

Courts, criminal justice and the revenue of punishment

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Justice was the most important public service that the ruling cantons provided in the bailiwicks and the most important source of the income of their governors. The two functions could not be separated. A court system that was paid by its users and by the punished had its own economy, and that economy influenced which cases were brought, how they were decided and which sanctions were imposed. The following section describes the structure of the courts, the character of criminal justice and the role of fines and confiscations as revenue.¹

1 The structure of jurisdiction

The *landfogto* held the high jurisdiction (*alta giustizia*, in the Latin formula *merum et mixtum imperium*), which included criminal cases punishable by death or mutilation and the supervision of the whole administration of justice in the bailiwick. In civil matters he also sat as judge, usually assisted by local assessors or by the *luogotenente*. Local participation was built into the courts themselves. In Locarno the criminal court (*tribunale del malefizio*) consisted of the *landfogto*, who held seven votes, and seven assessors (*congiudici*) elected by the community. In the Vallemaggia the governor resided at Cevio or Sornico and travelled regularly to the other centre to administer justice, assisted in the gravest cases by local assessors, while in the Riviera a council of five, and later seven, members assisted him in his jurisdiction. Minor civil disputes and breaches of communal regulations were decided by local courts and officials under the statutes of the town or valley, while the community of Locarno had the privilege of collecting the fines for minor offences.² Appeals from the *landfogto* went to the *sindacato*, and from there, in cases of sufficient value or importance, to the ruling cantons. In the Leventina the appeal went to the government of Uri and in the three-canton bailiwicks to the three cantons. The law applied was the local statute law, supplemented by the ordinances of the rulers and, where

these were silent, by the *ius commune*, the learned Roman and canon law of the Italian universities, as it was practised in the Duchy of Milan.³ The ruling cantons did not introduce their own law. A *landfogto* from Zurich or Uri therefore judged according to Lombard statutes and Roman-canonical procedure, usually with the help of the *cancelliere* and of local notaries and lawyers trained in Pavia, Milan or Como.

2 Procedure and proof

Criminal procedure followed the inquisitorial model of the *ius commune*. The *fiscale* or the *landfogto* opened an inquiry on denunciation or on his own initiative, witnesses were examined in secret and the accused was interrogated, if necessary under torture, in order to obtain a confession. The confession was the principal form of proof in serious cases, and torture was a regular and regulated part of the procedure until the end of the old regime, when the Helvetic Republic abolished it on 12 May 1798.⁴ Defence counsel could be admitted in some cases, but the accused had limited access to the evidence against him.

Civil procedure was written, formal and slow. Parties were represented by procurators, pleadings were exchanged in writing. The central figure of legal life was the notary, who drafted contracts, wills and settlements. The notarial tradition of the region was old, since early forms of the notariate had existed in Ticino, especially in the Sottoceneri, before the year 1000, as in northern Italy. Notarial deeds were the principal form in which property, credit and inheritance were documented. Chapter A.III shows how these notarial instruments followed the emigrant builders and artists across Europe and how they secured the remittances and the family property on which village economies depended.⁵

3 Notes

1. Holenstein, "Baliaggi comuni" (above), on the *landfogti* as holders of low and high criminal justice and administrators of the revenues and rights of the lordship; Holenstein, "Vogteien" (above), on the governor's share of the fines; Schindler, Chiesi, Crivelli and Orelli, "Bellinzona (comune)" (above), according to which part of the revenue from the transit trade "come anche le tasse di giustizia, invece di essere versati nelle casse del com. venivano infatti incamerati dai tre cant.". See also Ceschi (ed.), *Storia della Svizzera italiana dal Cinquecento al Settecento* (above). ↩

2. Rodolfo Huber, "Locarno (pieve, baliaggio, distretto)", in DSS, version of 18 November 2014, <https://hls-dhs-dss.ch/it/articles/008544/2014-11-18/>: "Il tribunale del malefizio era composto dal balivo (dotato di sette voti), da sette giudici (congiudici) eletti dalla comunità", and among the privileges of the community "l'incasso di multe per piccole infrazioni"; Daniela Pauli Falconi, "Vallemaggia", in DSS, version of 5 January 2015, <https://hls-dhs-dss.ch/it/articles/008548/2015-01-05/> (the governor "sceglieva il luogo di residenza (Cevio o Sornico), ma doveva recarsi regolarmente nell'altro capoluogo per amministrarvi la giustizia con l'assistenza, nei casi più gravi, di congiudici locali"); Giuseppe Chiesi, "Riviera (baliaggio, distretto)" (above): "Un Consiglio di cinque (XVI sec.) e poi di sette membri (XVIII sec.) assisteva il balivo nell'esercizio della sua giurisdizione." ↩
3. Ceschi (ed.), Storia della Svizzera italiana dal Cinquecento al Settecento (above). The subsidiary application of the ius commune and of Milanese practice is the general view of the literature; the rules differed by bailiwick. ↩
4. Andreas Fankhauser, "Repubblica elvetica", in DSS, version of 27 January 2011, <https://hls-dhs-dss.ch/it/articles/009797/2011-01-27/> ("La tortura era già stata abolita il 12.5.1798"). On criminal procedure in the bailiwicks see Ceschi (ed.), Storia della Svizzera italiana dal Cinquecento al Settecento (above). ↩
5. Kathrin Utz Tremp and Alain Prêtre, "Notariato", in DSS, version of 8 August 2023, <https://hls-dhs-dss.ch/it/articles/009640/2023-08-08/> ("nel Ticino (specialmente nel Sottoceneri) forme precoci esisteranno per contro già prima dell'anno Mille, analogamente all'Italia settentrionale"; the Ticinese notarial lists and deeds as "una delle fonti principali per la storia economica e sociale del tardo Medioevo"). On the notarial culture of the region see also Ceschi, Nel labirinto delle valli (above). ↩

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