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"PUBLIC OPINION IN ITS RELATIONSHIP WITH THE EVIDENCE", OR RATHER AN "UNCOMFORTABLE" WITNESS OF THE TRIAL: THE ITALIAN CASE BETWEEN THE NINETEENTH AND TWENTIETH CENTURIES

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ABSTRACT

In 1903 a little-known Italian jurist, Vittorio Tiranti, published the essay entitled 'L'opinione pubblica nei suoi rapporti con la prova'. Here Tiranti compares, in an original fashion, the complex phenomenon of public opinion with proof systems. The author speaks of a "splitting personality" within public opinion which would, at the same time, be a probative element as well as a body which reasons upon the worth of the evidence, or better subject that "tests and criticises the evidence". The contribution of Tiranti comes into the Italian debate between the 19th and 20th centuries on the transformations determined by the entry of public opinion and publicity into the criminal trial and the court rooms of justice. In the "theatre of justice" – especially in the Court of Assizes – the "public" comes into the court room, becomes judge of the fact (jury) and "interferes" with the "oracular" nature of justice. The report of the crime acquires a heavy media dimension and the trial begins to change meaning.

Key words: public opinion, evidence / proof, jury, publicity, press

"L'OPINIONE PUBBLICA NEI SUOI RAPPORTI CON LA PROVA", OSSIA UN TESTIMONE 'SCOMODO' DEL PROCESSO: IL CASO ITALIANO TRA XIX E XX SECOLO

SINTESI

Nel 1903 un poco noto giurista italiano, Vittorio Tiranti, pubblica il saggio 'L'opinione pubblica nei suoi rapporti con la prova'. In questa opera Tiranti mette in relazione, in maniera originale, il complesso fenomeno dell'opinione pubblica con i regimi della prova. L'autore parla di uno "sdoppiamento di personalità" dell'opinione pubblica che sarebbe al tempo stesso elemento probatorio ed entità che ragiona

sul valore delle prove, ovvero soggetto che "prova e critica la prova". Il contributo di Tiranti si inserisce nel dibattito italiano tra Otto e Novecento sulle trasformazioni determinate dall'ingresso dell'opinione pubblica e della pubblicità nel processo penale e nelle aule di giustizia. Nel "teatro della giustizia" – soprattutto in Corte d'Assise – il "pubblico" entra in aula, diventa giudice del fatto (giuria) e "interferisce" con il carattere "oracolare" della giustizia. Il racconto del crimine acquista una forte dimensione mediatica e il processo comincia a cambiare di significato.

Parole chiave: opinione pubblica, prova, giuria, pubblicità, stampa

AN INTERESTING WORK

In 1903 Vittorio Emanuele Tiranti publishes an essay in Pisa entitled *L'opinione pubblica nei suoi rapporti con la prova*. This title – which relates the phenomenon of public opinion to the systems of evidence – arouses curiosity. We know little about the author. Of the Pisa school, probably "student" of Ludovico Mortara[1] (who from 1886 had taught in that Tuscan city), he qualified for university teaching in 1894.[2] In the famous public competition in Naples in 1905 for the chair of civil procedure – obtained by the determined Giuseppe Chiovenda – the commission, in passing judgement on the work of Tiranti, positively evaluated his work on public opinion. "Lo studio sulla pubblica opinione si raccomanda per la bellezza dell'argomento ed è notevole per il suo intrinseco, del quale è da rilevare il conto che l'autore vi fa, con lodevole esempio, del diritto inglese" (The study regarding public opinion is recommended because of the beauty of the subject and it is noteworthy for its content, of which the account of English law that the author gives with laudable illustration is remarkable) (cf. Cipriani, 1991, 483).[3] Tiranti, professor of civil procedure and legal system, taught the *Introduzione alle scienze giuridiche e istituzioni di diritto civile*

1 Thus Cipriani, 1990, 99; Cipriani, 2006, 72; Cipriani, 1991, 42. Vittorio Denti (1988, 350, c.2) framed the hypothesis that Tiranti had been a student of Santi Romano, to whom he dedicated his interesting *Introduzione allo studio della giustizia in Inghilterra*. It is, nonetheless, totally improbable that Tiranti – whose initial works date about fifteen years previously – may have been a student of the Sicilian jurist who began to teach at Pisa only in 1908. As we know, Mortara took very little interest in the academic destinies of his "pupils" while the existence of a relationship of esteem between Romano and Tiranti is probable.

2 In this year Tiranti publishes his first work, 1894.

3 In the same years, Tiranti published the essays: Tiranti, 1903b; Tiranti, 1904; Tiranti, 1906a; Tiranti, 1906b.

(Introduction to juridical sciences and institutions of civil law) at the university of Urbino.[4]

Differently from that which went on in prevailing European Nineteenth-century thought, Tiranti resorts to a diachronic meaning of public opinion, as a not specifically modern phenomenon. The author, particularly, wishes to analyse the "rapporti esistenti tra l'opinione, e le sue manifestazioni dirette o riflesse nella cerchia dei varii istituti probatori" (existing relationships between opinion and its direct or reflected manifestations in the range of the various probative institutes) (Tiranti, 1903a, 7). He attempts to retrace through history the institutes that, according to him, would manifest the connection with the phenomenon of public opinion, in different forms and with differing functions (from Roman law to Canon law, from Germanic law to contemporary English probative law). Here then the *fama*, the notoriousness, certain institutes in the Anglo-Saxon procedural field. This connection with the *fama* and the so-called "vox publica",[5] as we will see, is not marginal. "Di fronte al fenomeno della pubblica opinione, e quasi parallelo, sta un organismo istituzionale: il complesso delle istituzioni probatorie il cui scopo fondamentale ed ultimo è anche l'accertamento e la cognizione dei fatti e degli avvenimenti. Pubblica opinione e istituzioni probatorie gravitano verso uno stesso punto [...]. Devono quindi *a priori* essere molteplici gli addentellati fra questi due organismi, che hanno una stessa orientazione; e lo sono infatti assai più di quanto generalmente si creda" (Facing the phenomenon of public opinion, and almost in parallel with it, there is an institutional organism: the whole of the probative institutions whose fundamental and final objective is also the ascertaining and cognition of facts and events. Public opinion and probative institutions all gravitate around the same, central point [...] The interconnecting cogs must, therefore, *a priori*, be many between these two organisms, which have the same orientation; and indeed they are rather more so than what is generally believed) (Tiranti, 1903a, 146). Through these probative institutes, public opinion is manifested immediately. "Nella maggior parte dei casi, invece, l'opinione pubblica non si trasforma immediatamente in un istituto probatorio; essa appare piuttosto come il precedente, il presupposto, il complemento di un'altra fonte di conoscenza del vero [...]" (In the majority of cases, instead, public opinion does not immediately transform into a probative institute; it rather appears like the precedent, the presupposition, the complement of another source of knowledge of the truth [...]) (Tiranti, 1903a, 148). But the mediated influence of public opinion remains anything but secondary, observes Tiranti, as can easily be seen on how and how much the credibility of witnesses depends upon the same public opinion.

4 Cf. Tiranti, 1913 and the university courses of the following years. Tiranti died during the First World War. In 1915, he had enrolled as a major with the elite Italian mountain army, the *Alpini*.

5 Regarding the phenomenon, as far as the experience of early modern law is concerned, see also for further reference, Théry, 2003; Bettoni, 2005; Bettoni, 2006.

Among the trial institutes recalled, the jurist from Pisa, not by chance, remembers the jury with his typical freedom of appreciation of evidence. "E' questo *sdoppiamento di personalità*, nella opinione pubblica, da una parte come elemento probatorio, dall'altra come entità ragionante intorno al valore delle prove, in base alla eventuale nozione tecnica che ne ha, che le rende appunto lecito affermare alcune esigenze circa la efficacia della prova. Prova e critica la prova; è sotto questo aspetto un organo di recezione e di emissione, colla particolarità però, che queste due funzioni sono difficilmente disgiungibili, perché operano, o per lo meno si manifestano per un mutuo riflesso." (It is this *splitting of personality*, in public opinion, on the one hand a probative element, on the other an entity reasoning on the value of evidence, on the basis of the eventual technical notion which it has of such value, that precisely allows public opinion to affirm certain needs regarding the efficaciousness of evidence. It tests and criticises the evidence; it is under this aspect a receiving and emitting organ, with the particularity though, that both these functions are hard to distinguish, since they operate, or at least, manifest themselves by mutual reflection.) (Tiranti, 1903a, 59 [*my Italics*]).

AN END-OF-CENTURY DEBATE

The work of Tiranti may perhaps seem eccentric, almost a sort of *divertissement*. Though, once well examined, it is part of a debate concerning public opinion – a slippery concept as well as a container-category – which attracts the attention, from the Seventies on, of a composite group of Italian scholars who operate along the point of intersection between the juridical phenomenon and the fields of political science and sociology (Lacchè, 2003). "Addotta talvolta come testimonio di fatto, talvolta come giudice, talaltra ancora come maestra di verità, la pubblica opinione – scrive Carlo Francesco Gabba nel 1881 – è una autorità, di cui nessuno può facilmente definire la vera competenza [...]. Tutti la invocano, ma ben pochi conoscono i segni e i caratteri per cui sicuramente riconoscerla ..." (Being sometimes brought forward as de facto witness, sometimes as judge, yet other times as master of truth, public opinion – writes Carlo Francesco Gabba in 1881 – is an authority, whose true competence nobody can easily define [...]. Everyone invokes it, but very few know the signs and characters to surely recognise it ...) (Gabba, 1881, 25). Thus the eclectic Gabba expresses himself, philosopher of law, expert in civil law, and "sociologist" speaking from the Florentine Chair of the "Cesare Alfieri" Institute of Social Sciences. Along the same lines of thought, the constitutionalist, Ignazio Brunelli – at the beginning of the 20th century – affirms the theme as "not being new", offering a list of those who have already made it the subject of their study. "Ciò non ostante noi non sappiamo dire che cosa sia realmente questa decantata pubblica opinione. Anzi ci è persino lecito chiederci se realmente essa esiste, o non sia piuttosto un nome vano

al quale non corrisponda qualche cosa di concreto" (Nevertheless, we cannot say what this much-praised public opinion really is. Rather, we have even allowed ourselves to ask ourselves if it actually exists, or if it is not just a vane name to which nothing sound finds correspondence) (Brunelli, 1906, 10). Scipio Sighele, instead, draws a reason to explain the scarce number of available analyses from the substantial non-definability of the subject at hand (Sighele, 1889, 88). In 1895, Antonio Teso, affirms that maybe there is no concept more talked about than public opinion, which has by now become a true "magic" word, on an equal basis with the people, liberty, democracy. Nevertheless, it is spoken about without knowing exactly what it really is, and this "[...] dipende [...] dalla indeterminatezza di significato delle parole del linguaggio politico, da cui proviene la varietà di sensi che ad esse si sogliono attribuire, ciò che non può a meno d'esser causa di grande confusione" (... depends [...] on the indefiniteness of meaning of the lexicon of political language, from which the variety of senses which are usually attributed to it comes. That which can only be the cause for great confusion) (Teso, 1895, 6).

This Italian debate is not lacking in interesting hints. We only have to think of Franz von Holtzendorff (Von Holtzendorff, 1880), for example, who polemicizes and dialogues, from a distance, with Saverio Scolari. The fact that Tiranti writes an essay on the relationships between public opinion and probative institutes is not therefore at all casual, with respect both to the contemporary *Zeitgeist*, and to his coming from Pisa that recalls the teaching of both Gabba and Scolari.

The debate between the two centuries reveals the field of tension between public opinion "positive" image, rational, well-educated, middle class, liberal, homogeneous and universal – an image that links itself to the Eighteenth-century origins of the concept – and public opinion problematical image, of the end of Nineteenth century, as "crowd", multitude, mass, "dangerous" aggregation and not-at-all rational.

THE CRIMINAL TRIAL OF MODERNS

Within this context, I would like to consider another "critical" profile of public opinion. In one of my previous works, I made reference to a play on words to point out and reason on, between the 18th and 19th centuries, a great transformation process from the "courts of public opinion" to "public opinion in court" (Lacchè, 2006).[6] This reference emphasises a process which had its main epicentre in France: whereas, during the 18th century the rhetorical/authoritarian figure of the courts of public opinion – intended as being a peculiar judging capacity which is no longer absorbed within the political body of the sovereign – dominates; however, it is during

6 The formula has been then taken up by Giostra, 2006.

the 19th century that the image of "public opinion in court" – or better of the stable presence of the public and public opinion in the courts of justice – becomes generalised. In Great Britain, already in the first decades of the 18th century, the Fielding brothers (John was a magistrate) contributed, with stories of trials and the entrance of journalists into the court rooms, to disperse the opaque character of justice. The "uncomfortable" witness, who we mention in our title, is precisely "public opinion in court". The basic question is: how do justice, its rules and rites, the trial, practices, behaviour of the actors change with the entrance of public opinion into its "sacred fold"? In that which we may name the *criminal trial of moderns* there are at least four essential factors to consider: the technical device (the so-called mixed trial, with a contradictory and complex relationship between secret and publicity); publicity/orality of the hearing phase, the intervention of the jury (in the Court of Assizes) (Lacchè, 20098; 2009), the role of the press (*reporting the crime*).

The fact that popular judges in Italy steadily enter the rooms of justice as judges when dealing with press crime is significant, for at least two reasons. In the introduction to the Edict concerning the Press, issued in March 1848 by Carlo Alberto, sovereign of the Kingdom of Sardinia, it is said that the jury was instituted so as "[...] nel modo di amministrare la giustizia entrasse l'elemento essenziale dell'opinione pubblica saggiamente rappresentata" (... the essential element of public opinion, wisely represented, entered into the manner of administering justice). Here we have, therefore, the formula that well highlights the link that lies between justice system, the role of the jury and the rhetorical figure of public opinion. The Edict abolishes preventative censorship and recognises an overall package of legal favour for "press crime", following – along the lines of the French doctrinal model – the logic of the special nature and intrinsically political character of the crime of opinion (See Lacchè, 2007). This link is explained by the fact that the jury is a representative organ of public opinion in the trial. Who better than public opinion – selected in accordance with wealth and capacity criteria which have gradually forged the political citizenry – may judge press crimes which are often opinion crime? Even who is against the institute of the jury, like Pietro Ellero, agrees on the fact that those of the press are "... reati in gran parte d'opinione, reati in gran parte contro l'opinione, non da altri che dall'opinione pubblica debbono essere giudicati" (... crimes of opinion to a large extent, crimes to a large extent against opinion, not by others but by public opinion must be judged) (Ellero, 1869, 761). The jury is judge of the fact and witness of "social truth" of the trial. Yet it is an *uncomfortable witness*. Between the years 1848 and 1874 the jury undergoes a gradual metamorphosis: established as a political and constitutional institution, safeguard of liberties, it affirms itself as a judicial institution. The law concerning judicial order (13th November 1859, N°. 3781) bases the jury in the Court of Assizes and widens its competence, as regards both political crimes and the sphere of the most serious common crime. The jury of the illuminists,

marked by feeling, instinct, and "democratisation" objectives, finds itself facing a dilemma: has the juror got to possess a peculiar "competence" of reason and logic or has he got to entrust himself to feeling and natural common sense? A dilemma, this, anything but secondary in importance, especially during *causes celebres*, where all these elements are ever-present ingredients. The *likelihood*, says Romagnosi, still remains an imperfect and partial form of certainty (Romagnosi, 1836).

The reform of 1874 as well as the vast debate which came with it, in the parliamentary chambers and in the realm of doctrine, answer the need to get around certain obstacles already raised by commentators: "scandalous" acquittals, following the example of what had happened in France since the Restoration, apathy of the jurors, typologies of organ make-up, abuse of the system of exemptions. In 1872, Enrico Pessina best summarises the issue of the dual nature of the jury: "Il giurì come istituzione politica attrae gl'uomini; il giurì come istituzione giudiciaria eccita contro sé diffidenze e paure ..." (The jury as a political institution attracts men; the jury as a judicial institution excites distrusts and fears against itself ...) (Pessina, 1872, 298). It is anyway enough to read the account of Pasquale Turiello in order to get the counter-image of the juror: nearly always ignorant, incapable of discerning the complex link that runs between fact and law, brought by appearances to judge in a non-pondered manner, without being burdened with a truly moral responsibility, in the absence of motivation and in the presence of a non-transparent vote (Turiello, 1980, 184ff.). Exponents of the positive School have no trouble in speaking about "true regression" (Ferri, 1881, 132), about "a passionate and short-sighted justice" (Ferri, 1892, 666), about a "primitive" organ which contradicts the principle of division of labour and introduces common sense where there is need of science and of an increasingly specialist knowledge of criminal man. Made up – rather than by the best who stay in the background thanks to exemptions and refusals – by an "assembly of grocers, barbers and tenant farmers" (Garofalo, 1891, 425) ready to show itself as being too weak towards the more serious and threatening crimes, even via the ambiguous interpretation of the "irresistible force" and of the justifications and diriment impediments, as well as being too strict towards – as followers of juridical socialism will point out – crimes against property.

Tiranti adopts a "psychoanalytical" category – the "splitting of personality" – just concerning the jury and its fullest freedom in appreciating the elements of evidence. The context of this debate is especially represented by the justice in the Court of Assizes and by the dimensions of the *causes celebres*. The Court of Assizes is an extraordinary drama-producing "machine". "Ever since society invented justice – writes Honoré de Balzac in a judicial novel of his – it has never found the means of giving a power equal to that which the magistrate has at his disposal against the crime to the accused innocent. Justice is not bilateral. Defence, which has neither spies nor police, does not have social power at its disposal in favour of its clients. Innocence has but

reasoning for itself, and reasoning, which may strike the judges, often has no power upon the biased minds of the jurors" (Balzac, 1996, 193).

The secret phase is a source of inferences, inventions, curiosity. "Facing a criminal court – this is still Honoré de Balzac observing – everything depends on the hearing, and the hearing will hinge upon small things which you will see become immense" (Balzac, 1996, 195). The French writer knows how to interpret the extraordinary aporia of a prevarication tool of middle-class/modern society: the Great Investigating Judge who constructs his trial; the hearing which may become *the magic box*: apparently insignificant things which may become immense. The testimony of Balzac is all the more interesting in that it is situated, we could say, halfway between the *ancien régime* and new worlds. The writer from Tours, with all his contradictory feelings of nostalgia for a universe on its way to definitive decay, makes the most of the theme of justice and trial. Balzac is aware of the importance of justice as "great apparatus of society" and knows that the "technicality" of the trial tool is not at all indifferent. The age of Balzac is also the age of that court system which the post-revolutionary French laboratory contributed to develop and codify.

Public opinion does exist, it presses upon the trial and on justice. The argument of unhealthy curiosity is not enough to explain the extraordinary "pressure" of the public upon justice between the 19th and 20th centuries. Public opinion is present in varying shapes and masks: the jury, "organ" of public opinion; the public present in the court room (which *is overflowing*, which is witness to "the justice show", galleries built to contain the public, presidents issuing tickets to go in, writers, reporters and members of the press creating all sorts of literary genres, pages and columns in the newspapers); the press, organ of public opinion "surrounding" justice. In 1874, there is an attempt to "protect" the jury as well as the trial banning even the publication "of reports or summaries of criminal trial hearings, before the definitive judgement being pronounced. The publication in the press of the names of jury members and judges, and of the individual votes of the former and the latter is equally prohibited". This prohibition – largely inefficient – will last only for three years.

What is the remedy, then, to rein in public opinion in its guise of "uncomfortable witness"? There are those who would like to keep it out of the trial. One of the most consolidated positivist *topoi* is that which could be defined as the *surgical sterilisation* of the trial. Cavagnari abruptly addresses publicity (and the presence of the jury) as prejudices or absurd judicial practices. In the *positive* trial, only the "technicians" should be present, lawyers, doctors, psychiatrists, experts just like in the medical anatomical theatres where only doctors and students are allowed in. In order to judge it is not enough any more, as requested of jurors, to have a bit of common sense as well as a common experience of things. The hearing will then be faster, the witnesses more sincere, the orators more concise and moderate. Should publicity really be kept, it must be overcome as *political guarantee*: who better than *those who have the com-*

petence are able to exercise the just control? On the guidelines of proposals by Lombroso, Garofalo and Ferri, Cavagnari is convinced advocate of that *scientification* of the trial which, applying the concepts of the positive School, would lead precisely to *sterilise* the hearings and have the clinical study of the criminal prevail (Cavagnari, 1893a; Cavagnari, 1893b). Nevertheless, both the pathological sides and the excesses frighten with an apparent paradox, or rather the fact that while every human activity tends to *become specialised*, justice tends to *become generalised*, that is to become a subject for all those that, just because they have read some newspaper articles, think they can judge upon any trial at all. Justice is like politics: everybody thinks he can talk about it, even though he has not got the necessary competences to do so and he ignores the exact knowledge of the facts.

Scipio Sighele, searching for a psychological theory for the presence of the public in law courts, makes a very sharp observation when he sees the process of *desacralisation* of justice from the point of view of a *generalisation* which lets public opinion enter into the courts and legitimises this power which is so "obscure", in modern terms. This is not only a trivial issue. Mankind needs evil, he needs "to see" evil and to face it: we are dealing therefore with a really-and-truly mental *structure* of modern man, a new way of the masses to present themselves in relation to the phenomenon of justice.

Within this debate, there lies the issue of distinguishing between the *public* and the *crowd*. If the crowd is an eminently barbaric and atavistic grouping "[...] il pubblico – scrive Sighele – è una collettività eminentemente civile e moderna" ([...] the public – writes Sighele – is an eminently civil and modern grouping) (Sighele, 1899, 107). Though differently from Gabriel Tarde, the Italian positivist believes that in the modern age the crowd and the public live side by side. A public – in which the social fact and not the atavistic one predominates generally – may degenerate into being a crowd, with all the consequences thereof. This is nothing else than "una forma acuta e patologica del pubblico" (an acute and pathological form of the public) (Sighele, 1899, 115). But who is the *meneur* of the public, or better still of an aggregation of opinions which change unexpectedly pursuant to an infinite number of suggestions? It can only be the possessor of the greatest social power since the age of Gutemberg: the journalist who moulds and gets, at the same time, moulded by public opinion. And nothing more than the Dreyfus affair, demonstrated how the press can influence in suggesting even "objects of hate" to the public.

Hannah Arendt, in *The Origins of Totalitarianism (Italian transl. Le origini del totalitarismo*), in the section where she faces the issue of anti-Semitism, dedicates, not by chance, a weighty chapter to the Dreyfus affair, to this extraordinary political and judicial "Balzac-style" case[7] – a true "sacrificial" political trial – which divided

7 "Le *dramatis personae* del processo Dreyfus potrebbero esser tutte uscite dalle pagine di Balzac ..." (The *dramatis personae* of the Dreyfus affair could all have come out of the pages of Balzac ...) (Arendt, 1990, 127).

France, and not only France, for many years to come, becoming the symbol of and a metaphor for taints and conflicts which rooted themselves in the obscure heart of European societies. Reasoning upon the characters of this affair, the German philosopher observes how "Mentre l'affare Dreyfus nei suoi più chiari aspetti politici appartiene già al XX secolo, il processo col suo strascico di cause è tipico del XIX, un secolo che aveva un appassionato interesse per i processi, perché in ogni sentenza poteva esser messa alla prova la sua maggiore conquista, l'eguaglianza davanti alla legge. Una caratteristica del periodo è che un errore giudiziario faceva divampare le passioni politiche mettendo in moto un'interminabile sequela di cause, duelli e risse. Ne bastava uno solo per suscitare lo sdegno popolare da Mosca a New York; tanto forte era ancora il senso dell'eguaglianza davanti alla legge nella coscienza del mondo civile. Soltanto l'opinione pubblica francese era già così moderna da associare la faccenda a considerazioni politiche" (While the Dreyfus affair, in all its clearest political aspects already belongs to the 20th century, the trial with its trail of court cases is typical of the 19th, a century which had a passionate interest for trials, because in every sentence its biggest conquest, equality before the law, could have been tried out. A characteristic of the time is that a miscarriage of justice made political passions burst forth thus beginning an interminable succession of court cases, duels and brawls. One was enough to arouse the popular disdain from Moscow to New York; so strong was the sense of equality before the law still in the conscience of the civilised world. Only French public opinion was already so modern as to associate the affair with political considerations) (Arendt, 1990, 127). Arendt judges this *episode* emblematic of a type of attitude of society facing justice and being tested by the principle of equality before the law. The authoress effectively understands the equality-law relationship as being a "new" dimension of justice. It represents a new dimension because it deals with the theme of judicial democracy "of opinion" as well as with incipient processes of democratisation of judicial systems. It is not by chance that Arendt correlates this phenomenon with the role played by public opinion.

Vittorio Tiranti, in his essay, evoked those sources of evidence – like *fama* and notoriousness – which in the order of society as well as in the *ancien régime* system of legal proof carried out an essential function. In the 19th century especially during the great trials based on circumstantial evidence (destined to become *causes celebres*), the debate on public opinion, seen in relation to justice and probative institutes, makes one remember, in a more or less founded and suggestive manner, the substantial lasting duration of an ancient *epistemology* of "circumstantial evidence" which is now embedded in the "modern" spaces of the free conviction of the judge. We hear its echoes in the vocabulary used, in the reasoning, in the recovery, at times conscious, of forms of knowledge and testimony which, in theory, must no longer have a "formal" character in the new trial order.

But, paradoxically, the more the trial acquired a circumstantial character, the more those forms conquered spaces of legitimacy. In one of those "causes celebres" of unified Italy – the trial of "the mysterious murder of Carnago" (a heinous murder of two women in a small community near the town of Como) – the whole trend of this trial (1888–1890) is dominated by the "vox publica", by the *fama* of the accused. The Public Prosecutor's final speech is completely centred upon the voice of the general public. "Dopo aver narrato e ricostruito il fatto tramite tutti i sospetti e gli indizi a sostegno della colpevolezza del Camuzzi, il p.m., consapevole della mancanza di prove, rammentò ai giurati che "l'istituzione della giuria non fu creata perché avesse a giudicare sulle sole prove di vista, ma altresì sulla convinzione che si forma dal complesso degli indizi"" (After having narrated and reconstructed the fact by way of every suspect and piece of circumstantial evidence supporting the guilt of Camuzzi, the Public Prosecutor, aware of the lack of proof, reminded the jury that "the institution of the jury was not created so that it may pass judgement on only those things that we can see, but also on the conviction that is formed by the whole set of circumstantial evidence available") (Fusco, 2008, 333–334). It was precisely the accusation that invited the jurors to reflect on the importance of public opinion: "La pubblica opinione può essere regina o meretrice. Signori giurati! Gli individui si possono ingannare. La coscienza di un popolo, no. Si è fatto appello alle classi colte. Ma qui, signori, non si tratta di nobili o plebei, di ricchi o di straccioni, si tratta di coscienza, dov'è o Camuzzi il plebiscito in vostro favore? Andate a Carnago, ad Albizzate, a Varese, girate tugurio per tugurio, vi sentirete rispondere da tutti: Siete voi l'assassino! Dovunque trapela la convinzione. E' il popolo che quando non è agitato da passioni ha una coscienza e questa coscienza ha pure un valore" (Public opinion may be queen or prostitute. Dear members of the jury! Individuals may be mistaken. The conscience of a people, no. The educated classes have been appealed. Though here, gentlemen, it is not a question of nobles and plebeians, rich men or beggars, we are dealing with conscience, where is oh Camuzzi!, the plebiscite in your favour? Go to Carnago, to Albizzate, to Varese, visit hovel after hovel, you will hear the answer from everybody. You are the murderer! The conviction seeps out everywhere. It is the people that when it is not stirred by passion has a conscience and this conscience has also a value). And also the defence is forced onto the same ground: "La voce pubblica è come una valanga: incomincia sommessa, indecisa, si diffonde, è accolta, diventa una parte della propria personalità. Ricordate la storia degli untori; è così che si forma l'opinione pubblica. Voi dovete resistere alla voce pubblica" (Public opinion is like an avalanche: it starts off quiet and subdued, undecided, it spreads, it is taken on board, it becomes a part of one's own personality. Remember the story of the plague-spreaders, it is thus that public opinion is formed. You have to resist public opinion) (Fusco, 2008, 334).

Carlo Francesco Gabba, during a conference in 1881, had observed that "Come semplice testimonianza di fatti accaduti, la pubblica opinione si confonde colla pubblica fama, della quale varie sono le gradazioni: dal semplice sussurro, o *rumor* dei Latini, al *si dice, alla voce pubblica*. Non occorre lungo discorso per dimostrare che le notizie di fatto, autenticate soltanto dalla voce popolare, sono assai poco attendibili. *Tutti sanno quanto fallace mezzo di prova siano in generale le deposizioni dei testimoni, e che la maggior parte delle moderne legislazioni non l'ammettono affatto quando si tratti di negozi civili di qualche rilevanza*" (As a simple testimony of facts that occurred, public opinion confuses itself with public *fama*, of which there are various degrees: from the simple whisper, or *rumor* for the Latins, to the *they say*, to *vox publica*. We do not need a long speech to demonstrate that the de facto news, authenticated only by popular voice, are rather not very reliable. *Everybody knows just how fallacious a means of proof is the deposition of witnesses, and that the vast majority of modern legislations does not ever admit it when civil deeds of certain importance are concerned*) (Gabba, 1881, 26). So too is the good or bad *fama* of people an aspect of public opinion. It is a judgement held in very high consideration, however anything but infallible.

And yet the "rapporti esistenti tra l'opinione, e le sue manifestazioni dirette o riflesse nella cerchia dei varii istituti probatori" (relationships that exist between opinion and its direct or reflected manifestations in the range of the various probative institutes) – as observed by Tiranti and as thoroughly confirmed by the position of the "judicial dramas" between the 19th and 20th centuries, are anything but marginal. The "splitting personality" – of a public opinion, that is, which "tests and criticises the evidence", which is "vox publica" and, at the same time, "judge of the fact" points out an extraordinary field of tension to us. This public opinion which *presses* and surrounds justice, we may say, founds the horizon of contemporaneousness. Its rational aspect (democratic control, criticism, public sphere) has to more and more take account of populistic drifting or of an indiscriminate and threatening use of public rumours and *gossip* which pollute the very source of communication and free democratic confrontation.

Staying in the field of justice, Kafka – in *The Trial (Italian transl. Il processo)* of 1915 – reminds us how "uncomfortable" is that witness. Joseph K. "Era in piedi, premuto stretto contro il tavolo, la folla dietro di lui era tanto grande che K. doveva opporle resistenza per non far cadere giù dal podio il tavolo del giudice istruttore, e, forse, il giudice stesso" (Was standing up, pressed tightly against the table, the crowd behind him was so great that K. had to offer resistance so as not to let the judge's table fall down from the podium, and, maybe the judge himself).

The jurist-writer Salvatore Satta, in a famous conference of 1949 concerning *Il mistero del processo* makes the most of a happy intuition of Francesco Carnelutti. How do we explain hearing publicity? Only "in quanto si riconosca al pubblico che

ha diritto di assistere al processo la qualità di parte, e appunto in quanto parte gli è vietato di manifestare opinioni e sentimenti, di tenere contegno tale da intimidire o provocare: se egli fosse terzo, cioè estraneo al conflitto di interessi esploso nel reato, tutto ciò evidentemente sarebbe superfluo" (in that the status of party is recognised to the public which has the right to attend the trial, and exactly as party it is prohibited from manifesting opinions and feelings, from keeping a behaviour such as to intimidate or provoke: if it was a third party, that is alien to the conflict of interest which exploded within the crime, all this would evidently be superfluous). Precisely as "party", the public "preme contro la sottile barriera di legno che lo divide dal giudice: se riesce a superarla materialmente, sarà il linciaggio, se riesce a superarla spiritualmente sarà la parte che giudicherà e non il giudice, cioè non si avrà giudizio" (presses against the thin barrier of wood that separates it from the judge: should it materially overrun it, it would mean lynching, should it overrun it spiritually it will be the party who will judge and not the judge himself, that is there will be no judgement) (Satta, 1994, 34). In whatever eventuality, public opinion is an uncomfortable witness.

"JAVNO MNENJE V RAZMERJU DO DOKAZA" OZ. "NADLEŽNA" PRIČA SODNE OBRAVNAVE: ITALIJANSKI PRIMER, 19. IN 20. STOLETJE

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POVZETEK

Leta 1903 je manj znan italijanski pravnik Vittorio Tiranti objavil esej z naslovom "L'opinione pubblica nei suoi rapporti con la prova" (Javno mnenje v razmerju do dokaza). V njem Tiranti na izviren način primerja zapleten pojav javnega mnenja v odnosu do dokazovalnih sistemov. Avtor v eseju piše o "razcepljeni osebnosti" v javnem mnenju, ki bi lahko istočasno igrala vlogo dokaznega elementa, kot tudi organa, ki razsoja o vrednosti dokazov, ali bolje subjekta, ki "preverja in kritizira dokaze". Tirantijev prispevek je del italijanske razprave med 19. in 20. stoletjem o preobrazbi, ki je sledila vključitvi javnega mnenja in obveščanja javnosti v kazenski postopek in sodne dvorane. V "gledališču pravice" – zlasti na porotnem sodišču – "občinstvo" vstopi v sodno dvorano, postane razsodnik primera (porota) in "se vmeša" v "preroško" naravo sodstva. Poročilo o zločinu pridobi izrazito medijsko razsežnost in začne se spreminjanje pomena sojenja.

Ključne besede: javno mnenje, dokazilo / dokaz, porota, obveščanje javnosti, tisk

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