

IVRIS ANTIQVI HISTORIA

AN INTERNATIONAL JOURNAL

ON ANCIENT LAW

Direttore

GIANFRANCO PURPURA

Comitato scientifico

ROGER S. BAGNALL

ALBERTO BURDESE

FELICE COSTABILE

GIOVANNI GERACI

MICHEL HUMBERT

LUIGI LABRUNA

ARRIGO DIEGO MANFREDINI

MATTEO MARRONE

GIOVANNI NEGRI

BERNARDO SANTALUCIA

RAIMONDO SANTORO

BERNARD H. STOLTE

WOLFGANG WALDSTEIN

★

«Juris Antiqui Historia» is a Peer Rewied Journal.

IVRIS ANTIQVI HISTORIA

AN INTERNATIONAL JOURNAL
ON ANCIENT LAW

1 · 2009



PISA · ROMA
FABRIZIO SERRA EDITORE
MMIX

Amministrazione e abbonamenti
ACCADEMIA EDITORIALE®
Casella postale n. 1, succursale n. 8, I 56123 Pisa
Tel. +39 050542332 · Fax +39 050574888

Abbonamenti (2009):
Italia: Euro 40,00 (privati) · Euro 60,00 (enti, con edizione *Online*)
Abroad: Euro 60,00 (*Individuals*) · Euro 80,00 (*Institutions, with Online Edition*)
I pagamenti possono essere effettuati tramite versamento su c.c.p. n. 17154550
o tramite carta di credito (*American Express, Visa, Eurocard, Mastercard*)

Uffici di Pisa: Via Santa Bibbiana 28 · I 56127 Pisa
Tel. +39 050542332 · Fax +39 050574888
E-mail: accademiaeditoriale@accademiaeditoriale.it

Uffici di Roma: Via Ruggiero Bonghi 11/b · I 00184 Roma
Tel. + 39 06 70493456 · Fax + 39 06 70476605
E-mail: accademiaeditoriale.roma@accademiaeditoriale.it

Autorizzazione del Tribunale di Pisa n. 6 del 3/4/2009
Direttore responsabile: Fabrizio Serra

Sono rigorosamente vietati la riproduzione, la traduzione, l'adattamento, anche parziale o per estratti, per qualsiasi uso e con qualsiasi mezzo effettuati, compresi la copia fotostatica, il microfilm, la memorizzazione elettronica, ecc., senza la preventiva autorizzazione scritta della *Fabrizio Serra editore*®, Pisa · Roma, un marchio della *Accademia editoriale*®, Pisa · Roma.
Ogni abuso sarà perseguito a norma di legge.

Proprietà riservata · All rights reserved
© Copyright 2009 by
Fabrizio Serra editore®, Pisa · Roma,
un marchio della *Accademia editoriale*®, Pisa · Roma

Stampato in Italia · Printed in Italy

La *Accademia editoriale*®, Pisa · Roma, pubblica con il marchio *Fabrizio Serra editore*®, Pisa · Roma, sia le proprie riviste precedentemente edite con il marchio *Istituti editoriali e poligrafici internazionali*®, Pisa · Roma, che i volumi delle proprie collane precedentemente edite con i marchi *Edizioni dell'Ateneo*®, Roma, *Giardini editori e stampatori in Pisa*®, *Gruppo editoriale internazionale*®, Pisa · Roma, e *Istituti editoriali e poligrafici internazionali*®, Pisa · Roma.

www.libraweb.net

ISSN 2035-4967

SOMMARIO

ACTA

CONVEGNO "DEBITO ED INDEBITAMENTO"

FERRARA, 6 DICEMBRE 2007

ARRIGO DIEGO MANFREDINI, <i>Introduzione</i>	13
JEAN ANDREAU, <i>L'endettement dans son contexte social et economique</i>	15
DANIELE FORABOSCHI, <i>Indebitamento e investimento</i>	23
GIOVANNI GERACI, <i>Garanti debitori: spunti papirologici ed epigrafici</i>	29
GIANFRANCO PURPURA, <i>La 'sorte' del debitore oltre la morte. Nihil inter mortem distat et sortem (AMBROGIO, de Tob. x, 36-37)</i>	41
RAIMONDO SANTORO, <i>Per la storia dell'obligatio. Il iudicatum facere oportere nella prospettiva dell'esecuzione personale</i>	61
SILVIA SCHIAVO, <i>Graziano, la cessio bonorum e l'esecuzione personale dei debitori</i>	125
TULLIO SPAGNUOLO VIGORITA, <i>Contribuenti ed esattori nella lex Portus Asiae</i>	135
VALERIO NERI, <i>Conclusioni</i>	155

STUDIA

SALVATORE SCIORTINO, <i>Lege agere pro tutela</i>	159
CARLOS SÁNCHEZ-MORENO ELLART, <i>Ulpian and the stars. The actio iniuriarum against the astrologer: some reflections about D. 7.10.15.13 (Ulp. lib. 77 ad edictum)</i>	195

LECTURAE

CARMELA RUSSO RUGGERI, <i>Cognatorum decreta e veneficia matronarum nel II secolo a. c.</i>	225
MARIO VARVARO, <i>Una lettera inedita di Bluhme a Göschen</i>	237

ULPIAN AND THE STARS. THE *ACTIO INIURIARUM*
AGAINST THE ASTROLOGER: SOME REFLECTIONS
ABOUT D. 47.10.15.13 (*ULP. LIB. 77 AD EDICTUM*)*

CARLOS SÁNCHEZ-MORENO ELLART

IN the following remarks, we will examine only one text – D. 47.10.15.13 (*Ulp. lib. 77 ad edictum*) – about astrology and the *actio iniuriarum*. By way of introduction, we should take into account that D. 47.10.15.13 (*Ulp. lib. 77 ad edictum*) represents the only direct testimony we have about this complicated question in the whole Digest. Therefore, this fragment merits closer scrutiny with the aim to discover the real meaning of the repression of astrology in the early Roman Empire. In order to integrate this fragment and to achieve a comprehensive interpretation, we must assess other texts related to the *actio iniuriarum* and to the prosecution of astrology and magic during the Principate and the Late Empire. To reconstruct the original context we ought also to bear in mind some sources about astrology and its function and public consideration at that time.

There is much confusion about the nature of the criminal implications of magic or astrology in the Principate. Yet, on the other hand, the uncertainties of literary sources about divinatory arts and their scope are widely known, making it difficult to comment upon D. 47.10.15.13 (*Ulp. lib. 77 ad edictum*). The main trouble with this fragment is not only that is an isolated case, nor even its controversial textual integrity, but also the question of whether its content corresponds to the last years of the Principate or – because of the alterations we can discover in it – to the legislation of late Empire. Let us go first to the text and then I will use four different approaches to comment upon.

D. 47.10.15.13 (*Ulp. lib. 77 ad edictum*)

Si quis astrologus vel qui aliquam illicitam divinationem pollicetur consultus aliquem furem dixisset, qui non erat, iniuriarum cum eo agi non potest, sed constitutiones eos tenent.

Many problems are implicated in this fragment. Bearing in mind this versatility my commentary shall be structured in four ways: 1) the interpolation criticism of the

* The text of this paper is the re-elaboration of my conference in the *IX Seminario internazionale di diritto romano: l'illecito e le sue sanzioni*, in Amantea (Italy) in July 2007 and it is merely a first approach to subject I am still working on to prepare a more detailed study about the criminal prosecution of astrology during the Principate. As usual, I must recognize that the list of my debts is noteworthy, having sought the assistance of many colleagues. I greatly appreciated the observations made by Prof. B. Santalucia during my conference and those by Prof. M. Miglietta, to whom I owe a great deal of suggestions. Special thanks are due to Prof. P. Quetglas, Prof. Ch. Schäfer and Prof. M. Talamanca. Prof. R. S. Bagnall and Prof A. Jones have given me a valuable insight into the sense of the astrological papyri in this context that helped me to discard many of my first prejudices and consequently to avoid many mistakes. I must mention my gratitude to Sir G. E. R. Lloyd for his illuminating answers to my questions about some aspects of astrology and science in Antiquity. I am especially indebted to my friend Dr. Patricia Anne Baker (University of Kent) for her reading of this paper, her suggestions for improving the manuscript and her interesting comments about ancient medicine and its methodological similarities with astrology and magic.

fragment, 2) its historical and ideological context or, to be clearer, how a case like this could happen in real life and which part astrology and the belief in this divinatory art could play in it, 3) the reason why this case is integrated – despite being eventually discarded in favour of the criminal procedure- in the *sedes materiae* of the *convicium* and, 4) to conclude, the relationship of this text to the prosecution of astrology during the Principate and the late Empire, mainly according to the unequal knowledge we have from two main sources of this period: the *Collatio* and the *Pauli Sententiae*. To sum up, in this section we shall investigate the actual sense of some mysterious *constitutiones* – or perhaps a singular constitution- quoted by the same text of D.47.10.13 (*Ulp. 77 ad edictum*), likely related to astrology. I would point out beforehand that these *constitutiones* are probably those integrated in the *Codex Iustinianus*, but with this expression the compilers could have replaced an original one concerned with some illegal use of this divinatory art. This last explanation leads to the matter, to which I alluded above: the actual origin and meaning of that regulation.

1. IS D. 47.10.13 (*ULP. 77 AD EDICTUM*) INTERPOLATED OR ABRIDGED?

This question might sound old fashioned to many scholars, but – as customary in all the exegesis – we cannot be certain of the content of the text without tackling its formal expression. We might assume that the Ulpianic text was interpolated or at least abridged by the Justinianic compilers or perhaps altered a little earlier, during the late Empire. If so, we could not be confident of its literal sense as a testimony of the regulation of the Severan age. The comparison between the *Collatio* or the *Pauli Sententiae* –which is to be dealt with in the last section- might be a way to clarify, albeit incompletely, this question.¹

The case discussed by Ulpian seems clear at first. If an astrologer or, as the text specifies, anyone who offers (*pollicetur*) illegal divination, after having been consulted, produces a wrong accusation that someone is a thief, he cannot be tried through an *actio iniuriarum*. Ulpian's decision apparently solves the case by affirming that instead under the mentioned action, the astrologer can be prosecuted under the Imperial Constitutions.

As I have stated before, the whole debate depends, by different degrees, upon the authenticity of the fragment. I dare say that this problem is much too common in our discipline, but sometimes these difficulties are deliberately avoided in discussion or superficially elaborated upon.² In my opinion, however this very point, the integrity of our text, must be examined in the first stage of the discussion. I shall

¹ Doing so we will be able to value some recent hypotheses about these questions, both the interesting and well-oriented, but in my opinion hypercritical exegesis recently proposed by Marie Theres Fögen, and the suggestive discussion about the extension of the *lex Cornelia de sicariis et veneficiis* advanced by James B. Rives. M. TH. FÖGEN, *Die Enteignung der Wahrsager*. Frankfurt a M., 1993, p. 57 ff.; J. B. RIVES, *Magic in Roman Law: the reconstruction of a Crime*, «CA» 22 (2003), p. 271 ff.; *Magic, Religion and Law: The Case of the Lex Cornelia de sicariis et veneficiis*, in C. ANDO, J. RÜPKE, *Religion and Law in Classical and Christian Rome*, Frankfurt a. M., 2006, p. 47 ff.

² For example, O. F. ROBINSON in her excellent handbook (*The Criminal Law of Ancient Rome*, London, 1995, p. 123) just boldly accepts the text as a testimony of the punishment of astrology, avoiding further discussion. In my opinion, this simplistic affirmation must be understood in the pedagogical context of a handbook.

try to discuss in brief the solutions proposed by the *Index interpolationum* to decide if the text is altered and in which way. Apart from *polliceor*, which Albertario had rightly pointed out as lacking in technical meaning,¹ the phrase *vel qui aliquam illicitam divinationem pollicetur* should be highlighted as a possible interpolation, but in my opinion without solid arguments. Although some syntactic reasons support the hypothesis of the interpolation in my opinion they are not a sufficient basis to solve the problem.² The author's reasons are as follows: *Cum eo* is in the singular form, whereas the subject is in the plural form. This lack of syntactical concord, in Lucetta Desanti's opinion – that essentially agrees with Albertario's hypothesis – shows that the original subject was exclusively the astrologer and not – as the phrase introduced by *vel* aims to imply – all the people who offered service more or less related with divination.

I think however, that the significant interpolation is not only the phrase *vel qui aliquam illicitam divinationem pollicetur*, but also the clause *sed constitutiones eos tenent*. This last digression proves to be also suspicious, being in concord with the precedent clause in plural, *vel qui aliquam illicitam divinationem pollicetur*. According to Desanti, whose theory – essentially right – we shall discuss later, with these words the compilers aimed to confirm in the very text of the Digest, the imperial constitutions against magic enacted in the Late Empire. As it is widely known, these were gathered together in the Theodosian Code and some of them also in the Codex of Justinian.³ Through this intervention, the compilers aimed to imply that the new regulation had previously been implemented in the classical jurisprudence and this was done, perhaps, to outline the internal coherence of the system. I mostly agree with this affirmation, but I should add that the active verb *teneat* turns out to be suspicious too, because this expression is normally available thorough the classical jurisprudence in passive voice, i. e. *ex constitutionibus tenetur*. This syntactical construction is used for example in D. 23.2.60.3 (*Paul lib sing ad orat div. Ant. et Comm.*)⁴ *tenetur ex sacris constitutionibus* or in singular in D. 42.1.41.2 (*Paul. 14 quaest.*), *non tenetur beneficio constitutionis*. On the other hand, it is widely known that this expression, which is normally in the passive form, is also quite common in other places, like the edict (D. 4.7.8 pr. *Paul 12 ad ed*), the *leges* (Coll. 1.2.1.15: *hac quidam lege non tenetur*; Coll. 7.3.1 *lege Aquilia non tenetur* or the *Senatus Consulta* (D. 47. 10.5.10 (*Ulp. 56 ad ed.*) *eadem poena ex senatus consulto tenetur*). Obviously, the construction with the term *constitutio* or *constitutiones* is less used than with the term *lex* or *edictum*. However, as D' Ors has pointed out,

¹ According to the definition offered by A. BERGER (*Encyclopaedic Dictionary of Roman Law*, Philadelphia, 1953, p. 634) a '*pollicitatio*' implies a promise of gift made to a municipality by a person who obtained or sought to obtain an official post in the municipal administration. E. ALBERTARIO (1929), *La pollicitatio romana e il cosiddetto obligari ex pollicitatione*, in *Studi di diritto romano* III, Milano, 1936, p. 237 ff., esp. p. 244. In this scholar's words, this clause (scil. *vel qui aliquam illicitam divinationem pollicetur*) could be qualified as «un'aggiunta, la quale si risolve in una vera e propria sovrapposizione».

² L. DESANTI, *Sileat omnibus perpetuo divinandi curiositas. Indovini e sanzioni nel diritto romano*, Milano, 1990.

³ L. DESANTI, *Sileat omnibus*, cit., p. 45 «Si è voluta menzionare nel Digesto la disciplina vigente della divinazione, dettata per l'appunto, dalle costituzioni tardo-imperiali recepite nel Codice. Con questa operazione, anche in assenza di un apposito titolo, la repressione dell'illecito risulta prevista anche nel Digesto». M. TH. FÖGEN, *Die Enteignung*, cit., p. 57 accepts the interpolation on the same grounds.

⁴ This text by Paul might contain, according to T. HONORÉ (*Ulpian*, Oxford, 2002², p. 52 n. 155) some sentences by Ulpian.

making use of the general term *constitutiones* to designate the legal intervention of the Emperor is not always a sign of post-classical or Justinian law, since it was also used in the last period of classical jurisprudence.¹

Obviously, accepting this interpolation implies a decision as to the actual reason for modification of the text. By doing so we can face the difficult question of its original content, or in other words, what the original decision of Ulpian was.

2. THE ORIGINAL CONTEXT

Regarding D.47.10.13 (*Ulp. 77 ad edictum*) and its original content, I think that first it might be useful to tackle, in a broad sense, the material and intellectual context of such a decision. By the material context, I mean the facts involved in the case that Ulpian tried to solve, conceived within the view of life in that historical moment. By the intellectual context I mean the public consideration of astrology in that time. Regarding the first aspect, the questions are difficult to answer: how could an astrologer state that someone was a thief? On which basis might this have been stated? Through a horoscope, perhaps? It is difficult to hypothesize whether a horoscope could be used as evidence in court. In other words, how could the horoscope of someone be put forward in order to incriminate that person as a thief?² It is worth pointing out that we can only draw this information from the rules of how the horoscopes must be interpreted, not directly from the horoscopes themselves that we have preserved in the papyri. What we call rules of interpretation are mostly included in the astrological treatises since the papyri hardly ever incorporate these data into the horoscopes that undoubtedly were orally developed before the petitioner. To be precise, we cannot draw any significant information from the documents regarding the horoscopes and the only useful information we can deduce from the important astrological literature of the time are some examples that people might have developed a tendency to steal on account of the stars.

Among the huge quantity of authors who have been analysed in the classic book by the Gundels,³ I have chosen Firmicus Maternus' *Matheseis* to illustrate this case. In

¹ A. D'ORS, *Derecho Privado Romano*, Pamplona, 1991⁸, p. 81: the expression '*constitutiones imperiales*' is widespread at the end of the classical period (i.e., during the Severan age), but probably it is not especially technical (cf. D. 1.4.1.1 Ulp. *quas vulgo constitutiones apellamus*). Anyhow the term is not essentially the reason to consider this fragment altered, but the content of the solution. On the other hand. It is also noteworthy that the jurists did not normally include *mandata*, or *sententiae* as types of *constitutiones*, vid. M. PEACHIN, *Iudex vice Caesaris*, Stuttgart, 1996, p. 17 n. 21.

² T. BARTON (*Ancient Astrology*, London-New York, 1994, p. 59 ff.) outlines that the horoscopes preserved in the papyri are little more than lists of planetary positions, references to the Ascendant and the lot of fortune. That is why this scholar takes into account the astrological treatises, especially Firmicus Maternus and the cases narrated by Vettius Valens in his *Anthology* or the Pentatheuc by Dorotheus of Sydon. Recently, R. BECK (*A Brief History of Ancient Astrology*, Oxford, 2007 38 ff) has explained in great detail - using the same kind of sources - how in Antiquity a horoscope was drawn up and how it was interpreted. O. NEUGEBAUER & H. B. van HOESEN, *Greek Horoscopes*, Philadelphia 1959 (reprint. 1987) had distinguished between literary horoscopes (e.g. the aforementioned *Anthology* of Vettius Valens) (76 ff.) and original horoscopes (14 ff.). Normally the original horoscopes we can find in the papyri do not offer clear interpretations, with some exceptions that are not very explicit., p. (cf. O. NEUGEBAUER & H. B. van HOESEN, *Greek Horoscopes*, 17: P. Oxy. 804 ll 15-17. D. BACCANI, *Oroscopi Greci. Documentazione papirologica*, Messina 1991 quotes P. Oxy. XXXI 2555, P. Warren 21 and P. Oxy. XLVI 3298, where horoscopes and magic formulae are mixed in the same document, but little secure information can be drawn from this fact.

³ W. & G. GUNDEL, *Astrologumena. Die astrologische Literatur in der Antike und ihre Geschichte*, Wiesbaden 1966 34 ff.

my opinion this has been a well-considered choice, since this book indeed can rightly be deemed as the most complete treatise or *compendium*, that takes account of many Greek and Roman astrological treatises, especially where practice is concerned. Its author deals with many different cases and has even been credited with his knowledge of the law,¹ We could have looked – as Barton did – at some other writers, such as Vettius Valens or Dorotheus of Sidon, for instance, but perhaps their examples are not as significant and clear in this particular matter.

Considering theft, we have many examples to comment upon in Firmicus' *Matheseis*. In the third chapter of the treatise, the main subject is the detailed delineations of the planets in the twelve houses. Firmicus talks about how the planets could have influenced on some aspects of human behaviour and on this account tackles the question of thievery.

Firmicus Maternus, *Matheseos Libri VIII*²

III.2.7

In tertio signo Saturnus ab horoscopo constitutus facit pigros tardos et nullam substantiam patrimoni requirentes. Si vero cum Mercurio ac Luna in hoc loco fuerit, faciet cum stultitia malitiosos, sacrilega contra divinitatem verba iactantes, pendentes semper patrimonium suum, fures, sed quos in furto prospere numquam sequatur eventos.

Dealing with Saturn in the third house, the astrologer claims that these natives are slow and sluggish. He also states that in conjunction with the Moon and Mercury in the same house these natives could become sacrilegious and stupidly malicious. According to Firmicus, normally these people lose their patrimony, so they end up as thieves, but as thieves who never take advantage of their thievery.

A little later and in the same chapter (III.7.12), Firmicus deals with Mercury in a morning rising and in a nocturnal chart in the sixth house, without any planet in the tenth house. In this case -he claims- the natives could also become thieves.

Si vero matutinus in nocturna genitura in sexto loco fuerit constitutus et decimus ab horoscopo locus nullam stellam habeat, facit malignos, malitiosos, malorum consiliorum auctores, fures sed qui res alienas invido mentis ardore desiderant...

In the fourth chapter (IV.14.7), when he deals with the full or waxing Moon moving from Mercury toward Mars in a diurnal chart, (*A Mercurio deflugens Luna si feratur ad Martem, in diurnal genitura, et sit Luna crescens vel plena luminibus*) the astrologer insists that in these cases the natives can be sacrilegious, perjurers, forgers and – what now is significant to us – burglars, thieves, bandits or killers.

Erunt effractores, fures, et qui templa sacrilego furore semper expilent, erunt latrones, homicidae, et ad neces hominum semper armati.

Or even clearer, Firmicus (*Mathesis VI.31.64*) states that people born under Mars and Mercury, in conjunction in the eighth house are thieves, sick of avarice and craving for the goods of others.

¹ J. D. HARRIES, *Law and Empire in Late Antiquity*, New York, 1999 138 ff. This author emphasises the «reliability of his picture of the contemporary penal system, as reflected in the fates awaiting those born under unfavorable signs».

² I quote according to the text of the Teubner edition by W. KROLL & F. SKUTSCH, *Iulii Maternii Firmici Matheseos libri VIII*, Berlin 1968.

Si in VIII ab horoscopo loco Mars et Mercurius simul fuerint collocati, malos fures efficient, et qui furoris mentis immodico et avaritiae vitio possessi aliena patrimonia iniustus semper desideriorum cupiditatibus insequantur.

These are only some examples illustrating how an astrologer could deduce from the stars that someone was a thief. The book is full of such explanations (cf. e. g. *Mathesis* v.6.9; VIII 19.1...). As I have said earlier, we may also have consulted – for example – Vettius Valens (VII. 5 283, 3-13. NEUGEBAUER 1 L 129 p. 123), who deals with cases of theft, but for the reasons above mentioned, Firmicus is probably more significant for our concern.

Considering the intellectual context of Ulpian's decision, the first consequences we can deduce from the aforementioned texts are that, probably, astrology had considerable intellectual prestige in that moment: the astrologers seriously assumed their competence to determine the character of people by paying attention to their astral configurations and people normally believed them. The accusation of theft made by an astrologer seems relevant for Ulpian, otherwise he may never have had attempted to tackle a case like this. When studying crimes related to occult practices, Mommsen rightly stated that astrology was considered as a kind of semi-science.¹ We must bear in mind that part of the high intellectual prestige that the astrology carried in that period was due to the Stoic or Neo-platonic cosmologies, whose influence might be especially detected in the Severan court, where the Second Sophistic was omnipresent. This might even be true in the jurisprudence of that time, Ulpian included.² On the other hand, all these predictions are based on general understandings and consequently unlikely to be used in a singular case to the point of incriminating him and that might be the matter of the specific constitution originally quoted by Ulpian. That is possibly the use of astrology forbidden by that constitution. Astrology could define the character of someone and even determine whether someone had a tendency to steal, but this could not be considered as

¹ TH. MOMMSEN, *Römisches Strafrecht*, Darmstadt, 1899 (reimp. 1955), p. 861 ff.

² It is widely known that the empress Julia Domna gathered philosophers, jurists, poets and astrologers, vid. e. g. Phil Vit. *Soph.* II.30. T. HONORÉ, *Ulpian*, cit., p. 80 ff. and G. CRIFÒ (*Ulpiano. Esperienze e responsabilità del giurista*, «ANRW» II.15, p. 734 ff.). I think that in this sense the affirmations made – to try some significant example – by J. H. W. G. LIEBESCHUETZ (*Continuity and Change in Roman Religion*, Oxford, 1979, p. 121) must be born in mind: «Astrology was intellectually respectable. The world picture of Stoicism made it a plausible hypothesis». The same can be stated about Neoplatonism, vid. e. g. R. T. WALLIS, *Neoplatonism*, London², 1995, p. 25 ff. Actually, these conceptions played an important role until the Renaissance and the classic work by A. J. FESTUGIÈRE (*La revelation d' Hermès Trismégiste I*, Paris, 190?, p. 89 ff.) had outlined this fact. For this scholar, the Hellenistic astrology, base in great deal of Roman conceptions about the subject, is: «l' amalgame d' une doctrine philosophique séduisante, d' une mythologie absurde et de méthodes savants employées à contre temps». We can state on the other hand that the universal sympathy is a doctrine that served as a base for science and magic or astrology at the same time, but astrology used some methods that gave it a scientific consideration even in elite circles. In this sense, we can take into account the use of geometry. About the key notion of *sympatheia universalis*, cf. the classical edition of the *Corpus Hermeticum* (W. SCOTT, *Hermetica I*, Oxford, 1924, p. 176). Scott's commentary (*Hermetica II*, Oxford, 1925, p. 200) stresses that the Hermetist accepts the Stoic doctrine but that – at the same time – the fundamentals of his theology are Neoplatonic. This notion of *sympatheia universalis* is generally accepted by the two doctrines and widely spread in the second and third centuries most current cosmology. About Stoic and Neoplatonic influences on Ulpian, vid. respectively e. g. T. HONORÉ, *Ulpian*, cit., p. 82 ff. and P. FREZZA, *La cultura di Ulpiano*, «SDHI», 44 (1968), p. 366 ff. (= *Scritti II*, Roma, 2000, p. 648 ff.)

a proof to accuse someone of having committed a theft. This deviant use of astrology was especially dangerous because of its reputation as a semi-science and could have been the purpose of the punishment by imperial constitution, likely present in D. 47.10.13.15 (Ulp. 77 *ad ed.*).

The question of distinguishing magic from astrology is fraught with difficulties because the ancient meanings of both are subtly complex. Probably – considering the tone – the conception about the astrological skill might be not exactly identifiable with magic but the problem is confusing. Pliny the Elder, normally quoted as a non believer in magic and in fact quite critical against astrologers (*Nat. Hist.* xxviii) actually spoke about astrology of the same level as medicine but also medicine and astrology – what deserved to be highlighted – at the same level of magic (*Nat. Hist.* xxx).¹ It is no less significant that – as some scholars had stated – some remarkable authors who seem sceptical about predictions in certain passages, are ambiguous or even contradictory in others.²

To close this digression, I argue that, in order to understand the meaning of astrology in that time and in Ulpian's view, we must renounce identifying our concepts of modern science as a parameter in deciding what is important and what is not in this context. It is obvious that this kind of diagnosis – based on astrological characteristics – played a role comparable to forensic science of the nineteenth century:³ the stars influenced the personalities and the physical features. The parallel can also be seen with astrology and medicine.⁴ It must be stressed that the influence of astrology on

¹ G. E. R. LLOYD, *Magic, Reason and Experience*, Cambridge, 1979. The question is essentially complex. As this scholar demonstrates, in Greek temple medicine was not easy to distinguish from rationalistic medicine (op. cit., p. 40 ff.) and (op. cit., p. 6 ff.), generally speaking «the success of natural science and philosophy contributed to the systematisation of these 'sciences' (scil., astrology and alchemy)». F. GRAF (*Magic in the Ancient World*, Cambridge, Mass-London, 1997, p. 50 ff.) tackles this apparent contradiction. Sometimes we insist on texts that at first sight fulfil the parameters of conventional science but the ancient understanding of these texts is no so simplistic, cf. N. JANOWITZ (*Magic in the Roman World*, London-New York, 2001, p. 12 ff.) by commenting Pliny the Elder (*Nat. Hist.* xxiv and xxx) says that Pliny's conception of magic is inconsistent and highly rhetorical, «permitting him to both include and exclude practices at will». We could add – for example – that Pliny values magic even with therapeutic aims, vid. P. MARTINO, *Abracadabra*, Roma, 1998, p. 81 ff.

² This paradox is relatively common in many cultures, vid. G. E. R. LLOYD, *Magic, Reason and Experience*, cit., p. 17 ff. Regarding Roman world, Tacitus – for example – pretends to dismiss magic or astrology but in other chapters demonstrates that in reality he is not so sceptical, vid. e. g., J. H. W. G. LIEBESCHUETZ, *Continuity and Change*, cit., p. 192, against R. SYME, *Tacitus*, London, 1958, p. 522, who thought that Tacitus was «openly sceptical about signs and wonders». It is obvious that this subject is at least a controversial one within Tacitus' works. cf. Hist. II 4 and Hist. I 22; Ann. II 27 and VI 20. 21-22; IV 58. This ambiguity has been stressed by E. KOESTERMANN's commentary (*Annalen II*, Heidelberg, 1965, p. 289) to the phrase (Ann IV 58), *Mox patuit breve confinium artis et falsi, veraque quam obscuris tegeantur*: «Denn dass Tiberius die Rücken versagt war, war eine richtige Auslage, die also auf 'wissenschaftlicher' Erkenntnis beruhte. Aber alles andere war unbestimmt bewies, dass auch das Echte in einen Schleier des Mysteriums gehüllt war».

³ This question has been recently tackled by F. ZUCCOTTI, *Furor haereticorum*, Milano, 1992, p. 105 ff. This author quotes e.g. Lombroso and compares his assertions to the ancient horoscopes.

⁴ In my opinion, this question of the actual concept of science in the ancient world is essential for our concern, i.e., to understand the context of Ulpian's affirmations. Apart from the comparison between medicine and astrology, it is also possible to confront magic and medicine in Galen, for example, vid. K. DEICHGRÄBER, «Ausgewähltes aus der medizinischen Literatur der Antike I», *Philologus* 110 (1957), p. 135 ff. The author – who takes resort to Artemidorus – says that in Galen it is possible to identify the «Programm einer in ihren Grenzen zuverlässigen wissenschaftlichen Mantik». vid. G. E. R. LLOYD, *Magic, Reason and Experience*, cit., p. 16 ff.; PH. VAN DER EIJK, *Medicine and Philosophy in Classical Antiquity*, Cambridge, 2005, p. 4 ff.

medicine is a considerably documented matter and even in contemporary medical texts this divinatory art was valued as a useful tool to reach an accurate medical diagnosis. The paradox is only apparent: as Ludwig Edelstein says, matters like astrology, the theory of humours or Plato's mathematical scale of music are not intrusions in ancient science, but a substantial part of it. These kinds of theories – «which do not pass the muster of modern criticism» constitute, in fact, the greater part of the preserved material. To the Greeks, Edelstein concludes, «they were as scientific as those other views which happen to seem acceptable to the modern scientist».¹ As for the case of a medical contemporary text of that of Ulpian, Galen himself, who was by no means an exception, believed that the Moon's position in the good and evil planets had a great effect over the condition of his patients.² Although there are numerous examples of this tendency, considerations like this have largely been overlooked or even dismissed. I believe we should take them seriously in order to consider the full context of the problem. In summary, Romans, especially elite Romans in the Severan age, seemed to have taken astrology very seriously and consequently Ulpian's decision must be understood in account of this fact. This statement does not necessarily mean that all the activities connected to astrology were actually prosecuted, but some of them obviously were. We shall come back to these questions when we treat the core of the matter, i. e., how to interpret this fragment in the context of the legislation against magic and astrology.

3. THE INSERTION OF § 13 UNDER THE SCOPE OF *CONVICIUM*

It is astonishing that Ulpian could consider it reasonable to include this case among the special edicts *de iniuriis*, particularly under the *convicium*. Although this question - since the jurist a priori excludes our case from the ambit of the *actio iniuriarum*- is not decisive for our interests, we must wonder why the jurist valued this possibility. The classical regime of the *actio iniuriarum* can be found particularly in books 56 and 77 of *ad edictum* by Ulpian, but according to Lenel, however book 77, the place where our fragment is found, is mistaken for book 57.³ Regarding the systematic insertion of D. 47.10.13.15 (Ulp. 77 *ad ed.*), we may also wonder why the jurist, before excluding this solution in favour of the criminal procedure, apparently placed § 13 under the edict of *convicium*. It still seems important to understand why and in which sense Ulpian deals with this matter in this part of his commentary (*convicium*), even to eventually exclude that this case could be adjusted to that action.

The context is especially difficult to reconstruct, but I personally do not believe that the possible connection between astrology and the *actio iniuriarum* had anything to do with capital punishment of the ancient *malum carmen incantare* in the XII tables, as Polay had stated. I consider this explanation risky, not only because Ulpian discards this procedural remedy (i. e. the *actio iniuriarum* in general), but especially because such an interpretation attempts to identify *convicium alicui facere* as a further evolution of the *carmen famosum* and consequently to admit that the former is nothing but the private version of the public crime regulated in the

¹ L. EDELSTEIN, «Recent Trends in the Interpretation of Ancient Science», *Journal of the History of Ideas*, 13 (1952), p. 573 ff. = *Ancient Medicine*, Baltimore, 1967, p. 401 ff., especially p. 405.

² J. SCARBOROUGH, *Roman Medicine*, Ithaca NY, 1969, p. 120 ff.

³ O. LENEL, *Palingenesia iuris civilis* II, Leipzig, 1889, col. 1335-1365.

latter. This is a thesis that is far from being proved.¹ The XII tables most likely had nothing to do with *infamatio*, but this is a typical *vexata quaestio* we cannot afford to deal with here.

Perhaps there is some relationship between this solution (eventually discarded) and the characteristics of the development of Roman *actio iniuriarum* in order to punish the defamation. Wittmann had rightly pointed out that the starting point of classical jurisprudence in this field was to comment upon the three so-called “special edicts” (i.e. *convicium*, *de adtemptata pudicitia* and *de iniuriis quae servis fiunt*) according to the abstract notion of acting *adversus bonos mores*.² As Daube has rightly argued, none of these three edicts supplied an exact model for tackling the problem of defamation, because this abstract concept does not find expression «in one or two typical acts, but may find expression in almost any act».³ But in my opinion, by considering the whole fragment (D. 47.10.13.2-14 *Ulp. 77 ad ed.*), the relationship between the defamation and the *actio iniuriarum* becomes harder to figure out. The most difficult point to justify is why § 13 is inserted under the *convicium* considering that this figure, at least *prima facie* and according to the definition and the requirements present in §4, is unlikely to include a case like this. In other words, it does not seem impossible to imagine a case where the opinion of the astrologer was pronounced among *vociferatio*, but this situation is far from being self-evident. Indeed, D. 47.10.13.2-14 (*Ulp. 77 ad ed.*) the fragment that Ulpian uses to define *convicium*, by commenting upon Labeo’s opinions, hardly ever could include the case of the astrologer if we think of a leading case.

D. 47.10.13.2-14 (*Ulp. 77 ad ed.*)

2. *Ait praetor: “Qui adversus bonos mores convicium cui fecisse cuiusve opera factum esse dicitur, quo adversus bonos mores convicium fieret: in eum iudicium dabo”.*

3. *Convicium iniuriam esse Labeo ait.*

4. *Convicium autem dicitur vel a concitatione vel a conventu, hoc est a collatione vocum. Cum enim in unum complures voces conferuntur, convicium appellatur quasi convocium.*

5. *Sed quod adicitur a praetore “adversus bonos mores” ostendit non omnem in unum collatam vociferationem praetorem notare, sed eam, quae bonis moribus improbatum quaeque ad infamiam vel invidiam alicuius specatret.*

6. *Idem ait “adversus bonos mores” sic accipiendum non eius qui fecit, sed generaliter accipiendum adversus bonos mores huius civitatis.*

7. *Convicium non tantum praesenti, verum absenti quoque fieri posse Labeo scribit. Proinde si quis ad domum tuam venerit te absente, convicium factum esse dicitur. Idem et si ad stationem vel tabernam ventum sit, probari oportere.*

8. *Fecisse convicium non tantum is videtur, qui vociferatus est, verum is quoque, qui concitavit ad vociferationem alios vel qui summisit ut vociferentur.*

9. *“Cui” non sine causa adiectum est: nam si incertae personae convicium fiat, nulla executio est.*

10. *Si curaverit quis convicium alicui fieri, non tamen factum sit, non tenebitur.*

¹ E. PÓLAY, *Iniuria types in Roman law*, Budapest, 1986, p. 150 ff. The origin of this thesis can be found in TH. MOMMSEN, *Römisches Strafrecht*, cit., p. 990 ff. and it has been followed by CH. BRECHT, s. v. ‘Occentatio’, «RE» XXXIV (1957), col. 1752; G. CRIFÒ, s. v. ‘Diffamazione e ingiuria’. «ED» XII (1964), p. 470 ff. vid. contra P. HUVELIN, *La notion de l’iniuria*, Lyon, 1903, p. 18 ff.; F. WIEACKER, *Zwölfstafelprobleme*, «RIDA», 3 (1956), p. 459 ff.; A. D. MANFREDINI, *La diffamazione verbale nel diritto romano I*, Milano, 1979, p. 49 ff.

² R. WITTMANN, *Die Entwicklungslinien der klassischen Injurienklage*, «ZSS» 91 (1974), p. 285 ff., esp. p. 303.

³ D. DAUBE, *Ne quid infamandi causa fiat. The Roman Law of Defamation*, Atti del Congresso Verona 1948 III, Milano, 1951, p. 413 ff. = *Collected Studies in Roman Law I*, Frankfurt am Main, 1991, p. 465 ff., esp. p. 468.

11. *Ex his apparet non omne maledictum convicium esse: sed id solum, quod cum vociferatione dictum est,*

12. *Sive unus sive plures dixerint, quod in coetu dictum est, convicium est: quod autem non in coetu nec vociferatione dicitur, convicium non proprie dicitur, sed infamandi causa dictum.*

13. *Si quis astrologus vel qui aliquam illicitam divinationem pollicetur consultus aliquem furem dixisset, qui non erat, iniuriarum cum eo agi non potest, sed constitutiones eos tenent.*

14. *Iniuriarum, quae ex convicio nascitur, in heredes non est reddenda: sed nec heredi.*

Paradoxically, it turns out that D. 47.10.15.13 (*Ulp. 77 ad ed.*) has been mostly neglected by the authors that have studied the *actio iniuriarum* and its development. This oversight is curious since the systematic situation of this text might have had many consequences for some of their theories.¹ Among the works devoted to the *actio iniuriarum* – such as those by Pugliese, Raber, Wittmann, Manfredini or Hagemann – the only one who directly tackles this specific question is Raber. He rightly realizes the difficulty of inserting § 13 under the *convicium*. The only possibility we can value is that the astrologer might be boldly accused of defamation. On this basis, he settles the problem by resorting to Mommsen's *editio maior*. Accepting that the order of our fragment is not the original, but a consequence of an alteration or oversight, our case would actually have nothing to do with the *convicium*. Therefore, the right order among the preserved fragments should be § 12 followed by § 14 and § 13.

12. *Sive unus sive plures dixerint, quod in coetu dictum est, convicium est: quod autem non in coetu nec vociferatione dicitur, convicium non proprie dicitur, sed infamandi causa dictum.*

14. *Iniuriarum, quae ex convicio nascitur, in heredes non est reddenda: sed nec heredi.*

13. *Si quis astrologus vel qui aliquam illicitam divinationem pollicetur consultus aliquem furem dixisset, qui non erat, iniuriarum cum eo agi non potest, sed constitutiones eos tenent.*

According to Raber, we could assume that Ulpian wondered about whether to include the case of the astrologer in the *actio iniuriarum* or not. We can also ascertain that eventually the jurist decided to exclude the case from this *actio* because there was criminal legislation considering a case like this, but never thinking in the *convicium* because its treatment had been concluded in the preceding fragment.² This possibility offers the advantage of not placing § 13 directly under the *convicium*, whose requirements are difficult to conceive in this case. Nevertheless this hypothesis is not completely convincing because it is not directly based on solid textual criticism, but merely upon what textual critics significantly call *devinatio*.

Starting from this difficulty, it would be advisable to accept as far as possible the order in which the text has arrived to us, instead of resorting to a solution based on slight textual criticism. Of course, despite the complexity of the requirements of the

¹ G. PUGLIESE, *Studi sull' iniuria I*, Milano, 1941; U. VON LÜBTOW, *Zum römischen Iniurienrecht*, «Labeo» 15 (1969), p. 159 ff.; A. WATSON, *The Law of Obligations in the Roman Republic*, Oxford, 1965; A. D. MANFREDINI, *La diffamazione verbale*, cit., p.

² F. RABER, *Grundlagen klassischer Injurienansprüche*, Wien-Köln-Graz, 1969, p. 30, on the basis of TH. MOMMSEN, *Digesta II*, p. 772, n. 2. Ulpian habe seinen Ediktskommentar streng am Edikt orientiert, so fragt man sich freilich, wie nach der abschließenden Bemerkung von § 12 in § 14 auf einmal wieder vom *convicium* die Rede ist. In D 47, 10, 15, 13 wird ja bereits ein anderer Tatbestand erörtert, der mit dem *convicium* überhaupt nicht zusammenhängt: Der Sterndeuter, der falsche Auskünfte erteilt, haftet nicht mit der *actio iniuriarum*, sondern nach den Konstitutionen. In diesem Textabschnitt scheint also gegenüber der klassischen Fassung in der Tat einiges geändert worden zu sein. MOMMSENS Korrekturvorschlag, auf D 47, 10, 15, 12 den § 14 folgen zu lassen, hiernach § 13 und dann (nach Einschleichen des Ediktswortlautes *de adtemptata pudicitia*) § 15, hat daher viel Einleuchtendes.

convicium D. 47.10.13.2-14 (Ulp. 77 *ad ed.*), it would be still possible to read § 13 continuously with the rest of the precedent fragments, i. e. §§ 2 ff. In this way it would not be necessary to state that the text is altered, but the difficulties would not be less considerable. Following what we could call an “unprejudiced reading” of these fragments (Pal. 11, frg. Ulp. 1350-1351), D. 47.10.15.2 ff. (Ulp. 77 *ad ed.*) offers the typical lemmatic analysis of the edictal text («*Qui adversus bonos mores convicium cui fecisse cuiusve opera factum esse dicitur, quo adversus bonos mores convicium fieret: in eum iudicium dabo*»). § 3: means the inclusion of the *convicium* into the *actio iniuriarum* according to Labeo; § 4: the *convicium* is defined through the *vociferatio* made by more than one person §§ 5-6: we discover a commentary about the clause ‘*adversus bonos mores*’; § 7: following Labeo’s interpretation, Ulpian distinguished between *praesenti* and *absenti*; § 8: general concept of *vociferatio*, including in its scope who had caused it, despite not having directly taken part of the clamour; §§ 9-12: Ulpian tackles the reasons for including some behaviour under the *convicium* and not another. § 13: depending on these assumptions, it is excluded, perhaps because of the importance given to the clamour (*vociferatio*) in §§ 11-12. This interpretation is obviously possible and at first sight unprejudiced, but in fact the case of the astrologer does not seem excluded because of the lack of *vociferatio* since the mention of the imperial constitutions implies that otherwise it could be considered within this regulation of the *actio iniuriarum*. Only by taking resort of § 8 we can justify that the astrologer, probably making use of a horoscope, might have indirectly provoked a *vociferatio*, but this it is also a complicated solution. I insist on that the decisive cause is precisely expressed through the phrase *sed constitutiones eos tenent*, the prevalence of the criminal legislation. Whatever the original reference was, it is likely that the jurist was talking about a precise imperial constitution dealing with an aspect of astrology relevant to the criminal law.

I dare say that the theory about the evolution of the special edicts proposed by Manfredini could allow us to reach a more comprehensive commentary of this fragment. This statement does not necessarily mean we have to share all the consequences of that interpretation,¹ but provided we accept Manfredini’s theory about the evolution of the *actio iniuriarum*, i. e., to understand the *convicium* as a general type of *iniuria verbis* developed in Labeo’s days and definitively present in Ulpian’s commentary the reason why Ulpian thought about the *convicium* in this case might be more understandable.² *Convicium facere* or *convicium dicere* would mean simply *iniuria verbis*. Following this solution, the case of the astrologer, considered only as a case of *iniuria verbis* with no further requirements (*in coeto, vociferatio...*), can easily be placed in this part of the commentary. If so, the astrologer would have committed an *iniuria verbis*, which only by tradition was still called *convicium*. The name ‘*convicium*’ became only a *nomen iuris* capable of including every *iniuria verbis*, regardless of the requirements provided for the *convicium* in its original form. After evaluating this behaviour (merely an *iniuria verbis*) as a possible matter of the *actio iniuriarum*, considered as a whole as *iniuria-contumelia*, Ulpian excluded it in favour of the criminal procedure on the grounds of a specific *constitutio*.

¹ There are some points worthy of being commented on as for instance his theory of the private nature of the *actio* derived from the *lex Cornelia de iniuriis* or also some possible alterations of the texts.

² A. D. MANFREDINI, *Contributi allo studio dell’iniuria in età repubblicana*, Milano, 1979, p. 16 ff.; p. 183 ff. and n. 73. IDEM, *La diffamazione verbale*, cit., p. 78 ff. This author does not deal with this fragment at all, but it is possible to deduce the consequence that I deduce from his thesis.

To reach these conclusions, we should carefully notice that Manfredini interprets Ulpian's commentary to Labeo on two levels, its historical development – in which Labeo plays a decisive part – and the order of the *Edictum perpetuum*, which constitutes the basis of Ulpian's commentary and that originally incorporated some notes to define the *convicium*. Starting with this explanation, it may be possible to concurrently distinguish between the exposition by Labeo, the commentary by Ulpian and the original order of the Edict.¹ I think that the three texts which uphold this theory are D. 47.10.1 (*Ulp. 56 ad ed.*), D. 47.10.3.1 (*Ulp. 56 ad ed.*) Coll. 2.5.4 (*Paul. l. sing de iniuria*). I shall outline only the aspects that might justify the insertion of § 13 under the *convicium* as a general type of *iniuria verbis*.

Dig. 47.10.1.1 (*Ulp. 56 ad ed.*)

Iniuriam autem fieri Labeo ait aut re aut verbis: re, quotiens manus inferuntur: verbis autem, quotiens non manus inferuntur, convicium fit.

Dig. 47.10.3.1 (*Ulp. 56 ad ed.*)

Sane sunt quidam, qui facere non possunt, ut puta furiosus et impubes, qui doli capax non est: namque hi pati iniuriam solent, non facere. cum enim iniuria ex affectu facientis consistat, consequens erit dicere hos, sive pulsent sive convicium dicant, iniuriam fecisse non videri.

Coll. 2.5.4 (*Paul. l.s. de iniuria*)

Fit autem iniuria vel in corpore, dum caedimur, vel verbis, dum convicium patimur, vel cum dignitas laeditur, ut cum matronae vel praetextatae comites abducuntur. Iniuriarum actio aut legitima est aut honoraria.

In the aforementioned texts the concept of *iniuria verbis* is what defines more properly the *convicium* as a general type of it. At least taking into account these sources, it is almost certain that *convicium*, which was described in § 4 with the old requirements, in Ulpian's times meant simply *iniuria verbis* as opposed to *iniuria re*. In other words, the whole original casuistic conception would be unified in the *iniuria-contumelia*. For Ulpian, *convicium* was nothing more than a historical name that at that moment might have lost its original meaning. In Manfredini's words, *convicium* and the expressions *convicium facere* or *convicium dicere*, according to the *Edictum perpetuum*, could imply only a sphere of the application of the private *delictum* called *iniuria*, but this sphere must be carefully distinguished from the notions stated in the Edict, which presuppose a unified notion of *iniuria* and *actio iniuriarum*.² The concept commonly known as *iniuria-contumelia*, originated in Labeo's interpretation of the edict is the grounds for this construction³ and it is significant that this wide notion gives cause to assert that the typical requirements (*cum vociferatione, in coetu...*) were in Ulpian's days nothing but a trace of the pre-Labeonian regulation, contemplated and quoted by Ulpian himself only as a historical reference.

To sum up, Manfredini developed this thesis by insisting on the two levels of Ulpian's commentary. They expressed the Labeonian theory (*iniuria-contumelia*) and its historical precedents as well. Most likely, in this scholar's words, the text first informs

¹ A. D. MANFREDINI, *La diffamazione verbale nel diritto romano I*, cit., p. 81 ff.

² Ivi, p. 133 ff.

³ L. VACCA (*Delitti privati e azioni penali nel principato*, «ANRW» (1982) XIV, p. 682 ff., esp. p. 695) summarizes this process which starts from a casuistic evaluation of the content, to end up in a general and abstract concept of *iniuria*.

of the law which was enforced at that moment – i. e. the *iniuria-contumelia* – and following makes explicit its historical development insisting on the part played by Labeo in the configuration of it and quoting Labeo's commentary. Another significant fact, which could support this interpretation, is that not one of the special edicts has a typical action, but simply the *actio iniuriarum* as a general name. I think that in our case this theory explains why the astrologer is mentioned under the treatment of the *convicium*. At the same time, this text, which has not been directly commented upon by Manfredini, could be another argument to maintain his assumptions. Either way, it would be necessary to review the basis of this solution.¹

We have ascertained that its insertion under the treatment of *convicium* forces us to decide between considering the fragment out of its original place – that is the solution of the *Editio maior* – or modifying the concept of *convicium* in the sense of Manfredini's thesis. To accept the inclusion of our fragment following the commentary to the Edict and considering the case as an exceptional one is also possible (on the grounds of § 8 and P. S. 5.4.20), but it remains hard to imagine in which context the jurist could wonder why the astrologer mentioned by Ulpian could commit *convicium* even only as a way of an instigator.

4. THE VALUE OF ASTROLOGY AND THE MEANING OF THE REFERENCE TO THE CONSTITUTIONES IN D. 47.10.15.13 (ULP. 77 AD ED.).

Once we have determined that there are some clues to state that D. 47.10.15.13 (Ulp. 77 ad ed.) has been altered, abbreviated, or otherwise modified by the compilers, we should evaluate whether there was a political or ideological cause for this decision, probably to adapt the text to the regulation of the late Empire which places astrology at the same level with magic and all of the divinatory arts. I shall devote the last pages of this paper to the main question: the possibility to discover the aims and the legal and ideological foundations of these substantive amendments. To develop this question, we should bear in mind the differences in perceptions of magic and astrology and their prosecution during the Principate.

As Desanti has pointed out, the most probable hypothesis is that the aim of the alterations in D. 47.10.13.15 (Ulp. 77 ad ed.) was to introduce a reference to the *constitutiones* in general (in fact, those included in C. I. 9. 18 that develops some included in C. Th. 9. 16) to replace the original reference to a single *rescriptum*. I dare say that with all the reservations we can have against stylometry as a method, it is a proven fact that Ulpian used to quote accurately the *rescripta* by mentioning the emperors who enacted them. The evidence of this tendency in Ulpian's writings is overwhelming and this can be proven 451 times out of 461.² This characteristic deserves more credit if we think that Justinian's policy generally was, when the Codex came into

¹ M. HAGEMANN, *Iniuria von den XII-Tafeln bis zur justinianischen Kodifikation*, Köln-Weimar-Wien, 1998, p. 68, n. 86, criticizes Manfredini with – in my opinion – weak reasons: «Claud. Sat. D. 48.19.16 wird oben drein nach verstümmelt zitiert und spricht sogar direct gegen Manfredinis These». In fact, Manfredini does not comment with detail this fragment but seems a poor objection against his theory.

² T. HONORÉ, *Ulpian*, cit., p. 234. I insist that I am aware of the difficulties of stylometry as a method (cf. review by B. W. FRIER, *Law on the Instalment Plan* in «Michigan Law Review» 82 [1984], p. 856 ff., esp. p. 861 ff.) but in any case I consider this particularity essentially significant to understand the content of the imperial intervention in our text.

force, to forbid quoting the constitutions by the work of the jurists (*Const. Summa* 3). This is the reason why the compilers were charged with the task of removing, whenever possible, the *constitutiones* of the Digest to prevent confusion and repetition (*Const Summa* 9). This point is commonly known, but it should be emphasized in order to understand and to evaluate the mention of the *constitutiones* in D. 47.10.13.15 (*Ulp. 77 ad ed.*). Thus, it becomes more likely that the original clause contemplates not only the constitution, but also the exact type of crime committed by the astrologer. To sum up, in my opinion, today, the insertion of the clause *constitutiones eos tenent* is what remains of that original reference to a particular imperial constitution cited by Ulpian with his typical meticulous care, but later cut down by the compilers. Obviously, with this intervention they eliminated one specific case where astrology was punished, i.e. the intervention of an astrologer in an accusation of *furtum*.

I have suggested above it is not likely that astrology and magic were treated together during the Principate or at least not totally. Therefore, it becomes difficult to reconstruct the original meaning of these notions and their possible juridical consequences. It is true that both magic and astrology can serve as divinatory arts, but it cannot be denied that astrology operates practically only as a divinatory art and that magic – essentially what we can conceive as ‘black magic’ – has other possibilities to be incriminated. The treatment of astrology and magic as a whole has undoubtedly something to do with the repression of these activities during the late empire, when the question of *mala sacrificia* is interpreted according to the religious deviance.¹ It is not easy – apart in our fragment – to find other mentions to astrology in the Digest so clear. When we find some references, they are normally introduced or at least modified by the compilers. As a consequence of this attitude, astrology is normally treated together with magic. It is easy to affirm that the model of this legislation can be discovered in C. Th 9.16 that is in its turn the basis for C. I. 9. 18.

The criminalisation of astrology in Roman law is not a well-documented phenomenon and in regard to this question Marie Theres Fögen affirms that the silence of Roman jurists is especially significant.² To tackle astrology as a crime during the Principate, we must also distinguish in which ways and in what sense this art was punished. Starting mainly from literary sources, I think that it is legitimate to affirm that astrology in this sense differed from magic; astrology was mainly punished when its practice had some direct relationship with political conspiracy and perhaps also in some peculiar cases such as in D. 47.10.13.15 (*Ulp. 77 ad ed.*). The links with the *lex Cornelia de sicariis et veneficiis* – commonly argued to postulate a commixed treatment of both divinatory arts³ – are difficult to assert in a total and not totally

¹ B. BIONDI interprets (in his fundamental work *Il diritto romano cristiano*, Milano, 1956, I, p. 269 ff.) this phenomenon – i.e., the prosecution of both magic and astrology as religious deviance – as a consequence of Christianity, but the control of religious deviance is not necessarily connected with it, otherwise some constitutions enacted by Galerius or Diocletian himself would be difficult to justify. The main aim of legislation against religious deviance is the concept of religion as part of public law. Recently D. J. O’MEARA (*Platonopolis: Platonic Political Philosophy in Late Antiquity*, Oxford, 2003, p. 3 ff.) has outlined the impact of the Neoplatonist political theory on this legislation. Starting from this theory E. DEPALMA DIGESER (*Religion, Law and the Roman Polity* in C. Ando, J. Rüpke, ed., *Religion and Law in Classical and Christian Rome*, cit., p. 68 ff.) has studied this problem.

² M. TH. FÖGEN, *Die Enteignung*, cit., p. 60 ff.

³ According to W. KUNKEL (*Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit*, München, 1962, p. 70) Sylla unified both *quaestiones* (*de sicariis* and *de veneficiis*) that existed

evident in what magic is concerned. It can be stated that the repression of magic only and exclusively through this statute is unlikely. There is no evidence either – or at least I shall try to demonstrate so – to affirm that the Cornelian law provided for cases of astrology.

Treating the crime of magic during the Roman Empire, J. B. Rives¹ has recently emphasized some ideas that can be useful to throw light on the status of astrology. The main problem lies in determining whether the *lex Cornelia de sicariis et veneficiis* was really the basis for the repression of magic. This problem leads to another question, which is essential to knowing the scope of criminal repression of magic. I mean the content that lies behind the concept of *veneficium*. The *mala venena* – as far as they are mentioned in the Digest – would be punished by this statute, but only if they were used as a method of killing or injuring someone.² In other words, the repression of magic through the Cornelian law is, in different levels, always connected to murder.

As a consequence, a general and coherent repression of magic was never reached through a wide interpretation of the *lex Cornelia de sicariis et veneficiis*. It is totally inexact, for example, that the term *veneficium* or the term *venenum* were easily interpreted as poison or spell.³ To reach such an interpretation the process seems to have been harder than we could imagine at first sight and was probably never totally achieved through the Cornelian law.⁴ This statute was clearly focused on the handling of *venena* for the sake of killing, as still I. 4.18.5 conveys and the more founded reconstruction of its text reveals.⁵ In other words, it cannot be excluded that part of the repression was originally based on this statute, but it is difficult to deduce that all the possible performances of magical rites, especially those not directly related to murder, were prosecuted through the Cornelian law.

Regarding the punishment of astrology, the situation seems radically different from the cases taken into account by the *lex Cornelia de sicariis et veneficiis*. We must bear in mind that the testimonies we have preserved from trials where astrology and magic were involved are all in some way related to political conspiracy.⁶ The valua-

before him. The extension of its scope to magic, allegedly through a generous interpretation of the term *veneficium* by a *Senatus consultum* has been postulated by TH. MOMMSEN *Römisches Strafrecht*, cit., p. 639 ff., p. 862 and e.g., by C. FERRINI, *Diritto penale romano*, Pavia, 1899, p. 387; U. BRASIELLO, *La repressione penale in diritto romano*, Napoli, 1937, p. 322, E. MASSONEAU, *La magie dans l'antiquité romaine*, Paris, 1934, cit., p. 167 ff. and L. DESANTI, *Sileat omnibus*, cit., p. 40.

¹ J. B. RIVES, *Magic in Roman Law: the Reconstruction of a Crime*, cit., p. 271 ff.; IDEM, *Magic, Religion and Law: The Case of the Lex Cornelia de sicariis et veneficiis*, in C. ANDO, J. RÜPKE, *Religion and Law in Classical and Christian Rome*, cit., p. 47 ff.

² J. B. RIVES, *Magic, Religion and Law*, cit., p. 49 ff. This author goes through many sources about the meaning of the term 'venenum', including pseud. Quint. Decl. Min. 246. 3 et 350. 1.

³ In his essential book about the *tabellae defixionum*, J. G. GAGER (*Curse Tablets and Binding Spells from the Ancient World*, New York, 1992, p. 254 n. 35) accepts uncritically this wide interpretation of *venenum* as either poison or spell but – as I shall try to show – the process is far from being so easy to describe.

⁴ J. B. RIVES, *Magic, Religion and Law*, cit., p. 64, n. 65 affirms that not before the first century AD some charges of *veneficium* were related to magic arts, of course I agree with his reconstruction, but the example he uses is that of Lollia Paulina (Tac. Ann. XII. 22), and magic seems not to be the essential element in this trial, vid. infra.

⁵ J. B. RIVES, *Magic, Religion and Law*, cit., p. 49, cf. J. L. FERRARY, in M. H. CRAWFORD, *Roman Statutes*, London, 1996, p. 752, who reconstructs the text as a prohibition of preparing, selling (s.c. 'de pigmentariis'), purchasing *veneficia* or even the possession of them for the sake of killing someone.

⁶ J. G. GAGER, *Curse Tablets* cit., p. 254 ff. About this point, the essential study is F. H. CRAMER, *Astrology*

tion of those trials as evidence of juristic problems is not always easy: Dio, Tacitus, Seneca or Suetonius, were not especially concerned with these technical questions, but only with presenting the facts under a moral prospective. Moreover, in some of those trials, astrology is only incidentally mentioned, so it did not seem to have played a significant part. The essential question is always the repression of political conspiracy and the *crimen maiestatis* as the instrument to achieve this target.

During the Julio-Claudian dynasty, for example, in Libo's plan and also in the conspiracy of Lollia Paulina (49 AD), magic and astrology are confusingly involved¹ and as a consequence it becomes difficult to distinguish which part astrology actually played. In my view, this problem becomes to a great extent pointless, since these trials were conducted as repression of political dissidence and consequently astrology and magic were incidentally involved in the conspiracy,² in other words, astrology and magic played a secondary part compared to the plot against the emperor or against a person vested by the *imperium*. If they were conducted under the *lex Cornelia de sicariis et veneficiis* it would be possible to include the magical rituals performed to kill the emperor under its scope, but even accepting this possibility astrology is hard to be included in this context.³ We must always consider that the interpretation of *veneficium* could embrace some magical rituals, but hardly a divinatory art like astrology.

Things do not seem to have changed during the Principate. Following Cramer's list of the trials dated during the Julio-Claudian dynasty, in only three cases the accusations are not specified and in two the accusations are related to magic as a divinatory art and with what we can understand as black magic. In the two cases in which astrology is involved (Libo Drusus and Lollia Paulina) the alleged relationship between *crimen maiestatis* and some use of astrology is quite clear. Libo and Lollia Paulina dealt with astrologers and interpreters of dreams, but their main crime was the crime of high treason, the crime of *maiestas*. Moreover, some details of Libo's trial – e.g. the decision to question and torture his slaves – confirm that the crime

in *Roman Law and Politics*, Philadelphia, 1954, p. 234 ff. Except for minor changes, Cramer embodies his article *Expulsion of Astrologers* in «C & M» 12 (1951), p. 9 ff. and his two articles called *The Caesars and the Stars* («Seminar» 9 1951, p. 1 ff. and «Seminar» 10 1952, p. 1 ff.). In this chapter he takes into account and brings to date the study of criminal trials during the reign of Tiberius (R. S. ROGERS, *Criminal Trials and Criminal Legislation under Tiberius*, Middletown, 1935) and his successors until Commodus. About Libo Drusus and Lollia Paulina, vid. B. M. LEVICK, *Tiberius the Politician*, London, 1976, p. 167 ff.; G. HERBERT-BROWN, *Ovid and the Fasti*, Oxford, 1994, p. 208 ff. and following Herbert-Brown's assumptions S. J. GREEN, *Ovid Fasti i. A Commentary*, Leiden-Boston, 2004, p. 121 ff.

¹ Cf. Tacit., p. Ann. XII, 22, p. 1-2: *Isdem consulibus atrox odii Agrippina ac Lolliæ infensa, quod secum de matrimonio principis certavisset, molitur crimina et accusatorem qui obiceret Chaldaeos, magos interrogatumque Apollinis Clarii simulacrum super nuptiis imperatoris*. The text does not make any difference between magic and astrology, but punishes the fact of consulting about the emperor's marriage.

² And even this idea has been refused by R. A. BAUMAN (*Impietas in Principem. A Study of Treason against the Roman Emperor*, München, 1974, p. 60 ff.). This author thinks that astrology is not the relevant element, especially in Libo Drusus' trial. His position about the trial of Barea Soranus and magic is practically the same. Compare e. g. R. A. BAUMAN (*Impietas in Principem*, cit., p. 65), who discards that magic was charged with *maiestas* and F. H. CRAMER, *Astrology*, cit., p. 255 ff.

³ R. A. BAUMAN (*Impietas in Principem*, cit., p. 60 ff. discards the *crimen maiestatis* and mainly relies on D. 48.8.13 (Mod. 12 *pand.*) to assert that the trials were conducted under the *lex Cornelia de sicariis et veneficiis*. Since the author dismisses the part played by astrology in those cases, it becomes obvious that he does not intend to demonstrate that that statute contemplated astrology.

was actually the *crimen maiestatis*.¹ After the Julio-Claudian dynasty, as in Domitian's execution of Mettius Pompusianus, things are more or less the same, for in this trial, one of the charges was to have an imperial horoscope or *imperatoria genesis*, as was designated by Suetonius (*Vesp.* XIV).

It is possible that the repression of political conspiracy was – due to political reasons – veiled as repression of magic or astrology. But in this case we should question the capacity of the old criminal statutes to include these behaviours. The study of these trials has been normally dealt with by trying to fit them into one determinate crime by following the old catalogue of the *iudicia publica*, but this procedure seems to ignore the role played by the emperor in criminal prosecution. As Crook pointed out, it would not be unfair to say that the imperial intervention in criminal prosecution had little to do with the original framework of the old criminal statutes.² In some cases we should wonder whether the misunderstanding could derive from how the jurists schematized the process of subsuming the new crimes under the old statutes. Many times the old framework did not fit the facts and consequently a rigid explanation of this process³ overlooks or even dismisses the part played by the emperor and the *cognitio extra ordinem* in the criminal repression, *per definitionem*, free from these links.⁴ Starting from this context we should value the aforementioned trials as connected to the *crimen maiestatis* or, if they were constituted according to the imperial *cognitio*, magic or astrology would probably be prosecuted as ways of committing political conspiracy. No evidence suggests a global prosecution of both magic and astrology as the sources of the late Empire aim to imply.

Following these keys, I shall revise the other fragments of the Digest where astrology – if not explicitly – is indirectly mentioned, in order to evaluate their scope and their possible relationship to our fragment. The text usually brandished to demonstrate that the repression of astrology was deduced through a *Senatus consultum* from the *lex Cornelia de sicariis et veneficiis* is D. 48.8.13 (*Modest.* 12 *pandectarum*). The other fragment, not explicitly dealing with the astrology but alluding to it, is D. 10.2.4.1 (*Ulp.* 19 *ad ed.*). For the sake of convenience, I will comment upon these fragments together with Coll. 15.2.1, P. S. 5.23.15 and P. S. 5.23.18.

D. 48.8.13 (*Modest.* 12 *pand.*)

Ex Senatus consulto eius legis poena damnari iubetur, qui mala sacrificia fecerit habuerit.

The compilers placed this fragment of Modestinus under the rubric *lex Cornelia de sicariis et veneficiis*. Although it is commonly accepted⁵ that the aforementioned statute covered some cases of magic it is impossible for us today to identify the *Senatus*

¹ P. A. BRUNT, *Evidence given under Torture in the Principate*, «SZ» 97 (1980), p. 256 ff.; O. F. ROBINSON, *Slaves and the Criminal Law*, «SZ» 98 (1981), p. 213 ff.

² J. A. CROOK, review of R. A. BAUMAN, *Impietas in Principem* in TR 54 (1976) 167 ff.

³ The origin of this interpretation of these trials can be found in TH. MOMMSEN, *Römisches Strafrecht* 640 and has been followed by E. MASSONEAU, *La magie*, cit., p. 171 ff.

⁴ P. A. BRUNT, «Did Emperors ever Suspend the Law of "Maiestas"», *Sodalitas Guarino* 1, Napoli 1984 469 ff.

⁵ According to R. A. BAUMAN, (*Impietas in Principem*, cit.) it is «almost certain» that this decree was *ex lege Corneliae de sicariis*. He relies on U. BRASIELLO (*La repressione penale*, cit., p. 231 ff.) and E. LEVY, *Die römische Kapitalstraffe*, in «Sitzungsberichte der Heidelberger Akademie der Wissenschaften» 5 (1930-31) = *Gesammelte Schriften* II, Köln-Graz 1963 323 ff.

consultum that performed this extension and its scope. On the other hand, and as I have said earlier, nothing indicates that the repression of magic was totally concentrated on this statute. Recently Rives has suggested that with *mala sacrificia* Modestinus implied impious or nocturnal rituals conceived to kill or damage people¹ and stating so this author values that the original ambit of that statute was gradually extended by the *Senatus consultum*. At the same time, he argues that the interpretation of *veneficium* hardly might contain all the magical rites punished during the late Empire. According to P.S. 5.23.15 some other magic rituals were punished apart from those conceived to kill and even this fragment uses a parallel terminology, *sacra impia nocturnave*, which makes possible to identify a definite trend to extend the purview of the *lex Cornelia de sicariis et veneficiis* to include – under a wide interpretation of *veneficium* – some rituals conceived to inflict death or to damage upon people. Rives rightly interprets these rituals as those we know from the curse tablets, such as to induce or to quell sexual passion or to hinder competitors and opponents, but we do not know for certain if these rituals were ever punished by virtue of the Cornelian law.² It is likely that some magical rituals not conceived to kill were punished but not exactly under the *lex Cornelia*, but under the *cognitio extra ordinem*. The trial of Apuleius in Sabrata offers indirect evidence about it, for the writer was not formally charged with murder and the *veneficium* is clearly excluded (Apul. *Apol.* 1-11).³ I would argue that the prosecution of religious deviance is what actually combines magic with astrology. During the Principate, religious deviance might have embraced some charges involving magic, but in my opinion this regulation (i.e. the *lex Cornelia de sicariis* and the *Senatus consultum* indirectly alluded to in D. 48.8.13 (*Modest, 12 pand.*)) was unlikely to include astrology.

The main argument to postulate a commixed treatment of both magic and astrology is significantly a post-classical source, Coll. 15.2.1 that alludes (and partially quotes) to the *Senatus consultum* enacted as a consequence of Libo's trial, which is not exactly the same mentioned in D. 48.8.13 (*Modest, 12 pand.*).

Coll. 15.2

Ulpianus libro vii de officio proconsulis sub titulo de mathematicis et vaticinatoribus:

Coll. 15.2.1

Ulpianus 7 de officio proconsulis

Praeterea interdictum est mathematicorum callida inpostura et obstinata persuasione. Nec hodie primum interdicti eis placuit, sed vetus haec prohibitio est. Denique extat senatus consultum Pomponio et Rufo consulibus factum, quo cavetur, ut mathematicis Chaldaeis Ariolis et ceteris, qui simile inceptum fecerunt, aqua et igni interdicatur omniaque bona eorum publicentur, et si externarum gentium quis id fecerit, ut in eum animadvertatur.

In the rubric of Coll. 15.2 we read *de mathematicis et vaticinatoribus*, i. e., about astrologers and fortune-tellers: *mathematicus* is the term appearing in the *Codex Gregorianus*, but it is already used by Tacitus, for example.⁴ In this way, divination is clearly

¹ J. B. RIVES, *Magic, Religion and Law*, cit., p. 58.

² Ivi, cit., p. 59.

³ Cf. ivi, cit., p. 322 ff. Although I do not totally share Rives' opinion about the relationship of Apuleius' trial to religious deviance I do agree with him in considering the trial as independent from the Cornelian law.

⁴ TH. MOMMSEN, *Römisches Strafrecht*, cit., p. 862.

equated to astrology. This starting point – which considers the punishment of divinatory arts as a whole – is in a way suspicious. With the exception of some individual cases – astrology was probably irrelevant to criminal law. Only when astrology had some value in the process of questioning the emperor's legitimacy – the question about the emperor's future and that of his dynasty¹ – does this divinatory art have some relevance for criminal law, but this case should be carefully distinguished from the private consultation, punishable only in some peculiar cases as might be in D. 47.10.15.13 (Ulp. 77 *ad ed.*).

The phrase *sed vetus haec prohibitio est* implies, therefore, a propagandistic will to demonstrate the existence of many precedents of a general prohibition however, apart from the *Senatus consultum* quoted in the next paragraph – more easy to relate to the consultation *de salute principis* than to the Cornelian law – no more examples are mentioned. It is true that the author might have resorted to the standard decisions that expelled the astrologers from the city, i.e. the praetorian edict of Cn. Cornelius Hispanus (139 BC) that banished them or the edictian edict by Agrippa (33 BC). But Mommsen rightly qualified these dispositions as police measures. Those were exceptional and conceived for a short period.² More interesting for us is the prohibition enacted by Augustus of 11 AD (Val. Max. I.3.3; Cass. Dio LVI.25, 5-6 and CIL XII 25 n. 147): the emperor forbade the consultation of astrologers «à deux» and about the death of the emperor but also the death of common people. Not by chance Dio refers in the very next line that Augustus made public his own horoscope to avoid speculations. I think that the aim of the aforementioned measure – probably an edict- was essentially political and secondarily to prevent people from consulting the astrologers so that they did not use the consultation as a previous measure to kill someone.³ Mommsen, not without reason, states that this is the origin of the constitutions forbidding the consultation *de salute principis*.⁴ In my opinion, this measure – as I have pointed out, probably an edict- might be even an argument against the inclusion of astrology in the scope of the Cornelian law. Dio does not relate the measure only to political conspiracy, but also to the ambit of plotting to kill someone, which in principle might be the ambit of that statute, but significantly there is no mention of it. Dio just refers to this possible edict irrespective of the *lex Cornelia de sicariis et veneficiis*. Magic is taken into account by the Cornelian law as far as murder is concerned, but the only case where astrology might be involved in a plot to kill someone is apparently not regulated according to that statute.

¹ About the use of astrology as a way to legitimize the imperial power, vid. J. P. MARTIN, *Providentia deorum. Aspects religieux du pouvoir Romain*, Roma, 1982, p. 379 ff.

² cf. for the former Val. Max. I. 3.2; TH. MOMMSEN, *Römisches Strafrecht*, cit., p. 861 ff.; F. H. CRAMER, *Astrology in Roman Law*, cit., p. 232 ff.; L. DESANTI, *Sileat omnibus*, cit., p. 46 ff. For the later, cf. Cass. Dio LVI.25.5; F. H. CRAMER, *Astrology in Roman Law*, cit., p. 83; L. DESANTI, *Sileat omnibus*, cit., p. 18 ff.

³ F. D. CRAMER, *Astrology*, cit., p. 250; L. DESANTI, *Sileat omnibus*, cit., p. 47.

⁴ TH. MOMMSEN, *Römisches Strafrecht*, cit., p. 863 n. 4. L. DESANTI (*Sileat omnibus*, cit. 21) takes resort of A. H. JONES, *Criminal Courts of the Roman Republic and Principate*, Oxford 1972, 58. In my view this scholar does not clearly state that the *iudex* was a specific feature of the *quaestio de sicariis et veneficiis*. By quoting Cic. *pro Roscio Amer.* 11, Jones (128, n. 86) just points out that we find a praetor who previously had been a *iudex questionis*, and at the same time he mentions – by quoting Cic. *pro Cluentio* 126, 147) that the *aediles* who acted as *iudices questionis de sicariis*. I do not think that these facts cast light on the problem. On the other hand, the source is not a good source to state so. The invective *contra Sallustium* was written during the reign of Trajan (cf. *Thesaurus Linguae Latinae, Index Librorum Inscriptionum ex quibus exempla offeruntur*, Leipzig 1990, 57).

With the ideological purpose of discovering ancient roots for the persecution of this practice, Coll. 15.2.1 states that the prohibition of the *callida impostura* (significantly, not a very reliable term in the Ulpian's work) professed by the astrologers *nec hodie primum interdici eis placuit, sed vetus haec prohibitio est*. And then the text – I have pointed it out – insists on offering proofs of this assertion. *Denique extat Senatus consultum Pomponio et Rufo cons. Factum, quo cavetur, ut mathematicis Chaldaeis Ariolis et ceteris, qui simile inceptum fecerunt, aqua et igni interdicator omniaque bona eorum publicentur, et si externarum gentium quis id fecerit, ut in eum animadvertatur*. The proof argued is one *Senatus Consultum* dated to 16 or 17 AD, which is relatively known to us through the testimony of the literary sources, especially Cassius Dio LVII.15.7-9 and Suet. Tib. xxxvi, because Tacitus (Ann. II.32.3) is not so precise: he refers to several, not only to one *Senatus Consultum*.¹ Not by chance these sources link this decree closely with Libo's trial. This *Senatus Consultum* is supposed to be the main argument to declare that the *lex Cornelia de sicariis et veneficiis* was extended to cases of divination, including astrology. This norm might have affected the *mathematici*, *Chaldei* and *arioli* and it could mean the *aqua et igni interdictio* and the *publicatio bonorum* for Roman citizens and the *animadversio* for the others.² In despite of the date that is present in the text of the *Collatio* (i.e., 17 AD) the literary sources situate the facts around Libo's trial, in 16 AD.³ The problem of this reference to the *Senatus Consultum* is solved by Desanti, following Cramer, under the assumption that there were several *Senatus Consulta* around Libo's trial, but only the last one remained in force. This fact does not prove that the *lex Cornelia* provided for astrology and furthermore it is unlikely that Libo's trial had something to do with astrology at least as a fundamental reason.⁴ Whatever part astrology could have played, it was only an instrument to commit high treason, i. e. the *crimen maiestatis*. The *Senatus consultum* is mentioned in this context, presented as a consequence of the Libo's case and no general prohibition of the divinatory arts can be deduced.

The assumption that the *lex* alluded to by the *Senatus Consultum* in Coll. 15.2.1 is specifically the *lex Cornelia de sicariis et veneficiis* is also based on the Nigidius Figulus trial, dated some years before (45 BC). It seems dubious to me, or at least it seems difficult to fit both theories together. If Nigidius Figulus was condemned for the exercise of astrology, in which sense did the *Senatus consultum* of 16 or 17 AD extend the *lex Cornelia de sicariis et veneficiis* to those practices? Which was the aim of the

¹ F. D. CRAMER, *Astrology*, cit., p. 234 ff.; L. DESANTI, *Sileat omnibus*, cit., p. 33 ff. ; 108 ff. M. TH. FÖGEN, *Die Enteignung*, p. 64 n. 26.

² U. BRASIELLO, *La repressione penale*, cit., p. 222 ff.; L. DESANTI, *Sileat omnibus*, cit., p. 34 n. 4. These punishments are typical from pure "crimen in die stas", at least according to the "lex Iulia" (cic. "ad fam" 3.2; P.S. 5, 29, 1). The "agena et igni interdictio isae possible for?????" *lex* (ovelia che secariis) (D. 48, 8, 3, 5, Marc. 14 Inst.).

³ F. D. CRAMER, *Astrology*, cit., p. 238 ff.; C. GIOFFREDI, 'Interdictio' NNDI II (1958) 817FF; L. DESANTI, *Sileat omnibus*, cit., p. 37 ff.

⁴ R. BAUMAN, *Impietas in Principem*, cit., p. 60 affirms that Libo's trial furnishes «clear proof» that occult practices were not yet being treated as a crime against *maiestas*. He bases this assertion on these reasons: Vibius, the accuser of occult practices, was not given a share in the reward distributed amongst the accusers (Tac. Ann. II 32.1) and the charge of astrology is treated separately (*singulatim*. Tac. *eod. loc.*). In my opinion, these arguments demonstrate that astrology was not the core of the question, but it does not exclude that occult practices were not yet treated as high treason. Bauman's thesis intends to prove that the Cornelian law was the basis of those trials, but this solution has proved to be very controversial. About this question vid. infra. xxx.

edict of 11 AD? Cassius Dio (54. 1 3-5) insists that Nigidius had a significant knowledge of the stars and that on these grounds he predicted the absolute rule of Augustus. We do not know for certain the content of that trial, but according to the *Chronica* of Saint Hieronymus (183.4) *Nigidius Figulus Pythagoricus et magus in exilio moritur*. On the other hand, the text of the apocryphal *oratio* by the Pseudo-Cicero against Sallust – other evidence usually invoked to prove the relationship between the *iudicia legitima* and the crime of astrology – mentions that the latter was involved in a sacrilegious conspiracy with a group of partisans (*in sodalicium sacrilegi*) of Nigidius Figulus.

Ps. Cic, in Sall. v. 14

“*At hercules lapsus aetatis tirocinio postea se correxit*”. *Non ita est, sed abiit in sodalicium sacrilegi Nigidiani; bis iudicis ad subsellia attractus extrema fortuna stetit et ita discessit, ut non hic innocens esse sed iudices peierasse existimarentur*.

As we can see, according to the text Sallust was summoned up twice before a *iudex*. Normally this reference is interpreted as *iudex quaestionis*. It might be significant – in short – that Nigidius’ trial was a *quaestio perpetua*, i. e., a *iudicium legitimum*.¹ Moreover, it is normally deduced that the nature of his crime was linked to astrology or at least to magic² and that the *lex* was actually the *lex Cornelia de sicariis et veneficiis*, applied to magic and, without differences, also to astrology. This is the thesis vindicated by Desanti.³ For her there is evidence enough to affirm that Dio Cassius implies that the crime of Nigidius Figulus was the use of astrology as a divinatory art.⁴

In my view, this apparently solid and convincing reconstruction has some weak points. As I have insisted earlier, I do not deny that there was some relationship with the *lex Cornelia de sicariis et veneficiis* and magic, especially in the first stages of the development of its prosecution and always linked to murder, but it is difficult to imagine which relationship might exist between this statute and astrology. Astrology is mainly a divinatory art and difficult to relate with methods to kill or to injure someone and consequentes its prosecution should be constructed on another basis, perhaps the *crimen maiestatis* when divination was part of a plot against the emperor. My objections are based on two points. First, the Pseudo-ciceronian *oratio ad Sallustium* has been proved not to be a very likely source,⁵ datable far from Cicero’s days and indeed not a technical source. Thus it does not seem to be a good way to reconstruct the context of Nigidius’ trial by insisting on the mention of the term *iudex*. Perhaps the *lex* that gave cause to that *iudicium legitimum* was not necessarily the *lex Cornelia* but the *lex Iulia de maiestate*. Second, if we consider the implication of astrology – whatever the crime under the Nigidius’ trial was – the only reference that

¹ W. KUNKEL, ‘*quaestio*’, RE XXIV (1963), col. 741. L. DESANTI (*Sileat omnibus*, cit. 21) based her thesis on A. H. JONES, *Criminal Courts of the Roman Republic and Principate*, Oxford 1972, 58. The indices quaestionum, who had the same “duties and powers” as the practis, were normally appointed, but Jones does not explicitly state that the ‘index’ was typical of the ‘*quaestio maiestatis*’. By quoting Cic. *pro Roscio Amer.* 11, Jones (128, n. 86) points out that we find a praetor who previously had been a ‘index quaestionis de sicariis’, but at the same time he mentions, by quoting Cic. *pro Cluentio* 126, 147. The aediles who acted as ‘iudices quaestionis de sicariis’. On the other hand, the source is not a good reason to state so. Accordig tho the *Index Librorum Inscriptionum ex quibus exempla offeruntur*, Leipzig 1990, 57 (*Thesaurus Linguae Latinae*), the ‘*oratio in sallustium*’ was probably written during trajan’s reign.

² TH. MOMMSEN, *Römisches Strafrecht*, cit., p. 206.

³ L. DESANTI, *Sileat omnibus*, cit., p. 21 ff.

⁴ Ivi, p. 23.

⁵ Vid. e. g. M. SCHANZ, C. HOSIUS *Geschichte der römischen Literatur*, München, 1966⁴, p. 370 ff.

we have about this is mentioned by Dio Cassius. In fact, the main concern of Dio in this text was precisely to outline the prophecies around the future of Augustus and that of Figulus is one of them, but nothing about the nature of the charges against him is said. In few words, I think that the original scope of astrology as a criminal behaviour is the crime of *maiestas* (especially in the sense of conspiracy) and that this regulation was progressively completed with some specific provisions by virtue of the *cognitio extra ordinem* during the Principate. Thus, we can affirm that there is no solid evidence to affirm that Coll. 15.2.1 related astrology to the *lex Cornelia de sicariis et veneficiis* when mentioning the *Senatus Consultum* of 17 AD.

Regarding D. 10.2.4.1 (*Ulp. 19 ad ed.*), it seems highly controversial or at least this is also the estimation of the majority of scholars. To value its content it is necessary to analyse P.S. 5.23.18. These texts are indirect evidence of how the legislation of the late Empire implied the correction of some fragments of the Digest.

D. 10.2.4.1 (*Ulp. 19 ad ed.*)

Mala medicamenta et venena veniunt quidem in iudicium, sed iudex omnino interponere se in his non debet: boni enim et innocentis viri officio eum fungi oportet: tantundem debet facere et in libris improbatæ lectionis, magicis forte vel his similibus. Haec enim omnia protinus corrumpenda sunt.

P. S. 5.23.18

Libros magicæ artis apud se neminem habere licet: et penes quoscumque reperti sint, bonis ademptis, ambustis his publice, in insulam deportantur, humiliores capite puniuntur. Non tantum huius artis professio, sed etiam scientia prohibita est.

The first fragment gives rise to the problem of how to apply the *actio familiae erciscundae*. The second is the main argument to state that astrology was included in the scope of the *lex Cornelia*, since it is placed under the rubric *ad legem Corneliam de sicariis et veneficiis*. According to D. 10.2.4.1 (*Ulp. 19 ad ed.*), the judge who must divide the inheritance is asked, on the grounds of his *innocentis viri officium*, to avoid including the *mala medicamenta et venena* in the division. It is significant that *venenum* is used with the adjective *malum* (*mala venena*),¹ because at first sight the term might not have dire connotations. Although under the concept of *veneficium* different things have been discerned, only those conceived to kill are included in the scope of the *lex Cornelia*. As we know, for criminal purposes and under this statute the *veneficia* are considered instruments of murder (D. 48.8.3.2 *Marc. 14 Inst: Sed hoc solum notatur in ea lege, quod hominis necandi causa habet*).² Hence, the prohibition of magic, according to the usual limits of the Cornelian law, once more does not appear related to provisions on astrology. As I have tried to convey, the typical assumption according to which the repression of magic was only constructed on the *lex Cornelia de sicariis et veneficiis* seems today to be under suspicion and its extension to astrology becomes in my opinion an even more controversial subject.

This is the reason for affirming that the indirect reference to astrology among the *libri improbatæ lectionis* is suspicious as included between *tantundem* and *corrumpen-*

¹ The same ambiguity happens in Greek ('*pharmakon*'), cf. C. PHARR, *The Interdiction of Magic*, «TAPA» 63 (1932), p. 269 ff, esp. p. 272 ff.; J. B. RIVES, *Magic, Religion and Law*, cit., p. 49 ascertains that the term '*venenum*' could denote substances that we distinguish as 'poisons', 'potions' and 'drugs'. «A *venenum malum* was thus a substance that brought about a negative or undesired change».

² M. TH. FÖGEN, *Die Enteignung*, cit., p. 59. J. B. RIVES, *Magic, Religion and Law*, cit., p. 64 ff.

da sunt, a clause that is probably interpolated.¹ The digression *magicis forte vel his similibus* does not seem to point necessarily to astrology, but the intention of the compilers was likely to include astrology among the *similes*. The decisive question is whether there is any evidence for the persecution of the learning and teaching of astrology in the Principate. This evidence, if there is any, is in very weak. Tertullian claimed that astrologers were expelled from Rome, but – as I have reminded earlier – that decision was obviously related to political conspiracy. The usual reference to Tertullian and the expulsion of the astrologers (Tert. *de idol.* 9) has been in my opinion rightly interpreted as temporary police measures taken by several emperors, who, at the same time, used to provoke or even to practice astrology.² The question boils down to that, there is no evidence at all for a general prohibition the teaching of astrology, or in other words, there is no notice prohibiting the learning and teaching of the art of astrology before Coll. 15.2.2 (Ulp. 7 *de off. proc.*) and P. S. 5.23.18, both dated in the late Empire. Besides, many of the astrologers who wrote these kinds of treatises were absolutely safe and even had some links with the emperors, especially in the Severan age. What is true is that some Christian authors, such as Tertullian, made an apologetic use of these slight or even vague notices as a way to prove that even the pagan emperors had forbidden these practices as religious deviance, but this idea seems to be an ideological interpretation of these references. Only such a prohibition could justify that having these kinds of books was absolutely forbidden a part from some stylistic deficiencies, the notices we have are not in favour of the authenticity of this aspect of D. 10.2.4.1 (Ulp. 19 *ad ed.*). Moreover, the references to astrology are not specific enough to deduce such a prohibition – the text (*magicis forte vel his similibus*) does not explicitly state that astrology was in fact the matter. As Fögen points out, neither Marcian, Ulpian, nor any other jurist, who comment upon D. 48. 8 the *lex Cornelia de sicariis et veneficiis*, link the book of magic with the poisons³ therefore it becomes even harder to prove that astrology was criminalized on the same grounds as magic.

The rubric of the *Pauli Sententiae* is a poor basis to state that astrology was punished in the ambit of the Cornelian law. The postclassical author might have classified the text following the new imperial legislation, but despite the different conception of religious deviance of the late Empire, this systematic order does not reappear until the *Basilicorum libri* (B. 60. 39). In fact, the *Codex Theodosianus* had headed the title 9.14 *ad legem Corneliam de sicariis* and the 9.16 *de maleficis et mathematicis et ceteris*

¹ Cf. O. LENEL, *Palingenesia Iuris Civilis* II, Leipzig, 1889, p. 533. L. DESANTI, *Sileat omnibus*, cit., p. 104, n. 72 quotes the old and very known interpolationistic article by F. PRINGSHEIM, *Beryt und Bologna, Festschrift Lenel*, Leipzig, 1921, p. 281 n. 6 – also quoted by B. BIONDI, *Il diritto romano cristiano* I, cit., p. 277 – that in this case is quite clairvoyant.

² Tert. *de idol.* 9 (PL I 671 ff.): *Expelluntur mathematici sicut angeli eorum. Urbs et Italia interdicitur mathematicis, sicut coelum angelis eorum. Eadem poena est exilii discipulis et magistris*. F. H. CRAMER, *Astrology*, cit., p. 248. T. D. BARNES, *Tertullian. A Historical and Literary Study*, Oxford, 1971, p. 113 ff.: *De idololatria* was composed before the *Apollogeticum*. The author outlines (96) that astrology for this heresiarch at the same time involves idolatry (*idol.* 9. 1). In my opinion we should pay attention to the apologetic aim of Tertullian in relating this episode, cf. P. BROWN, *The Making of Late Antiquity*, Cambridge Mass., 1978 (reprint New York, 1998), p. 75 highlights this idea, present in the text: «When Tertullian reported the exile of astrologers from Roman cities, he treated the measure as an attempt to ‘mop up’ anomalous and disrupted elements which directly continued, on earth and in his own age, the exile of the fallen angels from heaven».

³ M. TH. FÖGEN, *Die Enteignung*, cit., p. 59.

similibus. The *Codex Iustinianus* had named the title 9. 16 *ad legem Corneliam de sicariis* and the 9. 18 *de maleficis et mathematicis et ceteris similibus*. Both ambits seem accurately distinguished.

Maybe the *Collatio* and the *Pauli Sententiae*, can help us to observe the differences between the prosecution of magic and astrology in the late Empire and in the Principate. These texts are decisive since they constitute the only development we have preserved about divination in Roman jurisprudence. However we should be careful with the authenticity of many of the assertions included in them. As it is widely known and I have underlined, these fragments of the *Collatio*, from a post-classical source, are not always reliable.¹ The author of the *Lex Dei* showed evident apologetic aims and probably both altered and misunderstood the original meaning of the fragments. In our case, the author comments Deut. 18. 10-14, that deals precisely with divinatory art. The context of the apologetic text refers to the use of divination (consulters with familiar spirits, wizards, fortune-tellers, necromancers and all the diviners in general) and stress that the Mosaic Law had forbidden those practices in the same sense that Roman law did. In order to justify this principle, the author resorted to some fragments from treatise by Ulpian.

On the other hand, whatever the original meaning and the apologetic aim of the compiler let us consider that the nucleus of these excerpts is drawn from Ulpian's *de officio proconsulis*. It is commonly assumed² that in this work the jurist instructed the provincial officials about their possible duties in reference to juristic problems. Taking these data into account, this source probably deserves some interest, but the main difficulty is the necessity – which is in this case more remarkable than usual – to distinguish between the original nucleus from the posterior abbreviations, post-classical glosses and apologetic interpretations. We must never forget that these fragments demonstrated to the eyes of the post-classical reader that the repression of the occult practices in the late Empire had deep roots in the legislation of the Principate and that comparably that repression had some analogies with the Mosaic Law. Everything aims, nevertheless, to postulate a not so widely extended prohibition as the *Collatio* tries to convey. To be honest I should remind the reader that my exegetic key is that the legislation against astrology (and all the divinatory arts) during the Principate probably amounted to nothing more than a regulation of some precise activities, especially those linked with the *crimen maiestatis* and some particular cases regulated through precise imperial constitutions and consequently not under the *iudicia legitima*, but under to the *cognitio extra ordinem*, as it was probably the case in D. 47.10.13.15 (Ulp. 77 *ad ed.*). It is noteworthy that this panorama seems highly different from what the author of the *Collatio* wants to imply.

Coll. 15.2.2

Ulpianus 7 *de officio proconsulis*

Sed fuit quaesitum, utrum scientia huiusmodi hominum puniatur an exercitio et professio. Et quidem apud veteres dicebatur professionem eorum, non notitiam esse prohibitam: postea variatum. Nec

¹ M. TH. FÖGEN, *Die Enteignung*, cit., p. 63, n. 25 refers to D. LIEBS, *Die Jurisprudenz im spätantiken Italien (260-640 n. Chr.)*, Berlin, 1987, p. 165 ff. to date the *Collatio* starting from 291, when it was enacted the more recent imperial constitution quoted in the text, i. e. one by Theodosius I. vid. et. R. M. FRANKS, *Item Theodosianus? Observations on Coll. v. 3. 1*, «Quaderni Urbinati di Cultura Classica» 71 (2002), p. 163 ff.

² Vid. e. g. D. NÖRR, *Rechtsskritik in der römischen Antike*, München, 1974, p. 150 ff.

dissimulandum est nonnumquam inrepsisse in usum, ut etiam profiterentur et publice se praeberent. Quod quidem magis per contumaciam et temeritatem eorum factum est, qui visi erant vel consulere vel exercere, quam quod fuerat permissum.

Fögen estimates this fragment suspicious in view of its literary style. In my opinion she is probably right, despite being her exegesis in many aspects hypercritical. Only to outline one characteristic of her analysis, the comparison she makes between the texts of the books *de officio proconsulis*, preserved in the Digest and the *Collatio* happens to be quite significant. The dialog between the teacher and his pupil (*sed fuit quaesitum*) of § 2 is very different from the direct and concise style of D. 48.9.6 (*Ulp. 8 de off. proc.*) or D. 26.5.12 (*Ulp. 3 de off. proc.*).¹ But in my opinion it is still trustworthy – according to what we know from the literary sources – that astrology was only prosecuted as far as conspiracy was concerned. The gloss *postea variatum* is an attempt to express that the prohibition changed its original sense to embrace both theory and practice. According to the author, in other times these arts were publicly practised and advertised, but this freedom was due more to the contumacy and audacity of those who practised them than to any legal basis. In my opinion and according what we have seen, this argument sounds strange in the Severan times. As Fögen suggests, the basis of this postclassical re-elaboration of Ulpian is C. 9.18.2, where *ars mathematica* – in the sense of astrology – is forbidden.

Coll. 15.2.3

Ulpianus 7 *de officio proconsulis*

Saeppissime denique interdictum est fere ab omnibus principibus, ne quis omnino huiusmodi ineptiis se immisceret, et varie puniti sunt ii qui id exercuerint, pro mensura scilicet consultationis. Nam qui de principis salute, capite puniti sunt vel qua alia poena graviore adfecti: enimvero si qui de sua suorumque, levius. Inter hos habentur vaticinatores, quamquam ii quoque plectendi sunt, quoniam nonnumquam contra publicam quietem imperiumque populi Romani improbandas artes exercent.

§ 3 insists on the topic of the old and practically constant prohibition of astrology by nearly all the emperors (*saeppissime denique interdictum est fere ab omnibus principibus*) but the text is again focused on political conspiracy: divination is only mentioned within the context of the consultation *de salute principis*. Therefore, this fragment is not problematic for us because refers to astrology as a way of ingiuring about the future of the emperor (*de principis salute*) and consequently this crime cannot be included in the case dealt with by Ulpian in the fragment we are considering. The text also speaks about *pro mensura*, to imply that not only the question on the emperor's health is forbidden, probably making reference to the possible edict enacted by Augustus in 11 AD: the penalty is said to be lighter where the enquiry does not concern the emperor, but the consulter's own life or that of his relative. Again, *vaticinatores* is a suspicious term in Ulpian's work. PS 5.21.3 is – apart from the indirect allusion to the literary sources – our only evidence of how this crime was legally treated. The context – PS 5.21.1-2 – indicates once more that the postclassi-

¹ M. TH. FÖGEN, *Die Enteignung*, cit., p. 64 ff. According to F. HORAK, *Wer waren die veteres? Zur Terminologie der klassischen römischen Juristen*, in *Vestigia Iuris Romani. Festschrift für G. Wessener*, Graz, 1992, p. 201 ff. (esp. p. 220 ff.) '*postea variatum*' is nothing but a gloss. Fögen relies on Horak, but she herself points out other suspicious features.

cal sources were more focused on a general concept of religious deviance than on astrology as a peculiar divinatory art. Magic, astrology and every art, which might involve religious deviance is dealt with at the same level and the consultation *de salute principis* is biased presented as a consequence of those general principles. To sum up, the post-classical author tries to present the historical development of the prosecution of magic and astrology as a linear and coherent process, which – as we have seen – is quite far from realistic and very ideological.

P.S. 5.21.3

Qui de salute principis vel summa rei publicae mathematicos hariolos haruspices vaticinatores consulit, cum eo qui responderit capite punitur.

The order of exposition of Coll. 15.2.3 is the same as that of PS 5.21: after a general statement condemning in general and in hard terms the divinatory arts (PS 5.21.1) and a not less hard condemnation of those *qui novas sectas vel ratione incognitas religiones inducunt* (PS 5.21.2) happens the widely known interdiction to ask *de salute principis* (PS 5.21.3). In my opinion this closed connexion between divinatory arts and the prosecution of sects – i.e., the prosecution of religious deviance – is typical of the legislation of the late Empire and it is clearly and significantly expressed by both post-classical sources: the *Collatio* and the *Pauli Sententiae*. Fögen also points out many suspicious details as the term *vaticinatores* (absolutely unknown to the classical jurisprudence and also present in PS 5.21.1) or the possibility that the model of this statement was actually the constitution of Diocletian against the Manicheans. It is significant that neither the author of the *Collatio* nor the author of the *Pauli Sententiae* do not quote in support of the allegedly extended prohibition any precise constitution¹ but only the usual one against the consultation *de salute principis*. Some little details – such as the mention of the *haruspices* – demonstrates the intervention of a post-classical hand. In the next fragments, however, the author insists on the alleged antiquity of the prohibition by quoting imperial *rescripta* but again the content of them amounts to insist on political conspiracy as the main concern of those enactments.

Coll. 15.2.4

Ulpianus 7 *de officio proconsulis*

Extat denique decretum divi Pii ad Pacatum legatum provinciae Lugdunensis, cuius rescripti verba quia multa sunt, de fine eius ad locum haec pauca subieci.

Coll. 15.2.5

Ulpianus 7 *de officio proconsulis*

Denique divus Marcus eum, qui motu Cassiano vaticinatus erat et multa quasi instinctu deorum dixerat, in insulam Syrum relegavit.

Coll. 15.2.6

Ulpianus 7 *de officio proconsulis*

Et sane non debent inpune ferre huiusmodi homines, qui sub obtentu ex monito deorum quaedam vel enuntiant vel iactant vel scientes confingunt.

§ 4 deals with a rescript by Antoninus Pius addressed to the *legatus provinciae Lugdunensis*. According to the jurist, the text of the rescript is too long to be quoted entirely.¹ § 5

¹ M. TH. FÖGEN, *Die Enteignung*, cit., p. 69.

is also about a rescript, by Marcus Aurelius, who punished Cassianus with *the relegatio in insulam*, but again the context is significantly a political conspiracy. Before reproducing the constitution of Diocletian, a digression about divinatory arts is closed by a general statement about this crime or, according to other interpretation, § 6 quotes some *verba* of the rescript alluded in § 4. No more new data can be deduced from this last fragments.

5. CONCLUSIONS

a) The text of D. 47.10.15.13 (*Ulp. lib. 77 ad edictum*) is slightly altered, but at the same time the interpolations that have been proposed are not essential. Only the insertion of a general allusion to the *constitutiones* using the verb *tenere* in the active is in my opinion a clear trace of the intervention in our fragment. Taking into account the usual precision of Ulpian in citing the imperial rescripts, the text still preserves the traces of a prohibition of astrology in a sense clearly differentiated from the *crimen maiestatis* and not easy to be related to the ambit of the *lex Cornelia de sicariis et veneficiis*. The wider repression of magic and astrology during the late Empire clouded the original references by subsuming the divinatory arts under the general accusation of religious deviance.

b) As a matter of fact, Ulpian places D. 47.10.13.15 (*Ulp. 77 ad ed.*) in his commentary to the *actio iniuriarum* and specifically to the special edicts, under the *convicium*. But his decision in favour of the imperial constitutions implies the exclusion of this case from the *actio iniuriarum*, which eliminates the lack of *dolus* as a solution. According to the data we have about the prosecution of astrology it would be reasonable to think that this kind of behaviour remained unpunished, but it is more likely – bearing in mind the relative serious status of this divinatory art – that the general reference to the *constitutiones* replaces a specific rescript in which that behaviour was punished. It is obvious that the first impression is that the defamation involved in accusing one of being a thief – furthermore by making use of a horoscope – could at first sight be subsumed under the *actio iniuriarum*. Eventually Ulpian however excludes the charges for *iniuria*, even in its *extra ordinem* form probably considering that the astrologer should be punished in another way, for there was some imperial decision in this sense. Accepting that defamation is not the main concern of the case it is still worth wondering why Ulpian considered at first sight this context to propose the problem. It is not unreasonable to think that in Ulpian's days, *convicium* only meant *iniuria verbis*, as Manfredini has stated. This solution would in fact eliminate many difficulties, i.e., the requirements of the *convicium* (e.g. *in coeto, vociferatio*) to interpret the case. Accepting however the literal tenor of the text it would be also legitimate to deduce that the astrologer, through his explanation of the horoscope, could have indirectly committed *convicium* by having provoked the *vociferatio* (D. 47.10.13.8 *Ulp. 77 ad ed.* and P.S. 5.4.20). In the second case we would have to consider an instigation of *convicium*, created by an astrologer who deduced too much from the horoscope of someone: not only his predisposition to steal, but that a precise theft had actually been perpetrated by him. In all events, as I have said earlier, Ulpian excludes the case

¹ It is actually a controversial subject. Some authors think that the quotation has been shorted; others that the missing quotation is that included in § 5.

of the scope of the *actio iniuriarum* in general terms, in benefit of criminal procedure, by quoting an imperial rescript, today lost.

c) The presence of astrology in D. 47.10.15.13 (*Ulp. 77 ad ed.*) could indicate that we do not totally know the rules that punished this divinatory art during the Principate. We can only assert that during the Principate astrology was punishable in the case of the consultation *de salute principis* and –according to Dio Cassius– the consultation about the life of someone as well as the consultation “à deux”. Our case can probably be explained as a private use of this divinatory art but with some criminal consequences, punished through the *extra ordinem iudicium* not through the aforementioned *lex Cornelia* and consequently through one *iudicium legitimum*.

d) I do not think that we still have evidence to relate astrology to the *lex Cornelia de sicariis et veneficiis*, that was originally the basis to condemn magical practices. Therefore, the cases subsumed under the Cornelian law were always related to murder and magic was included through a wide interpretation of the term *veneficium*. However, not all the cases related to magical rituals could be embraced under this concept. So, it is unlikely that all the cases involving magical rituals were subsumed under that statute and consequently probably were dealt with according to the imperial legislation. The possible edict of 11 AD is an indirect evidence against including astrology under the scope of the *lex Cornelia de sicariis et veneficiis*, because it forbade the consultation about the life of someone – which in a way might include a plot to kill someone – and no mention of that statute is made.

e) The problem of the extension of the Cornelian law by the *Senatus consultum* referred in Col. 15.2.1 is usually treated in a superficial way. It is possible that Figulus was condemned by virtue of this *lex*, but if so the extension of the aforementioned statute would be dated before 16 or 17 AD. The context seems to be again related to political conspiracy (so state the literary sources about Libo’s case) and consequently the *iudicium* at issue was likely based on the *crimen maiestatis* and on the *lex Iulia de maiestate*. Despite his alleged knowledge of the stars, Figulus has predicted the absolute power of Octavius and that seems to be the basis of the accusation, not exactly the practice of astrology per se. In the trials having place during the Julio-Claudian dynasty and referred to by the historians, the core of the matter seems to be the *crimen maiestatis*. Magic and astrology (only present in two of them) played a secondary part as an instrument to commit treason against the *Princeps*.

f) So, astrology – apart from the *crimen maiestatis*– was probably a tolerated practice, punished only in some few cases and not on the same basis as magic (mainly constructed although not exclusively, on the *lex Cornelia de sicariis et veneficiis*) but on the *cognitio extra ordinem*. D. 47.10.15.13 (*Ulp. 77 ad ed.*) might be included among these cases: the astrologer – abusing his art – accuses someone of being a thief. The possible *convicium* (probably as ‘defamatio’) is excluded in favour of some rescript that provided – on the basis of the *cognitio extra ordinem*– one specific criminal punishment for this behaviour.

g) The commixed treatment of both *crimina* – magic and astrology – (in the *Collatio* and in the *Pauli Sententiae*) probably derives from the influence of the legislation of the late Empire, – not necessarily related to Christianity – more focused on religious deviance and consequently without foundations on the classical law. This new treatment causes the substitution of the original rescript (probably accurately quoted by Ulpian) by a general reference to the *constitutiones*, which contributes to cloud the classical regime of the punishment of astrology.

COMPOSTO IN CARATTERE DANTE MONOTYPE DALLA
ACCADEMIA EDITORIALE, PISA · ROMA.
STAMPATO E RILEGATO NELLA
TIPOGRAFIA DI AGNANO, AGNANO PISANO (PISA).

★

Luglio 2009

(CZ 2 · FG 13)



*Tutte le riviste Online e le pubblicazioni delle nostre case editrici
(riviste, collane, varia, ecc.) possono essere ricercate bibliograficamente e richieste
(sottoscrizioni di abbonamenti, ordini di volumi, ecc.) presso il sito Internet:*

www.libraweb.net

*Per ricevere, tramite E-mail, periodicamente, la nostra newsletter/alert con l'elenco
delle novità e delle opere in preparazione, Vi invitiamo a sottoscriverla presso il nostro sito
Internet o a trasmettere i Vostri dati (Nominativo e indirizzo E-mail) all'indirizzo:*

newsletter@iepi.it

★

*Computerized search operations allow bibliographical retrieval of the Publishers' works
(Online journals, journals subscriptions, orders for individual issues, series, books, etc.)
through the Internet website:*

www.libraweb.net

*If you wish to receive, by E-mail, our newsletter/alert with periodic information
on the list of new and forthcoming publications, you are kindly invited to subscribe it at our
web-site or to send your details (Name and E-mail address) to the following address:*

newsletter@iepi.it