen *modo procedendi* wider die verargwonten der laster, wie dann ebenfalls nit zu achten ist, dass nach für oder angezogenem und approbiertem *secundum allegata e[st] probata* vielleicht zu zeiten der verdammt oder verurteilt werde, der auch in der Wahrheit unschuldig ist, dann es ist dem gemeinen Nutz mehr daran gelegen, dass nach angezogen und bewehrten, so wie dess merer thails mit der Wahrheit gegründet sein, *Secundum allegata et probata, quae ut plurimum veritate nituntur*, der sentenz oder Urteil gefällt werde, dann es sie nie beschehen oder sich begeben, dass ein Unschuldiger gericht werde, und dies ist also wahr, dass auch des mehrern theils der Theologen und auch des Rechts erfahrene halten und achten, der Richter soll den Urteilen, der nach ordentlichen Gerichtsprozess schuldig erwiesen wird, ob wohl der Richter für sich selbst ein Privat wissen hat, dieser sei unschuldig und falschlich angeben»: *Responsum duarum Facultatum Theologiae et Iuridicae Academiae Ingolstadiensis*, 106.

Or, in short, the judge must not be too concerned with any doubts regarding the defendant's actual guilt, as it is in the State's interest for the sentence to be based on legal evidence alone. The execution of innocents is a possible side effect of the proper operation of the law that should not invalidate full compliance with established procedures. **80**

The same argument can be found reformulated in Valencia's *Commentarii theologici*, and specifically in the chapter «On the judge's duty in punishing sorcery»: «It is necessary for the judge to always pronounce the sentence on the basis of testimony and evidence, even if he knows of a certainty that the sentence runs contrary to the truth. I prove [my thesis]. The judge pronounces the sentence on the basis of public authority: hence he must pronounce it on the basis of public knowledge, which is commonly provided by laws and specifically or in point of fact by testimony and other legitimate public instruments». ⁴⁹ **81**

The core of the problem lies once more in the relationship between the judge's conscience and compliance with the procedures. Nevertheless, «the essential foundation of this conclusion [...] must lie in the fact that the judge's action in his office cannot be deemed correct unless the community itself acknowledges and approves his doing so. However, if the judge pronounces a sentence guided by his own personal knowledge in disregard of public testimony, the community cannot acknowledge and approve his doing so. Hence the judge shall not pronounce the sentence correctly». ⁵⁰ **82**

Valencia develops his arguments building on Caietan's interpretation of Aquinas, accepting that knowledge and conscience are homogenous in the magistrate's *persona publica* as well as the notion of public truth, a 'truth by right' rooted in a form of knowledge which is not absolute in itself but rather gains absolute power in the realm of collective life. I would argue that Valencia insists on this interpretation of the thesis of the *allegata et probata* because he seeks to dictate a jurisprudential rule that could be adopted wholesale by Bavarian criminal law governing exceptional crimes, binding judges to their public identity of «bouche de la loi», 'the mouth of the law'. **83**

9

Late 16th century German legislation on witchcraft can be viewed as a testing ground for the increasing centralization of State power in terms of criminal law. However, as a juridical experiment it rested on uncertain foundations: it was a matter of rationalizing longstanding judicial customs, decoding ritual practices and invocations using the vocabulary of legal evidence, and overcoming **84**

⁴⁹ «Necesse est semper ferre sententiam secundum allegata et probata, etiamsi iudex evidenter sciat contrarium esse verum. Probatur. Nam iudex potestate publica fert sententiam: ergo etiam debet illam ferre secundum scientiam publicam, quae quidem habetur in communi per leges, in particulari aut facto per testes et alia legitima publica instrumenta»: *Commentariorum theologicorum tomi quatuor*, 3, 1595, 'De virtutibus et vitiis', disp. V, *De iustitia, et eius speciebus*, q. XI, *De iustitia et iniustitia iudicis*, Punctum II, *An iudex debeat semper ferre sententiam secundum allegata et probata*, 1378-82, 1378-79.

⁵⁰ «Potissimum fundamentum huius sententiae [...] debet esse, quod iudex non potest censerī recte facere aliquid ex suo officio, nisi id ipsa etiam communitas censerī possit facere et approbare. Sed si iudex privata sua scientia ductus, postposita testificatione publica ferat aliquam sententiam, non potest tunc censerī communitas id facere aut approbare. Ergo non recte feret iudex talem sententiam»: *ibid.*

the resistance of local magistrates who felt their authority threatened by the unlimited repressive power enjoyed by princely judges on the basis of the *crimen exceptum* clause.

As historiography on this topic shows, there were multiple and often divergent dynamics involved in this process. As we have seen, in the mid-17th century central authorities generally acted to contain these trials, moderating the judicial zeal of lesser magistratures. And yet earlier, around the last quarter of the 16th century, those same lesser magistrates would not necessarily have supported inquiries based on the newer demonological literature such as the works by Bodin, Binsfeld, Delrío and Delancre that had not existed when they were trained.

It is no coincidence that, from that time and for at least a few decades onward, preachers and jurists such as Pierre de Lancre, Jeremias Drexel and Jean Boucher repeatedly appealed to princes objecting to the magistracies' restraint in sorcery cases. Both the 1592 ordinance on sorcery issued by Peter Ernst von Mansfeld, governor of the Spanish Low Countries, and the further rescript by the Archdukes Albert and Isabella threatened to penalize judges accused of negligence in their inquiries.⁵¹ Likewise, De Lancre in his well-known *Tableau de l'inconstance des mauvais anges et demons* (1613) argued that judges were in conscience bound to believe in witchcraft since, as Stuart Clark notes, «they were vehicles of royal justice and kings were 'sacred persons'».⁵²

In the juridical section of his *Disquisitiones magicæ* (1st ed. 1599-1600), the prominent demonologist and Jesuit Martín Delrío likewise denounced the lack of fervor shown by magistrates who, influenced by the skepticism of Johannes Weyer and Cornelijs Loos, considered the confessions of alleged witches to be mere hallucination: «We see the growing wickedness [of skepticism], [...] especially among some judges and advocates who shamelessly resort to the teachings of Weyer and recklessly lend an ear to the words of Loos [...]. What can we hope for when every day we see swarming the defenders of the thesis of the hallucination of witches, slithering among the echevins, the Parliamentary officers and even through the princes' palaces?»⁵³

Delrío drew on a well-known argument to condemn this phenomenon: «These people should not look beyond their own competences, yet they behave as if guards and other judicial executors might tell the judge that he has ruled incorrectly and thus oppose the sentence. In reality in heresy trials lay judges are mere executors of the sentences issued by ecclesiastical judges. [...] When the Church resolves that our witches are to be punished as true criminals, it is not lawful for the lay

⁵¹ Robert Muchembled, *Sorcières, justice et société aux 16e et 17e siècles* (Paris: Imago, 1987), 97.

⁵² Stuart Clark, *Thinking with Demons. The Idea of Witchcraft in Early Modern Europe* (Oxford: Oxford University Press, 1997), 566.

⁵³ «Nonne in ipsa nostra Teuthonica Brabantia, quae solebat ab hoc crimine satis esse pura, hoc scelus videmus gliscere, ex quo multorum in corda falsus d[icti] cap[it]is Episcopi sensus se penetravit, maxime iudicum et causidicorum quorundam, quibus temere usurpata Wieri lectio, et incaute auditi sermones Loosei, et a quibus divina iniuria et catholicae religionis dehonestatio haud magni penditur. [...] Hi dominium tyrannicum daemonis in Christi Ecclesiam confirmant, horum opera salus reipub[licae] proditur. Ab his de communi interitu privata lucra comparantur [...]. Quid ergo fas sperare nobis, ubi tot quotidie pullulant maleficorum fascinatorum defensores, et in scabinatus, consulum fiscalium Parlamentorum, et in ipsa principum sacra irrepunt?»: *Disquisitionum magicarum libri sex* (I ed. 1599-1600; quoted here in the reprint Coloniae Agrippinae: sumptibus Petri Henningii, 1656), 5, 'De officio iudicum contra maleficos sive de processo iudiciario in crimine magiae', sect. 16, 'De poena et supplicio maleficorum', 869-70.

magistrate to disregard this pronouncement by saying “This woman speaking is mad”: if the witch has duly confessed, he must condemn her». ⁵⁴

With this argument, Delrío was asserting the primacy of Church authority in matters of witchcraft, legitimating it with the analogy of the crime of heresy. He cited canon law and Pope Innocent IV’s bull *Summis desiderantes affectibus* (1484), referring to the supposedly dogmatic character of a belief in witchcraft. In reality, however, the Roman Church long maintained an ambiguous position and never issued a clear pronouncement on the question, addressing only the method of the inquiries. 99

In contrast, Valencia employed only juridical arguments rather than theological ones and did not interest himself in the relationship between secular and ecclesiastical courts. Indeed, he was not a demonologist rather a scholastic theologian dealing with issues of *iustitia* and *ius*, the juridical system and political theory. 90

Despite this distinction, both Jesuits were grappling with the same problem, namely the dual character of the judge’s figure, simultaneously public and private, and the autonomy he enjoyed in interpreting the law and following established procedures. They were both using the category of witchcraft to address the relationship between law and sovereign authority – a topic Jean Bodin had also dealt with in the recent past. 91

10

Throughout Bodin’s *République* (1576), the basic colour of sovereignty is the legislative authority of the prince. The supreme power of the State, he argues, consists in its capacity to produce positive law; hence, the original judicial function of the king is delegated to his magistrates, which thereby acquire a specifically administrative function that deprives them of their authority to freely interpret the law. ⁵⁵ 92

In historiographical accounts, this shift has been read as a transition from the ‘judicial’ State to the ‘administrative’ State. Judges ceased to be extensions of the prince, reproducing his powers, and became instead officers of the law. Bodin invokes a tradition dating back to Roman law to distinguish between *iurisdictio*, the mere execution of law, and *imperium*, an ‘equitable’ judgment arising from the judge’s act of free will. Viewed from the perspective of sovereignty, this act changed into a legislative deed which belonged exclusively to the prince as the source of positive law. ⁵⁶ 93

⁵⁴ «Ipsi ius usurpant definiendi, aliquid sit haereticum, aut ne; quod non ad iuristas, sed ad theologos, non ad Parliamenta subsellia laicorum, sed ad episcoporum conventus et synodos pertinet [...]. Plane ultra crepidam sutores: et petinde faciunt, ac si lictores et alii iudicum executores, iudici dicerent eum male iudicasse, et se sententiae opponerent. Nam in causa haereseos iudices laici revera tantum sunt executores sententiae per ecclesiasticos iudices latae. [...] Sic quando Ecclesia definit striges nostras, ut vere criminosas puniendas, non licet laico magistratui hanc sententiam eludere, dicendo: hanc, quae fatetur, delusam; sed rite confitentem debet condemnare»: *Disquisitionum magicarum libri sex*, 870-71.

⁵⁵ Diego Quagliani, *I limiti della sovranità. Il pensiero di Jean Bodin nella cultura politica e giuridica dell’età moderna* (Padova: Cedam, 1992), 141 ff.

⁵⁶ Blandine Barret-Kriegel, “Jean Bodin: de l’empire a la souveraineté; de l’État de justice à l’État administratif”, in *Jean Bodin. Actes du Colloque international d’Angers* (Angers: Presses de l’Université d’Angers, 1985), 1: 345-56, 352 ff.

Therefore, judgment according to conscience was allowed to the magistrate in cases of absence of law, but it ordinarily remained a privilege of the sovereign. Bodin had first outlined this principle in his *Methodus ad facilem historiarum cognitionem* (1566): citing Aristotle's well-known argument for a government grounded on law instead of human will (*Politics* III,13), he added that «if this is true, it seems to apply, not to princes or those who have the higher power in the State, but to the magistrates. For those who decree law ought to be above it, that they may repeal it, take from it, invalidate it, or add to it, or even if circumstances demand, allow it to become obsolete. These things cannot be done if the man who makes legislation is held by it».⁵⁷ 94

A decade later, in the *République*, he returned to this issue in view of the hierarchical relationship between the magistracy and the sovereign source of law. In relation to the magistrate's office, he noted that «if [...] the orders of the prince are not contrary to the divine and natural law, he [the magistrate] must execute them, even if they are contrary to the law of nations, for the law of nations can be modified by the civil laws of any particular State, provided natural justice and equity to which the prince is bound is not infringed, but public or particular utility only is in question».⁵⁸ 95

Compared to Valencia's rigid legalitarianism, Bodin's stance took into account a more complex set of elements including civil law, the law of nations, and equity. This latter, equated with natural law, constituted an overarching element that bound the prince to observe the kingdom's fundamental laws. Nevertheless, it did not represent a legitimate reason for the magistrate to disregard the law: «Though we have stated that the prince [...] ought to keep the laws of the commonwealth over which he is sovereign, one cannot conclude therefore that if the prince should fail in his duty in this or that respect, the magistrate need not obey him. It is not for the magistrate to take cognizance, or contravene in any particular the will of the prince in regard to positive laws, since the prince is free to disregard them».⁵⁹ 96

State sovereignty as such was not invoked in Caietan's and Valencia's writings, devoted as they were to the older concept of *bonum commune*, 'public good'. Bodin's sovereign, in contrast, was separate from public good and even from the good of the State because, as the source of positive law, he acted as a regulatory principle of the common good, especially in relation to potential disruptions of civil and religious peace. 97

It was in this case that Bodin finally introduced the judge's conscience, positing it as subordinated to a higher principle, not of public knowledge but rather of political obligation: «Supposing the prince does indeed fail in his duty, and command something which is contrary to the public good and the justice of the laws, but not contrary to the law of God and of nature, what ought the magistrate to do? [...] It is our opinion that it is better to submit obediently to the majesty of the prince, than by refusing to carry out his orders, give an example of rebellion to the subject». In other 98

⁵⁷ *Method for the Easy Comprehension of History*, transl. Beatrice Reynolds (New York: Columbia University Press, 1945), ch. 6, 'Type of Government in States', 202.

⁵⁸ *Six Books of the Commonwealth*, transl. Marian J. Tooley (Oxford: Basil Blackwell, 1955), b. III, ch. 4, 'The Magistrate', 86-87.

⁵⁹ *Six Books of the Commonwealth*, 87.

terms, it was necessary «to beware of opening the door to rebellion on the pretext of conscience, or an ill-founded doctrine».⁶⁰

In the same historical period Delrío, Bodin and Valencia each drew on a different language – demonology, political theory, and scholastic theology respectively – to interpret a common need to rationalize the judicial system by centralizing the sovereign power of punishment. 99

All three of them dealt with witchcraft. And, in his *Démonomanie des sorciers* (1580), Bodin also addressed the dilemma of potentially condemning an innocent, resolving it – though less prescriptively – in a similar way to the other two: «After the trial is carried out and completed on strong presumptions [...] one must prescribe a sentence of corporal punishment: otherwise there will never be punishment for wicked deeds if one punishes only the crimes for which one has obvious proof. This is a difficulty which the juriconsult has addressed in order to make a conviction, even though there may be uncertainty when several have transgressed which one ought to be punished. [...] I certainly admit that it is better to acquit the guilty than to condemn the innocent. But I say that one who is convicted on acute presumptions is not innocent».⁶¹ 100

It is quite possible that Valencia was influenced by Bodin. The first translation of the *République* to circulate in Germany was in Latin, printed in Frankfurt in 1591; a German edition followed one year later, and five additional Latin editions before 1641. The work had certainly been widely known throughout Catholic Europe since its original publication, having been included in the Index under clause of correction in 1590 and again under absolute prohibition in 1593.⁶² 101

At any rate, the Spanish Jesuit's viewpoint began from a thomist interpretation of the question of the *scientia iudicis* and traced its development in Caietan's commentary to eventually encounter Bodin's heterodox thinking on the common ground of the theory of political sovereignty as defined by four elements: truth, law, the judge and his conscience. 102

⁶⁰ *Six Books of the Commonwealth*, 90.

⁶¹ *On the Demon-mania of Witches*, transl. Randy A. Scott (Toronto: The Centre for Reformation and Renaissance Studies, 1995), b. IV, ch. 5, 'On the Punishment that Witches Merit', 210. On Bodin's *Démonomanie* and its jurisdictional premises s. William Monter, 'Inflation and Witchcraft: The Case of Jean Bodin', in *Action and Conviction in Early Modern Europe*, Essays in Memory of E.H. Harbison, eds. Theodore K. Rabb – Jerrold E. Seigel (Princeton: Princeton University Press, 1969), 371-89; Jonathan L. Pearl, *The Crime of Crimes. Demonology and Politics in France 1560-1620* (Waterloo, Ontario: Wilfrid Laurier University Press, 1999), 119 ff.

⁶² Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (München: C.H. Beck, 1988), 1, 'Reichspublizistik und Policywissenschaft 1600-1800', 174 ff.