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

Emanuela Fugazza
University of Pavia
emanuela.fugazza@unipv.it

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

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

Summary: 1. The trial. – 2. *Publica fama* and the *ex officio* start of the trial. – 3. *Publica fama* and testimonies in the conviction. – 4. Wilful misconduct and negligence in the judge's evaluations. – 5. Conclusive observations

The contribution that follows regards the study of a verdict in Pavia dating back to 1249. Regulatory and doctrinal sources will be quoted that would require a deeper study of the multiple profiles of a general nature that underlie them, if only we think of themes and issues that require much textual analysis. Nonetheless, it is worth noting that the author intends to focus the attention primarily on the judicial events in Pavia.

1. *The trial*

In the first months of 1249, on an unspecified day, in Pavia seventeen prison warders were sentenced for the escape of some prisoners. Of the trial, the verdict issued by the imperial *potestas* Filippo *Barbavaria* remains, copied on plain paper in a Register of Convictions held in Pavia's *Archivio Storico Civico*[1]. Although some pages have been damaged, the crucial moments of the trial can be reconstructed with close accuracy.

Regarding the initial phase of the proceedings, the anonymous notary states that the judgement of the accused - then convicted - was started *ex officio* based on *publica fama*. The *fama* of which we speak is, naturally, that of *fama facti*[2]. In fact, the warders were «infamati» of having been responsible for the escape of prisoners whom they were supposed to be guarding. No personal evaluation, regarding their reputation, good or bad, was considered by the judging authorities at the start of the trial.

The verdict also holds some information regarding the preliminary inquiry carried out by the *potestas*. We know that many witnesses were called and that based on their testimonies and the *fama* that already existed against the accused, it was decided that they would have to pay a

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[1] Pavia, Archivio Storico Civico, *Archivio comunale. Parte antica*, *Registri comunali* (from hereon ASCPv, ACPA, RC) chart. 6 (280).11. The same archives also contains another ten Registers of Conviction, dating back to the years immediately after the 1250s, two of which have been examined by T. Perani, *Pluralità nella giustizia pubblica duecentesca. Due registri di condanne del comune di Pavia*, in «Italian History Archives», 167 (2009), pgs. 57-89.

[2] On *fama facti*, as well as the literature quoted *infra*, see: F. Migliorino, *Fama e infamia. Problemi della società medievale nel pensiero giuridico nei secoli XII e XIII*, Catania 1985, pgs. 45-72; Idem, *«La Grande Hache de l'histoire». Semantica della fama e dell'infamia*, in *Fama e publica vox nel Medioevo* (Study Convention Documents, Ascoli Piceno, 3rd – 5th December 2009), Rome 2011, pgs. 5-21 (Istituto Storico per il Medio Evo).

financial fine. Three warders were also punished with the *bannum* of two hundred Pavian lire for failing to appear in court. As the judge would explain, only by paying the above sum could the offenders escape the condition of *banniti*. Until that moment, they could be offended in their person or property with impunity.

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

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

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

When the warders of Pavia were tried and condemned, *publica fama* had acted as the element that initiates the trial in ecclesiastical courts for several decades, ever since Innocent III 'personified' it, «facendole prendere il posto di un accusatore reale»[3] and replacing it with the various forms of witness groups, previously necessary in order to proceed without

[3] On the personification of *fama*, see: J. Théry, *Fama: l'opinion publique comme preuve judiciaire. Aperçu sur la révolution médiévale de l'inquisitoire (XII^e^-XIV^e^ siecle)*, in *La preuve en justice de l'Antiquité à nos jours*, Rennes 2003, pgs. 119-147, in particular, pg. 129; M. Vallerani, *Modelli di verità. Le prove nei processi inquisitori*, in *L'enquête au Moyen Âge*, Rome 2008, pgs. 123-142, in particular, pg. 126.

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

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[4] On this aspect, see: G. Alessi, item *Processo penale*, in *Enciclopedia del diritto*, XXXVI, Milan 1987, pgs. 360-401, in particular pg. 376; Eadem, *Il processo penale. Profilo storico*, Rome-Bari 2001, pgs. 23-60.

[5] Without claiming to be complete, see: W. Trusen, *Der Inquisitionsprozess. Seine historischen Grundlagen und frühen Formen*, in «Zeitschrift für Rechtsgeschichte. Kanonistische Abteilung», 74 (1988), pgs. 168-230; R. Fraher, *Preventing crime in the High Middle Ages: the Medieval Lawyers' Search for deterrence*, in *Popes, Teachers and canon law in the middle ages*, New York 1989, pgs. 212-233; Idem, *IV Lateran's revolution in criminal procedure: the birth of inquisitio, the end of ordeals, and Innocent III's vision of ecclesiastical politics*, in *Studia in honorem eminentissimi cardinalis Alphonsi M. Stickler*, Rome 1992, pgs. 97-111; E. Peters, *Wounded names: the medieval doctrine of infamy*, in *Law in mediaeval life and thought*, Sewanee 1990, pgs. 43-89; P. V. Aimone, *Il processo inquisitorio: inizi e sviluppi secondo i primi decretalisti*, in «Apollinaris», 67 (1994), pgs. 591-634; J. Théry, *Fama* (note 3).

[6] For the edition of *Summula de criminibus*, see R. Fraher, *Tancred's Summula de criminibus. A new text and a key to the ordo iudiciarius*, in «Bullettin of Medieval Canon Law», 9 (1979), pp. 25-35, in particular, pgs. 29-35. For a punctual examination of his *Summula*, see Aimone, *Il processo inquisitorio* (note 5), pgs. 592-595. References also in M. Vallerani, *La giustizia pubblica medievale*, Bologna 2005, pg. 35 and Idem, *Procedura e giustizia nelle città italiane del basso medioevo (XII-XIV) secolo*, in *Pratiques sociales et politiques judiciaires dans les villes de l'Occident à la fin du Moyen Âge*, Roma 2007, pgs. 439-494, in particular, pgs. 461-462. See also Tancredi's *Ordo iudiciarius*: Tancredi, *Ordo iudiciarius*, in Pillius, Tancredus, Gratia, *Libri de iudiciorum ordine*, F.C. Bergmann (ed.), Aalen 1962 (reprinted ed. Göttingen 1842), pp. 153-154.

[7] About the German canonist, see Aimone, *Il processo inquisitorio* (nota 5), pgs. 596-599.

[8] See *Der ordo iudiciarius des Aegidius de Fuscararíis*, in *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, L. Wahrmund (ed.), III, Aalen 1962 (reprinted ed. Innsbruck 1916), pp. 156-157.

In the mid-1200s, some civilists also started to take on *inquisitio*, probably encouraged by the need for clarity called for by the towns' judges. As a way of becoming aware of and following crimes, the *inquisitio,* far from remaining confined to ecclesiastical courts, started to find a place also in municipal courts. And to this end, it is interesting to observe how even the civilists, when writing about the *inquisitio*, insist on the role of *publica fama* as the element that initiates the trial. This is, for example, what Martino da Fano does in his *Summula super materia inquisitionum*[9]. Martino, who is a «man of school, science, forensic practices, politics and also a canonist»[10], in giving it a definition, in fact writes that the «*inquisitio est illa quam facit iudex ad famam publicam de crimine aliquo adclamantem*»[11].

That the *inquisitio* of council towns was born as an imitation and re-elaboration of the ecclesiastical inquisitor process is a fact upon which historians, even in recent years, have often dwelled[12]. What the verdict with which we are dealing here adds to that reflection is the statement that certain elements sometimes considered typical and exclusive to the canonical procedure, in reality also penetrate municipal courts, and that was already the case in the mid-13th century[13]. The personification of *fama*,

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[9] For the edition and for a deep study on the work, see A. Errera, *La Summula super inquisitionum di Martino da Fano*, in *Medioevo notarile. Martino da Fano e il formularium super contractibus et libellis*, V. Piergiovanni (ed.), Milan 2007, pgs. 31-56.

[10] The judgement is of F. Liotta, *Martino da Fano giurista e pratico del diritto nell'Italia del XIII secolo*, in *Medioevo noterile* (note 9), pgs. 1-5, in particular pg. 4.

[11] See Martino da Fano, *Summula super materia inquisitionum* (note 9), pg. 56. *Fama* is dedicated a paragraph also by Rolandino de' Romanzi in his *Libellus de ordine maleficiorum*. On this treatise, see G. Murano, *Il "Libellus de ordine maleficiorum" di Rolandino de' Romanzi*, in *"Panta rei". Studi dedicati a Manlio Bellomo*, IV, Rome 2004, pgs. 177-194.

[12] Without claiming to be complete, see: Vallerani, *La giustizia pubblica* (note 6), pg. 34; Idem, *Procedura e giustizia* (note 6), pg. 460; Idem, *Modelli di verità* (note 3), pg. 128; Prodi, *Una storia della giustizia*. *Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, Bologna 2000, pg. 133.

[13] E. Dezza, *Accusa e inquisizione dal diritto comune ai codici moderni*, Milan 1989, pg. 10 note 13 had already referred to the repercussions that the inquisitor model elaborated by the canonical right had on the « toria del processo penale nell'età del diritto comune». See also Idem, *Lezioni di storia del processo penale*, Pavia 2013, pp. 5-7.

sanctioned on the regulatory level by papal decretals, legitimated on the theoretical level by the doctrine and endorsed by the usual procedure of the ecclesiastical tribunals, where the justice practiced in the Italian municipal courts should also be considered a characterising element. In an essay published approximately twenty years ago, Severino Caprioli highlighted the almost literal contiguity between some *capitula* of the statute of Perugia in 1287 and canon 8 of the IV Lateran Council. Furthermore, Caprioli demonstrated how in the months immediately preceding the promulgation of that *statutum* in Perugia's courts, *fama* was granted the same role as a propelling element of the trial[14]. And yet, the Pavia situation, which should be «considerata rappresentativa per la sua non provata singolarità»[15], brings forward the phenomenon of the penetration of institutes and rules of the canonical rite in municipal courts by at least four decades.

This also gives us the chance to highlight some aspects of the criminal justice system in Italian cities of the 13th century. With very few exceptions, regarding nonetheless judicial cases of the late 1200s, in the middle of the historical research the links between the canon law and the criminal procedure remain fairly unclear. Even those who have dedicated themselves *ex professo* to studying the verdicts pronounced by the judges of some Italian cities have not particularly dwelled on the role of *fama facti* as an element sufficient to start up the *inquisitio*. Of Perugia, for example, it has been written that «sebbene le inquisizioni non abbiano un'intestazione fissa, omologata, in genere il primo atto che segna l'inizio effettivo della causa è la denuncia della parte lesa, o dei suoi rappresentanti, non molto diversa dalle normali accuse»[16].

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

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[14] S. Caprioli, *Evoluzione storica della funzione d'accusa (ovvero: il caso Giacopuccio e poche note introduttive)*, in *Accusa penale e ruolo del pubblico ministero* (Proceedings of the Conference, Perugia 20th -21st April 1990), Naples 1991, pgs. 33-49.

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

[16] M. Vallerani, *Il sistema giudiziario del comune di Perugia*, Perugia 1991, pg. 90.

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

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

[17] See M. Vallerani, *Giustizia e documentazione a Bologna in età comunale (secoli XIII-XIV)*, in *La documentazione degli organi giudiziari nell'Italia tardomedievale e moderna*, Rome 2012, pgs. 275-314.

[18] See: D. Quaglioni, *Alberto Gandino e le origini della trattatistica penale*, in «Materiali per una storia della cultura giuridica», 29 (1999), pgs. 49-63; L. Kéry, *Albertus Gandinus und das kirchliche Strafrecht*, in *Inquirens subtilia diversa*, Aachen 2002, pgs. 183-200.

[19] See M. Vallerani, *Il giudice e le sue fonti. Note su inquisitio e fama nel Tractatus de maleficiis di Alberto da Gandino*, in «Rechts geschichte», 14 (2009), pgs. 40-61.

[20] Ivi, pg. 48.

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

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

3. Publica fama *and testimonies in the conviction*

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

In Pavia, in the mid-1200s, *publica fama* was not only that which legitimated the *ex officio* beginning of the trial. It was also an element considered by the judge for conviction. In fact, it can be confirmed that *fama* is given a precise probatory value in the course of judgement. To this regards, the verdict is clear in the part in which the judge considers the behaviour of Pietro *Rasus* and his son *Carbonus*, warders – among others – of the prison from which the prisoners escaped. Having reconstructed the fact subject to the charge, the judge refers to the fact that many witnesses were heard. Although their depositions were not reported integrally, the main part of their contents can be seen with a certain precision, in that it is summarised by the recording notary. In this way, we know that no witness stated having seen the *custodes* helping the prisoners in their escape. On the other hand, the convivial relationships that the fugitives had installed with those who should have been watching them are proven, as is the fact that the prison stood in front of the house in which Pietro and *Carbonus* lived. In the light of these considerations, the witnesses declared that the evasion could not have happened unless the warders were at least aware

of it. The depositions gathered were not however considered sufficient to legitimise a conviction, so much so that the judge in motivating his decision did not limit himself to referring to the results of the preliminary examination but endorses his decision with the *mala fama* existing against the accused. And he does so with a reasoning that I find worthy of interest. Remembering the testimonies, in fact, he clearly states that

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

It would seem that in this part of the verdict, the Pavian judge wove together the two different types of *fama*: what the sources define *fama alterius rei inter homines existentis* and *fama hominis*. The first may be defined as an uncertain, unguaranteed knowledge of the facts[22]. This is *fama facti*, the same that gave the impulse to the process and on which we have focussed our attention until now. The second is the reputation that others have of each of us. It is what in most dating glosses was defined as «inlaesae dignitatis status, moribus ac legibus comprobatus, et in nullo diminutus»[23].

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

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[21] ASCPv, ACPA, RC, chart. 6 (280).11, f. 2r.

[22] See Migliorino, *«La Grande Hache»* (note 2), pg. 8.

[23] To this regard, Migliorino, *Fama e infamia* (note 2), pg. 61 and M. Vallerani, *La fama nel processo tra costruzioni giuridiche e modelli sociali nel tardo medioevo*, in *La fiducia secondo i linguaggi del potere*, P. Prodi (ed.), Bologna 2007, pgs. 93-111. See also: G. Todeschini, *Fiducia e potere: la cittadinanze difficile*, ivi, pgs. 15-26; D. Corsi, *Donne medievali tra fama e infamia: leges e narrationes*, in «Storia delle donne», 6/7 (2010/2011), pgs. 107-138, in particular, pgs. 109-115.

It is well known how, based on the latter type of *infamia,* medieval jurists created the doctrine of *infamia facti*. Although subject to a first theoretical elaboration by the civilists, this was however very important in the work of decretists and decretalists[24]. In those writings, this is considered a prerequisite of the canonical *purgatio.* It was the latter – as known – the swearing of innocence that was requested of the accused *infamatus* in the absence of a prosecutor. Various surveys have been carried out around this institute and its origins, even in recent years, which we refer to for more current information[25]. Here we will limit ourselves to remembering those aspects of the speculations of the *doctores* who seem closely linked to the topic under discussion. We refer precisely to Bernardo da Pavia and to the turning point he impressed in the tide, destined to influence the most general problem of the probatory worth of the *praesumptiones*. Exceeding in fact the traditional relationship between *purgatio* and *praesumptio probabilis*, Bernardo introduces the latter into the category of half-full evidences. In this way, clearly, *infamia* is given the same probatory value as an *inditium*[26].

As for *fama facti*, the doctrine – clearly of civil law – attributes the probatory worth of an *inditium* to this too. Towards the end of the 1200s, Tommaso da Piperata, starting with the opinion that *in criminalibus* evidence must be «luce clariores»[27], denies that a conviction can be given

[24] On the doctrine of *infamia facti*, abundantly: G. May, *Die Infamie im Decretum Gratiani*, in «Archiv für Katholisches Krichenrecht», CXXIX (1960), pgs. 389-408; P. Landau, *Die Entstehung des kanonischen Infamiebegriffs von Gratian bis zur Glossa ordinaria*, Cologne-Graz 1966, pgs. 17 ss; Migliorino, *Fama e infamia* (note 2), pgs. 171-197; Idem, *Il corpo come testo*, Turin 2008, pgs. 62-83; Idem, «*La Grande Hache*» (note 2), pgs. 15-21.

[25] See: A. Fiori, *Inchiesta e purgazione canonica in epoca gregoriana*, in *L'enquête*, (note 3), pgs. 29-39; Eadem, *Il giuramento di innocenza nel processo canonico medievale. Storia e disciplina della 'purgatio canonica'*, Frankfurt am Main 2013.

[26] On all these topics: A. Fiori, *Praesumptio violenta o iuris et de iure? Qualche annotazione sul contributo canonistico alla teoria delle presunzioni*, in *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, I, O. Condorelli, F. Roumy, M. Schmoeckel (ed.), Köln, Weimar, Wien 2009, pgs. 75-106, in particular, pgs. 86-93; Eadem, *Il giuramento di innocenza* (note 25), pgs. 431-446. About the procedural role that Gandino attributed to this type of *infamia*, see Vallerani, *Il giudice e le sue fonti* (note 19), pgs. 49-54; Idem, *La fama nel processo* (note 23), pp. 100-105.

[27] Tommaso will take on the well-known passage of C. 4.19.25. On this constitution and

based solely on *fama*. *Fama*, which if anything should be equated to a piece of evidence if associated with another piece of evidence, such as the declaration of a single witness, could legitimise the use of torture. If, on the other hand, it is in addition to a lot of evidence and together they make up that which is defined «indicia ad probationem indubitata», the judge may give a conviction[28].

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

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

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

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the interpretation offered by medieval jurists, see G. Alessi Palazzolo, *Prova legale e pena. La crisi del sistema tra evo medio e moderno*, Naples 1979, pgs. 3-5.

[28] Tommaso di Piperata, *Tractatus de fama*, in *Tractatus criminales qui nunc primum in lucem prodeunt*, Venetiis, apud Aurelium Pincium, 1563, pgs. 10-14. On this point, see: Migliorino, *Fama e infamia* (note 2), pg. 70; R. Fraher, *Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof*, in «Law and History Review», 7 (1989), pgs. 37-40.

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

There is no Pavia's statute for the period of the trial in question[31]. It is, therefore, impossible to verify if the *ius proprium* contemplated the case in point of the accusation and if, where this is the case, it imposed the same punishment issued by the judge in the mid-13th century.

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[29] ASCPV, ACPA, RC, chart. 6 (280).11, f. 1r.

[30] ASCPV, ACPA, RC, chart. 6 (280).11, f. 1v.

[31] The oldest preserved *liber statutorum* of Pavia dates back to 1393. On the history of Pavia's statutory legislation, see E. Dezza, *Gli statuti di Pavia*, in *Storia di Pavia*, III, *Dal libero comune alla fine del principato indipendente 1024-1535*, I, *Società, istituzioni, religione nelle età del Comune e della Signoria*, Milan 1992, pgs. 409-431; Idem, *«Breve seu statuta civitatis Papie». La legislazione del Comune di Pavia dalle origini all'età di Federico II*, in *«Speciales fideles Imperii». Pavia nell'età di Federico II* (Documents from the study day, Pavia 19th May 1994), Pavia 1995, pgs. 97-144; IDEM, *Legge imperiale, statuto e consuetudine nelle carte pavesi dell'età sveva*, in *Federico II e la civiltà comunale nell'Italia del Nord* (Documents from the International Convention, Pavia 13th -15th October 1994), Rome 2001, pgs. 193-207.

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

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

[32] C. 9.4.4. For a study, see L. Minieri, *I commentarienses e la gestione del carcere in età tardoantica*, in www.teoriaestoriadeldirittoprivato.com. [number IV – 2011].

[33] See gl. *Ad commentariensem* in C. 9.4.4: «id est principem carceris (…) et dicitur commentariensis quia comitari debet eum quem custodit».

[34] See Placentinus, *Summa Codicis*, Turin 1962 (reprint ed. Moguntiae 1536), pg. 425.

[35] See gl. *Qui fugerit* a C. 9.4.4: «Hoc si nimia negligentia fuit in eo, quia tyroni commisit, ut. ff. eo l. fin. in principio [D. 50.13.223pr.]». See gl. *Latae culpae* a D.50.13.223 pr.: «quae dolo comparatur».

to the theme of imputability[36].

5. *Conclusive observations*

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

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

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[36] On the reflections of the legists regarding the subjective element of the crime, see M. Conetti, *Responsabilità e pena: un tema etico nella scienza del diritto civile (secoli XIII-XIV)*, Milan 2011. On the subject of the construction of a theory of the imputability of the canonists, S. Kuttner's *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX*, Vatican City 1935 is vital. Of the most recent literature, see L. Kéry, *Non enim homines de occultis, sed de manifestis iudicant. La culpabilité dans le droit pénal de l'Église à l'époque classique*, in «Revue de droit canonique», 53 (2003), pgs. 311-336, O. Descamps, *L'influence du droit canonique médiéval sur la formation d'un droit de la responsabilité*, in *Der einfluss* (note 26), pgs. 137-167.

[37] I make my own the words of M. Sbriccoli, *«Vidi communiter observari». L'emersione di un ordine penale pubblico nelle città italiane del secolo XIII*, in «Quaderni Fiorentini», 27 (1998), pgs. 231-268.

[38] For bibliographical references, see *supra* note 36.

[39] Sbriccoli, *«Vidi communiter observari»* (note 37), pg. 245; Idem, *Giustizia negoziata, giustizia egemonica. Riflessioni su una nuova fase degli studi di storia della giustizia criminale*, in *Criminalità e giustizia in Germania e in Italia*, M. Bellabarba, G. Schwerhoff, A. Zorzi (ed.), Bologna 2001, pgs. 345-364; Idem, *Giustizia criminale*, in *Lo stato moderno in Europa*, M. Fioravanti (ed.), Bari 2006, pgs. 163-205.

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