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# ***Fama*, shame punishment and metamorphoses in criminal justice (Fourteenth – Seventeenth centuries)**

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## **Introduction**

A city in the North of Italy, a train station, a subway to the platforms with its walls covered in writings, slogans, scribbles and drawings like many others, a passer-by's comment: «If I caught those who wrecked this place, I would chain them to the wall and make them clean it with their tongue!». This statement, in all its harshness, gives rise to a series of considerations. 1

First of all, we can consider it a sort of voice of the community which makes itself heard and asks to be entrusted with some forms of participation in the right of punishment, given that the State is, by now, ineffectual and unable to impose the respect of certain norms of civil behaviour. 2

Then, the kind of punishment which the passer-by would like to inflict, falls rightly within the category of shame punishments because of the method of its execution. Indeed, it is not simply a matter of making the wall clean again, washing away the graffiti with a detergent or giving it a coat of paint, rather the cleaning must be done by the offenders' tongue, chained to the wall and on public view. That passer-by probably did not know he was evoking a punitive system which was still used up to a couple of centuries ago, a punitive system which implied a large community participation, a punitive system which has been, in the end, overcome by the exclusive attribution of the right of punishment to the State. 3

Finally, the passer-by's statement recalls the question regarding the opportunity, or otherwise, of starting to use shame punishments as substitutes for imprisonment again. 4

Such a question produced a lively debate among jurists, psychologists and philosophers in the United States of America around the nineties of the Twentieth century<sup>1</sup>. Martha Nussbaum, one of the most influential American contemporary philosophers who deals with politics and law, in her volume *Hiding from humanity*<sup>2</sup> reconstructs the debate – providing sound points of interpretation – between *Communitarians*<sup>3</sup>, who sustain the necessity of starting to use shame punishment again, and *Liberals*, who instead hold that going back to shame punishment is useless and harmful to a certain extent.

According to *Communitarians* the reason for social disorder and for today's decline is represented by the fact that people have no inhibitions, therefore they believe that, in order to restore values pertaining to family and social order, deviant individuals should be stigmatised. Kahan, a criminalist, who was one of the most authoritative voices of *Communitarian* theories before he revised his position, stated that since society reaffirms its fundamental values by punishing criminals, it does so publicly when using shame punishments: he who is humiliated in public, «cannot hide [and] his offense is exposed to the gaze of others»<sup>4</sup>. Moreover shame penalties have a strong deterrent effect and can better fit the crime. 5

*Liberals* instead question themselves first of all on the opportunity for liberal democracies to inflict such punishments and then on the benefits, or else that the State could gain inflicting shame punishments. Moreover, they state that western legal systems cannot stand the infliction of shame penalties because they have already «articulated the 6

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1 The question was introduced in 1989 by J. Braithwaite, *Crime, shame and reintegration*, Cambridge 1989, pp. 226. He outlined certain problems concerning shame punishment, and hypothesised a form of shaming which he calls reintegrative shame, that «controls crime». He distinguished it from the disintegrative shame (stigmatization) which instead «pushes offenders toward criminal subcultures» pp. 12-15.

2 M.C. Nussbaum, *Hiding from humanity. Disgust, shame, and the law*, Princeton 2004, pp. 413.

3 Please see: Braithwaite, *Crime, shame and reintegration* (Anm. 1), see pp. 85-94, for a definition of communitarianism. The socio-criminalist states: «For a society to be communitarian, its heavily enmeshed fabric of interdependencies therefore must have a special kind of symbolic significance to the populace. Interdependencies must be attachments which invoke personal obligation to others within a community of concern.»

4 Nussbaum, *Hiding from humanity* (Anm. 2), pp. 227-228 and 238-239; D.M. Kahan, *What do alternative sanctions mean?*, in: *University of Chicago Law Review* 63 (1996), pp. 591-653; D.M. Kahan, *The progressive appropriation of disgust*, in: S.A. Bandes (Ed.), *The passions of law*, New York 1999, pp. 63-79. D.M. Kahan, *What's Really Wrong with Shaming Sanctions* (July 1, 2006, revised November 6, 2008), in: *Texas Law Review* 84 (2006), p. 2075, or in: Yale Law School, Public Law Working Paper No.125 (available at SSRN:<http://ssrn.com/abstract=914503>) revises his previous opinion concerning shame penalties as substitute for imprisonment, stating that «What's really wrong with shaming penalties, I believe, is that they are deeply partisan: when society picks them, it picks sides, aligning itself with those who subscribe to norms that give pride of place to community and social differentiation rather than to individuality and equality.» p. 3.

distinction between shame and guilt. Shame ... pertains to a trait or feature of the person, whereas guilt pertains to an act»<sup>5</sup>. Therefore they raise five objections against this kind of sanction.

The first objection concerns the fact that shame penalties intend to hit human dignity, they do not punish the criminal deed; rather they indicate a deviant identity to the others, they humiliate and degrade the whole person, marking him as a bad person and creating a “spoiled identity”<sup>6</sup>. Shame penalties take away a fundamental good from the individual, making him a sort of sub-individual and carrying away his possibilities of redemption and reintegration into society. 7

The second objection, formulated by James Whitman, a jurist and a legal historian, underlines the fact that shame penalties are a kind of “mob justice”, since they encourage the public community to punish the criminal and therefore they are not a trustable system of punishment<sup>7</sup>. 8

The third objection, made by Eric Posner, a jurist and a legal philosopher, has its roots in history. History provides us with evidence for understanding that shame punishments failed their purpose. Indeed, they often stray from punishing crimes to punishing individuals who are nonconformist or at the margins of society and from whom the community tries to differentiate and protect itself<sup>8</sup>. 9

The fourth objection is sustained by James Gilligan, a psychologist. He denies that shame punishments have a strong deterrent power. He, indeed, believes that people who have been humiliated publicly have great difficulties in integrating themselves again into society, they become more and more alienated, tend to relapse into crime and associate among themselves. Inflicting a shame penalty, therefore, produces crime more so than reduce it<sup>9</sup>. 10

The fifth objection, proposed by Steven Schulhofer, a criminalist, questions the fact that 11

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5 Nussbaum, *Hiding from humanity* (Anm. 2), p. 229.

6 Nussbaum, *Hiding from humanity* (Anm. 2), pp. 230-231.

7 Nussbaum, *Hiding from humanity* (Anm. 2), pp. 233-234; J.Q. Whitman, *What is wrong with inflicting shame sanctions?*, in: *The Yale Law Journal* 107 (1998), 4, pp. 1055-1092.

8 Nussbaum, *Hiding from humanity* (Anm. 2), pp. 234-235; E.A. Posner, *Law and social norms*, Cambridge 2000, pp. 260.

9 Nussbaum, *Hiding from humanity* (Anm. 2), pp. 235-236; J. Gilligan, *Violence: reflections on a national epidemic*, New York 1997, pp. 320. Also sustained by Braithwaite, *Crime, shame and reintegration* (Anm. 1), pp. 12-14, 54ff: the author states that stigmatization causes relapse into crime. From a historical point of view see also that which I state at p. 60 and in the footnotes 44 and 45 of A. Bettoni, *The perception of ‘social danger’ among ius commune jurists: a reconstruction of the concept of malus in Sixteenth- and Seventeenth-century Italian and German juridical doctrine*, in: *Liverpool Law Review* 26 (2005), pp. 45-73.

shaming penalties would be used instead of imprisonment for minor crimes, juvenile offenders or first-time offenders. Actually, states Schulhofer, shame punishments will be used against people who either would not have been punished at all or would have been punished with fines or probation. Therefore, shame punishment would produce an extension of social control<sup>10</sup>.

Martha Nussbaum winds up by stating that «we have, then, five arguments against shaming penalties. All of them have independent force, and any one of them might be sufficient to convince us that these penalties are a bad idea»<sup>11</sup>. 12

For the purpose of this essay, one of the most interesting lines of reasoning, which surfaces in this debate, is that concerning the intertwining, medleys and implications between State and society in the application of shame punishments and the active role played by the community. 13

## **1. *Fama and infamia* within negotiated justice**

The community is the central element which characterises all medieval experience. Individuality of each person fades and blends with the group to which he belongs. Individuals are important and noteworthy of consideration only in that they belong to a community: a town, a monastery, a guild, a family. The same life of the individual has a meaning only in that it is included and is part of the community life. 14

In the Middle Ages the power of issuing norms is a widespread power since it belongs to every social body which individuals set up by associating with one another. The Middle Ages have been rightly defined a plural civilisation<sup>12</sup>, a civilisation made up of many autonomous groups which coexist and regulate themselves. Therefore there is not a sovereign legislator, the law comes from below, it is the expression of social bodies. The complex duty of harmonising norms and settling jurisdiction conflicts, from the Twelfth century onwards, is up to jurists who are the beating heart of that juridical system and the only ones able to guarantee its functioning. 15

Justice and its administration are affairs which concern the community. The community protects its members, vouches for them and acts as guarantor for them, and adopts strategies in order to settle conflicts (vendetta, negotiation). The crime therefore concerns the whole community: from the identification of the culprit, to the satisfaction of the 16

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10 Nussbaum, *Hiding from humanity* (Anm. 2), pp. 236-237.

11 Nussbaum, *Hiding from humanity* (Anm. 2), pp. 237.

12 P. Grossi, *L'ordine giuridico medievale*, Bari 1995, p. 195.

victim. An important part of the practised justice is absorbed by vendetta. Vendetta is a right of the victim<sup>13</sup>, and is a practice which involves the community in its entirety: not only the families of the victim and of the offender, but also all the network of friends who are connected with one or the other. Vendetta is not an extraordinary practice, rather it is an ordinary practice of managing conflicts in the medieval communes<sup>14</sup>.

Negotiation practices, which see community and families involved not any more only in 17  
retaliations and reprisals, but also in transactions, conciliations and negotiations directed to restore peace, go alongside the vendetta. The late Middle Ages are characterised by negotiated justice: a kind of justice with a strong communitarian nature<sup>15</sup>. Outsiders, vagrants, idlers, border-line people, in short all those who do not have any certain position within the community, are abandoned to the public justice.

In some cases, community members resort to public justice, leaving behind the strictly 18  
private sphere of reparation for a suffered wrong. In these cases, public justice not only has the role of defining and concluding the lawsuit, it also represents a further element which can be evaluated and weighed in the transaction, however public justice can always be stopped by the agreement which the parties have reached.

Also the practices established by the Catholic Church in order to stem heresy and immoral 19

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13 M. Sbriccoli, Giustizia criminale, in: M. Fioravanti (Ed.), Lo Stato moderno in Europa. Istituzioni e diritto, Bari, 2002, p. 164.

14 Sbriccoli, Giustizia criminale (Anm. 13), p. 164; A. Zorzi, «Fracta est civitas magna in tres partes». Conflitto e costituzione nell'Italia comunale, in: Scienza e Politica 39 (2008), p. 75. On the matter please see: Procedure di giustizia, monographic issue of the periodical Quaderni storici 101 (1999), 2; M. Cavina, Il duello giudiziario per punto d'onore. Genesi, apogeo e crisi nell'elaborazione dottrinale italiana (secc. XIV-XVI), Torino 2003; O. Niccoli, Rinuncia, pace, perdono. Rituali di pacificazione della prima età moderna, in: Studi storici 40 (1999), pp. 219-261; A. Gamberini, La faida e la costruzione della parentela. Qualche nota sulle famiglie signorili reggiane alla fine del medioevo, in: Società e storia 24 (2001), 94, pp. 659-677; J. Théry, Faide nobiliaire et justice inquisitoire de la papauté à Sienne au temps des Neuf: les recollections d'une enquête Donosdeo de Malavolti, in: S. Lepsius, T. Wetzstein (Hg.), Als die Welt in die Akten kam. Prozeßschriftgut im europäischen Mittelalter, Frankfurt am Main 2008, pp. 275-345.

15 Sbriccoli, Giustizia criminale (Anm. 13), p. 166.

16 *Purgatio canonica* consists in an oath taken by the defamed person together with a lawful number of *compurgatores* (people who guarantee the trustworthiness of the person who is taking the oath). The person that takes the oath has to put his hand on the Gospel, swear to tell the truth and declare that he has not committed the fact of which he is defamed. It is used especially to purge oneself from the crime of heresy, but also by the priests to defend themselves from the bad *fama* of living with a woman. It distinguishes itself from the *purgatio vulgaris* which consists in the ordeals of the cold water and of the white-hot iron and which is no more approved. On *purgatio canonica* please see: Decretum, pars 2, causa 2, quaestio 5; Liber Extravagantium, lib. 5, tit. 34. See also: P. Landau, Die Entstehung des kanonischen Infamiebegriffs von Gratian bis zur Glossa ordinaria, Köln 1966, pp. 10-20; A. Fiori, Inchiesta e purgazione canonica in epoca gregoriana, in: C. Gauvard (études réunies par), L'enquête au Moyen Age, Rome 2008, pp. 29-39; A. Fiori, Probatio e purgation en el proceso canonico medieval, entre rito acusatorio e inquisitorio, in: E. Conte, N. Madero (Eds.), Procesos, inquisiciones, pruebas, Buenos Aires 2009, pp. 77-96; A. Fiori, Praesumptio violenta o iuris et de iure? Qualche annotazione

behaviour of the clergy: *purgatio canonica*<sup>16</sup> and, later in the Thirteenth century, *inquisitio*<sup>17</sup>, fall within a communitarian logic, in that they leave yet an important role to the community. They are indeed activated on the basis of the *fama*<sup>18</sup>, a sort of collective voice with which the whole community indicates the supposed culprit of a misdeed.

The *fama* is also that which consents the judge to proceed *ex officio* in the inquisitorial trial which is quickly spreading in all the judging courts throughout Europe. Jurists declare in treatises concerning the *ordo iudiciarius* that the inquisitorial trial starts *fama denunciante* (denouncing *fama*)<sup>19</sup>. Jurists then clearly define the characteristics (relative to the number and the quality of the people who spread it and to the place and time of its taking hold) which the *fama* of the criminal deed must have in order to begin an inquisitorial trial. The defining work of the jurists is necessary in order to guarantee the juridical trustworthiness of the *fama*. 20

The *fama* of the criminal deed must be differentiated from the fama of every single person, the latter as well originates and remains within the community. It is indeed the opinion which the community, and especially a qualified part of it: the *boni et honesti viri* (good and honest men), has of each of its members. Rightly, it is included among the external goods (*bona externa*) in the *Summa Theologiae* of Saint Thomas Aquinas (1225-1274)<sup>20</sup>. 21

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sul contributo canonistico alla teoria delle presunzioni, in O. Condorelli, F. Roumy, M. Schmoeckel (Hg.), *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, Bd. 1 Zivil- und Zivilprozessrecht, Köln 2009, pp. 75-106.

17 R.M. Fraher, IV Lateran's revolution in criminal procedure: the birth of *Inquisitio*, the end of ordeals, and Innocent III's vision of ecclesiastical politics, in: R. Castillo Lara (Ed.), *Studia in honorem eminentissimi cardinalis A.M. Stickler*, Roma 1992, pp. 97-111.

18 The decretals *Inter sollicitudines* (lib. 5, tit. 34, cap. 10) and *Licet Heli* (lib. 5, tit. 3, cap. 31) issued by Innocentius III (Pope from 1198 to 1216) and enclosed in the *Liber Extravagantium*, published by Gregorius IX, require *fama* in order to start an inquisitorial trial. See: G. Alessi, *Il processo penale. Profilo storico*, Bari 2001, p. 36.

19 On this matter see: J. Théry, *Fama: l'opinion publique comme preuve judiciaire. Aperçu sur la révolution médiévale de l'inquisitoire (XII<sup>e</sup>-XIV<sup>e</sup> siècle)*, in: B. Lemesle (sous la direction de), *La preuve en justice de l'Antiquité à nos jours*, Rennes 2003, pp. 119-147; M. Vallerani, *La fama nel processo tra costruzioni giuridiche e modelli sociali nel tardo medioevo*, in: P. Prodi, *La fiducia secondo i linguaggi del potere*, Bologna 2007, pp. 93-111. For the early modern period, please see: A. Bettoni, *Voci malevole. Fama, notizia del crimine e azione del giudice nel processo criminale (secc. XVI-XVII)*, in: *Quaderni Storici* 41 (2006), 1, pp. 13-38.

20 Saint Thomas Aquinas, *Summa Theologiae*, Rome, Marietti, 1952, pars II<sup>a</sup>, II<sup>ae</sup>, quaestio 73, art. 3, par. *Respondeo*: «Cum autem sit triplex bonum hominis, scilicet bonum animae et bonum corporis et bonum exteriorum rerum, bonum animae, quod est maximum, non potest alicui ab alio tolli nisi occasionaliter, puta per malam persuasionem, quae necessitatem non infert: sed alia duo bona, scilicet corporis et exteriorum rerum, possunt ab alio violenter auferri. Sed quia bonum corporis praeeminet bono exteriorum rerum, graviora sunt peccata quibus infertur nocumentum corpori quam ea quibus infertur nocumentum exterioribus rebus ... Consequenter autem sunt exteriora bona. Inter quae, fama praeeminet divitiis, eo quod propinquior est spiritualibus bonis ... Et ideo detractio, secundum suum genus, est maius peccatum quam furtum».

Among them, the *fama* is considered a good greater than wealth because of its closeness to spiritual goods. From its position among external goods, it derives that, even though everybody is entitled to the *fama*, however nobody has full power over it. Community has the dominion of man's *fama*, individuals can only be the jealous guardians of their *fama*<sup>21</sup>. The process that brings to *fama* formation is taken away from the individual's control, he can only have a certain influence on it. From his good or bad actions, good or bad *fama* may come about, the power of activating and determining such potential outcome of theirs lies within the community. Community can get hold of the news of these actions, in certain cases can manipulate their content, and in any case can spread them creating good or bad *fama*. The *fama*, in order to be able to be fully structured, needs an effective tool of propagation: the voice, the voice of many people. Once the *fama* is structured, it adheres to the individual. The division between *fama* dominion, entrusted to the community, and its safeguard, entrusted instead to individuals, activates a strong social control<sup>22</sup>, since individuals, having to safeguard their *fama*, must behave honestly and according to rules socially accepted. It is, however, the community which approves of and supports such behaviour attributing good *fama*.

It is this precious good of the individual that is affected by infamy and shame punishments and it is clearly understandable how, in this kind of society they have a well defined role and function. 22

Infamy substantially consists in the loss of one's good *fama*, imposes a stigma on him who suffers this kind of punishment, and damages his social identity. According to the classifications elaborated by Glossators in the second half of Twelfth century and during the Thirteenth century – classifications that will have a long life in the Middle Ages – infamy can be of two kinds: *infamia iuris* (law infamy) and *infamia facti* (fact infamy). Both have noteworthy juridical consequences, which are heavier in the case of *infamia iuris* and lighter in the case of *infamia facti*. 23

*Infamia facti* is the border element between *infamia iuris*, as defined by jurists' interpretation of Justinian's norms, and a more general and less definite nonconformity to rules and social behaviour. *Infamia facti* is inflicted exclusively by the community: it is the social stigma which affects those around whom in the community rumour is spread that they have committed some crime; it is the social stain which dirties those who 24

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21 See what is affirmed in *Decretum Gratiani*, pars 2, causa 12, quaestio 1, cap. 10 *Nolo ut*. On the matter, please see: G. Todeschini, *Visibilmente crudeli. Malviventi, persone sospette e gente qualunque dal Medioevo all'età moderna*, Bologna 2007, p. 243.

22 On the social control exercised by community by way of the attribution of good or bad *fama* in medieval England, please see: B.A. Hanawalt, 'Of good and ill repute'. *Gender and social control in Medieval England*, Oxford 1998.



avoided conviction in a shaming criminal trial (for example in a trial for *iniuria*) by way of appearing in court with procurator; it is the social discredit which does not abandon those who are publicly blamed by their father or the judge; it is the humiliation which the offender accepts to undergo as part of the victim's satisfaction in negotiation practices; it is the indelible brand burnt into the flesh of illegitimate children from birth; it is, finally, the mark which colours those who carry on certain jobs considered infamous and dishonouring.

By way of imposing *infamia facti* the community appropriates the right of punishing and, selecting principles and values that must be protected, administers its own justice. With the infliction of *infamia facti* the community separates, repels, rejects. 25

In the Twelfth century Decretists and Glossators include the category of *infamia facti* in the law and attribute juridical consequences to it. Canon law establishes that those who suffer *infamia facti* cannot accuse, give testimony or access the holy orders. Whereas according to Glossators, *infamia facti* prevents access to dignities and reduces the value of trustworthiness of the testimonies given by those who are stricken by it. 26

*Infamia iuris* presents an added element if compared with *infamia facti*: the law. In the *lex Praetoris verba* of title 2 *De iis qui notantur infamia* book 3 in Digest, there is a long list of people, indicated by "qui", who in certain situations are struck by *infamia iuris*. On this confused grouping Glossators start working, and they, putting together similar cases and separating dissimilar ones, create coherent categories which have an internal eurhythmy of their own. They part *infamia iuris* into *infamia ipso iure*, *infamia per sententiam* and *infamia ex genere poenae*<sup>23</sup>. 27

The constitutive elements of *infamia iuris* are essentially two: the law and a crime of one's own. From their combination derives *infamia iuris*. 28

Among the categories of *infamia iuris*, *infamia ipso iure* is, without doubt, that which presents more affinities with the *infamia facti*. It is indeed a sanction foreseen by the law which derives directly from perpetrating certain crimes. The law – strongly felt as expression of the community that follows it – stands alone and alone inflicts the punishment of infamy without the intermediation of the judge. Crimes sanctioned by this kind of infamy are characterised by a high degree of notoriousness and by the capacity of creating social scandal. For these reasons the law can hope in a ready and immediate answer from the community, and this answer arrives as long as the law keeps pace with and is tuned into the common feeling. Naturally, faulty timing in tuning-in between law 29

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23 F. Migliorino, *Fama e infamia. Problemi della società medievale nel pensiero giuridico nei secoli XII e XIII*, Catania 1985, pp. 85-93.

and common feeling cannot but affect community answer, producing a loss of effectiveness of those norms which continue foreseeing certain criminal deeds as infamatory. In the Twelfth and Thirteenth centuries Glossators, interpreting the *Corpus Iuris Civilis* and adapting its norms to their time, establish that the following crimes produce *infamia ipso iure*: prostitution, pimping, adultery, bigamy, sodomy, marriage of the widow during the first year of mourning, usury, circus games and theatre plays. As we can see, they are all “crimes” whose execution is public, they happen under everybody’s eyes and therefore they are able to produce scandal. Avoiding scandal is one of the imperatives of medieval culture about which a lot has been written. In the Twelfth and Thirteenth centuries for *ipso iure* punishments final judgement of the judge is not required<sup>24</sup>, indeed as we have already said, infamy derives directly from perpetration of the crime.

The work of the judge, and therefore a final judgement, is instead necessary in order to impose *infamia per sententiam*. The *infamia per sententiam* gives the power to inflict infamy to the judge, but his power is submitted to precise limitations. The judge is not free in determining the cases to which he can apply infamy, they are established by the law, anyway the correspondence between the actual criminal deed and the law is left to the judge’s discretionary power (*arbitrium*)<sup>25</sup>. In order to inflict *infamia per sententiam*, not only the *factum rei* but also the *factum iudicis* is therefore necessary. 30

The *factum iudicis* consists in a final judgement of conviction pronounced for one of the crimes foreseen by law as productive of *infamia per sententiam*. 31

All the crimes which undergo an *actio famosa*, produce *infamia per sententiam*. By *actiones famosae*, jurists mean all the judicial proceedings generated by crimes, delicts or contracts which produce infamy if they end with a final judgement of conviction. *Actiones famosae* include both *actiones publicae* and *actiones privatae*. *Actiones publicae* persecute *crimina publica* and they are all infamatory. Among them we remember the crime of lese-majesty, murder, parricide, kidnapping, forgery, counterfeiting, public and private violence. *Actiones privatae* persecute private crimes deriving from criminal deeds and contractual deeds and they are not all infamatory. Usually *ex delictis*, the judicial proceedings for theft, robbery, *iniuria* and *dolus malus* are infamatory, while *ex contractibus*, the judicial proceedings for *mandatus*, *tutela*, *depositum* and *pro socio* are infamatory. This is therefore a kind of infamy for whose infliction the community needs 32

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24 Bartolus a Saxoferrato, In primam Codicis partem (commentaria) ..., Venetiis 1581, lib. 2, tit. 4 *De transactionibus*, lex 41 *Si quis maior*, n. 10.

25 On the *arbitrium iudicis* please see: M. Meccarelli, *Arbitrium. Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune*, Milano 1998.

the intermediate work of the judge who singles out the culprit. Crimes which produce it do not present the characteristics of notoriousness.

*Infamia ex genere poenae* puts the decision of imposing infamy, or otherwise, by way of inflicting a shame punishment totally into the hands of the judge. On the basis of a fair evaluation of the crime, its gravity and its circumstances, the judge, in his final judgement can decide to apply a shame punishment even though the crime is not among those that produce infamy. This is a much-debated kind of infamy upon which Glossators discuss at length, because they think, on the one hand, that inflicting infamy only as a consequence of the punishment is inadmissible, on the other that, in such a way, great powers of making people infamous would be conferred to the judge. The difference in duration between *infamia per sententiam* and *infamia ex genere poenae* is not an argument able to convince them. Indeed, even though the juridical effects of the former last forever, while those of the latter last only for the duration of the punishment, however the damage of the person's *fama* is permanent and therefore the judge has to be extremely cautious in issuing his decision and establishing the punishment to inflict. However, there is more to be said about the *infamia ex genere poenae* and a reason for its existence can be found in the works of the jurists: Glossators affirm that in order to inflict *infamia per sententiam* a final judgement (*sententia*) is indeed necessary. 33

What would happen if the judge proceeding *extra ordinem*<sup>26</sup> convicts somebody of an infamatory crime by way of a decree (*decretum*)? The convicted person would avoid *infamia iuris*. In the Thirteenth century the inquisitorial trial takes its first steps, has not acquired yet a well defined physiognomy, maintains connections with the community and is perceived as more vexing precisely because it lacks an accuser. The accusatory trial is still largely used and is considered the ordinary trial, therefore when the judge proceeds *extra ordinem* and issues a decree, he keeps the faculty of inflicting infamy when the crime is infamatory resorting to shame punishments<sup>27</sup>. 34

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26 On *ordinarium* and *extra ordinarium* in the Middle Ages please see: M. Meccarelli, Le categorie dottrinali della procedura e l'effettività della giustizia penale nel tardo medioevo, in: J. Chiffolleau, C. Gauvard, A. Zorzi, Pratiques sociales et politiques judiciaires dans les villes de l'Occident à la fin du Moyen Age, Rome 2007, pp. 573-594; M. Meccarelli, Paradigmi dell'eccezione nella parabola della modernità penale, in: Quaderni Storici 131 (2009), 2, pp. 493-521, see especially pp. 495-500.

27 Bartolus a Saxoferrato, In secundam Digesti Novi partem (commentaria) ..., Venetiis 1585, lib. 48, tit. 1 *De publicis iudiciis*, lex 7 *Infamem*, n. 2. The quoted passage so continues: «Unde hic non curo, sit punitus vel non, quia ictus fustium non infamat, nisi procedat causa habilis ad infamiam inducendam. Item dicitur hic, nisi id crimen ex ea accusatione descendat et caetera et sic innuit, quod crimen ex accusatione descendat, contra immo accusatio descendit ex crimine». The jurist remembers the opinion of those who affirm that with the inquisitorial trial, the judge burdens the accused more than what is due, and he explains that the greater burden consists in the fact that this kind of trial allows pursuing a crime without an accuser.

The execution of a shame punishment (flogging, pillory) is usually public and the whole community is necessarily part of it. The community is not only the audience, it is instead an indispensable instrument for its execution. If there was no community, shame punishments would have no reason to exist. 35

*Infamia iuris*, according to Glossators, makes those on whom it is inflicted unable to accuse, to be witnesses in a trial or in a will, to postulate, to become a lawyer, a judge and an assessor and to accept any dignity (*dignitas*)<sup>28</sup>. Canon law establishes as well that those who suffer *infamia iuris* cannot accuse, postulate, give testimony, become a solicitor, a lawyer or a judge, accept any dignity or access the holy orders. Moreover some of the infamous people – those who have committed a mortal sin – cannot receive the Eucharist<sup>29</sup>. The social stigma deriving from committing a criminal deed reflects itself in the law and those who bear it find themselves in a juridically limited status. 36

The use of shame punishment is noteworthy appropriate to a system of negotiated justice, since it refers to a society which is still largely community. The community co-operates with the *res publica* in matters of social control, in maintaining order, in inflicting punishments. Therefore, shame punishments suit this kind of justice which delegates part of its functions to the community. 37

## **2. Fama and infamia within hegemonic justice**

Around the end of the Thirteenth century, extraordinary constitutional changes intervene in the layout of city-states, princedoms and kingdoms whose governments undergo a twisting towards centralised forms of power organisation. This constitutional transformation, necessarily concerns the administration of justice which suffers a process of estrangement from the community and of institutionalisation. Nascent States soon realise that justice administration is a major attribute of government power, in that it permits maintaining public order and social control. They vouch for public peace and therefore they tend to consider every offence against it as an offence against the State: it is a primary interest of the *res publica* not to let any crime go unpunished. The law becomes extraordinarily important for the State that makes it an *instrumentum regni*, a tool for government. Essential to this purpose is criminal law and criminal procedure. Till that moment, the law happily did without (and developed without) the State, it moulded itself on the society that produced it, being in tune and symbiosis with it and representing its 38

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28 Migliorino, Fama e infamia (Anm. 23), pp. 139-157.

29 Landau, Die Entstehung des kanonischen Infamiebegriffs (Anm. 16), pp. 97-120.

«lasting constitution underneath (and sheltered from) the many episodes of ordinary politics»<sup>30</sup>.

These changes gradually deprive the community of the right of settling disputes and they progressively lead to the sunset of negotiated justice and to the affirmation of hegemonic justice<sup>31</sup>. The affirmation of hegemonic justice, based on a trial started *ex officio* by the judge, supported by gathered evidence and crowned by the infliction of a punishment, does not determine the immediate disappearance of negotiated justice. The process is gradual and jurists register it. At the end of the Thirteenth century in his *Tractatus de maleficiis*, Albertus Gandinus, a jurist that witnesses the transition, states that also in the case of a serious crime, homicide for example, parties can reach a settlement, obtain satisfaction and therefore pacify. Such settlement, however, is not to the detriment of the public justice power of starting an inquisition on the crime and therefore of punishing the culprit<sup>32</sup>. However, in this phase the inquisitorial trial is still strongly influenced by negotiation practices and it can end with a transaction, though reached thanks to the mediation of the judge.

Moreover the power of the community to avoid that one of its members of good *fama* is put to torture (privilege of good *fama*) falls to pieces when, as Albertus Gandinus refers once again, the bad *fama* of the fact is corroborated by other presumptions and circumstantial evidence<sup>33</sup>.

The community sees, therefore, reducing its power of interfering in the criminal trial with the purpose of orientating its outcome, cleverly using witnesses on the *fama* of the accused and its power is taken away to the advantage of public institutions which have the specific duty of the administration of justice. The administration of justice is gradually institutionalised, and becomes more and more an affair of offices and apparatuses.

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30 Grossi, L'ordine giuridico medievale (Anm. 12), p. 31.

31 Sbriccoli, Giustizia criminale (Anm. 13), pp. 164-173.

32 M. Sbriccoli, Legislation, justice and political power in Italian cities, 1200-1400, in: A. Padoa Schioppa, Legislation and justice, Oxford 1997, p. 49. Albertus Gandinus, Tractatus de maleficiis, Venetiis 1555, rub. *De transactionibus et pactiis in maleficiis*, n. 13 *in fine*.

33 Albertus Gandinus, Tractatus de maleficiis (Anm. 32), rub. *De praesumptionibus et indiciis dubitatis, ex quibus plerumque proceditur ad tormenta*, n. 15. On the matter please see: M. Vallerani, Il giudice e le sue fonti. Note su *inquisitio* e *fama* nel *Tractatus de maleficiis* di Alberto da Gandino, in: Rechtsgeschichte 14 (2009), pp. 40-61; M. Vallerani, I fatti nella logica del processo medievale. Note introduttive, in: Quaderni Storici 36 (2001), 3, p. 684; R.M. Fraher, Conviction according to conscience: the medieval jurists' debate concerning judicial discretion and the law of proof, in: Law and History Review 7 (1989), 1, p. 47; M. Vallerani, Modelli di verità. Le prove nei processi inquisitori, in: C. Gauvard (réunies par), L'enquête au moyen âge, Roma 2007, pp. 123-142.

Also emblematic is the case of *infamia ipso iure*. In the Fourteenth century, jurists following the opinion of Baldus de Ubaldis<sup>34</sup> reconsider the question referring to the superfluosity of the final judgement for inflicting *infamia ipso iure*, and declare that such an affirmation has to be interpreted in the sense that the ‘enacting terms’ of the judgement are not necessary. However, they believe that for the production of juridical effects a ‘declaratory’ judgement is necessary<sup>35</sup>. Such judgement retroacts to the moment of perpetration of the criminal deed, and is required, for example, in order to exclude somebody from testifying. Therefore, the judge assumes control of this form of shame punishment whose infliction was before entrusted to the community. 42

The community loses its centrality. «Individualistic attitudes surface in the Fourteenth century ... in those theological currents of thought which focus on the will as a characterising dimension, and focusing on the will, isolate – or risk to isolate – the individual from other individuals and from the community»<sup>36</sup>. 43

Therefore, the establishment of hegemonic justice changes the scenery. Hegemonic justice proceeds from above, from a “State” which claims the right of judging and punishing for itself. Shame punishments are badly suited to it since they necessarily imply a community which takes part in the power of judging and punishing. 44

Hegemonic justice with its wealth of offices and apparatuses interposes between community and crime, between community and justice administration. This change can be perceived in the official representation of justice, too. In the official paintings and statues of Justice that ornate European churches, squares and public buildings, a blindfold is 45

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34 Baldus de Ubaldis, *In primum, secundum et tertium Codicis libros commentaria ...*, Venetiis 1577, lib. 2, tit. 4 *De transactionibus*, lex 41 *si quis maior*, n. 11 *circa in medio*, affirms that the person infamous *ipso iure* should not be considered infamous until he is so declared by a declaratory judgement.

35 Jason Maynus, *In primam Codicis partem Commentaria*, Venetiis 1590, lib. 2, tit. 4 *De transactionibus*, lex 41 *Si quis maior*, n. 25; E. Bossi, *Tractatus varii qui omnem fere criminalem materiam excellenti doctrina complectuntur*, Venetiis 1570, tit. *De sententiis*, n. 47 *circa in medio*; J. Clarus, *Sententiarum receptorum, Liber Quintus in quo iudicii criminalis tractatus universus ... continetur*, Venetiis 1607, § *finalis*, quaestio 51, § *Scias etiam*; J. Menochius, *De arbitrariis iudicium*, Venetiis 1590, lib. 2, casus 220, n. 6; P. Farinacius, *Praxis et Theorica criminalis*, Lugduni 1634, lib. 1, quaestio 10, nn. 70-71, lib. 2, quaestio 56, nn. 35-36; J. Brunnemann, *Commentarius in Codicem, Coloniae Allobrogum 1754*, tomus 1, lib. 2, tit. 12 *Ex quibus causis infamia irrogatur*, lex 20 *Improbum foenus exercentibus*, nn. 2-5; B. Carpzov, *Practica nova imperialis Saxonica rerum criminalium*, Lipsiae 1739, pars 2, quaestio 92, n. 34. The same principle is stated also by M.A. Savelli, *Summa diversorum tractatum*, Venetiis 1748, tomus 3, § 14 *poena*, n. 4.

36 Grossi, *L'ordine giuridico medievale* (Anm. 12), p. 196.

37 On the matter, please see the exhaustive and ponderous work of M. Sbriccoli, *La benda della Giustizia. Iconografia, diritto e leggi penali dal medioevo all'età moderna*, in: M. Sbriccoli, P. Costa, M. Fioravanti et al., *Ordo iuris. Storia e forme dell'esperienza giuridica*, Milano 2003, pp. 41-95. Now also translated into French: M. Sbriccoli, *La triade, le bandeau, le genou. Droit et procès pénal dans les allégories de la Justice du Moyen Âge à l'âge moderne*, in: *Crime, Histoire et Sociétés / Crime, History*

added to its other two classic attributes: the sword and the scale<sup>37</sup>.

As stated above, the inquisitorial trial, originally, is strongly linked to *fama*, a trustable and legally accepted community voice, so much so that it cannot be started without the *fama denunciante* (denouncing *fama*). Gradually this power, as well, is taken away from the community, jurists and judges co-operate in strengthening the *ex officio* procedure, and in the Sixteenth century Julius Clarus, a well known criminalist, in the final paragraph of his *Sententiarum receptarum liber quintus*, in which he deals with criminal procedure, affirms that *fama* has by now abandoned the courtrooms<sup>38</sup>. 46

Moreover, between the Thirteenth and Seventeenth century a noteworthy erosion of the community power to protect its members intervenes. Such erosion can be tested, for example, comparing two passages written by two outstanding jurists: Albertus Gandinus, whose opinion concerning the role of the *bona fama* in avoiding torture we saw before, and Prosperus Farinacius who lived between the second half of the Sixteenth century and the first half of the Seventeenth century. 47

Indeed, Albertus Gandinus' opinion is still present and is referred to in the Sixteenth century: *ius commune* does not abandon anything. Instead, like a great river, it carries all that its current gathers up. 48

Farinacius quotes Albertus' opinion in his *Praxis et Theorica criminalis*. In the same passage, however the Roman jurist also refers to an opposite *opinio* which is shared by a noteworthy number of jurists and which is more reasonable in his judgement: «since, as he says, if the defendant can escape torture because his *bona fama* has been proved, then defendants will never be put to torture. There is no man, however bad he may be, that does not have two friends ready to testify on his *bona fama* ... The evidence of *bona fama* ... will be useful in that the defendant is tortured more gently, rather than not tortured at all»<sup>39</sup>. Therefore, the community is no longer able, with two witnesses on the good *fama* of the accused, to avoid that one of its members is put to torture. It can only obtain the 49

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& Societies 9 (2005) 1, pp. 33-78. Please see also, the interesting interpretation of A. Prosperi, *Giustizia bendata: percorsi storici di un'immagine*, Torino 2008.

38 J. Clarus, *Sententiarum receptarum liber quintus* (Anm. 35), § *finalis*, quaestio 6, § *Praeterea scias, in fine*. On the matter please see: Bettoni, *Voci malevole* (Anm. 19), pp.13-38.

39 Farinacius, *Praxis et Theorica criminalis* (Anm. 35), pars 1, tomus 2, quaestio 47, n. 192: «Prima opinio [that of Gandinus] sine dubio est magis communis, ac etiam canonizata per Doctores omnes consulentes ad favorem inquisitorum, sed haec secunda et contraria pariter, et sine dubio est non solum magis servata, sed ni fallor, iudicio meo rationabilior: quia si provata bona fama, reus effugere torturam, utique fere numquam rei torquerentur, cum nullus sit homo etiam nequam, qui duos non habeat amicos deponentes super eius bona fama. Et si tu dices, quid ergo operabitur probatio bonae famae? Nonne debet aliquid operari? Ego respondeo, quod operabitur, ut levius torqueatur, non autem nullatenus torqueatur».

application of a lighter torture. Many elements concur in limiting its power: first of all the cumbersome presence of a hegemonic power which claims certain prerogatives<sup>40</sup>.

The negotiation power of the community is taken away and is substituted with the judge's final pronouncement. Negotiations, transactions, settlements can be made, but they will be of no consequence for the official justice. Clarus, for example, affirms that a custom which is widespread throughout all the Italian princedoms establishes that the judge can start an inquisitorial trial to prosecute whatever kind of crime, and it is of no importance if the parties have promoted an accusatory trial or have settled the dispute already: the parties' pacification does not and cannot stop the judge's inquisitorial action<sup>41</sup>. In the Seventeenth century, Carpzov, a well renowned German jurist, declares that the settlement between the offender and the victim does not prejudice the public revenge. The party can indeed give up the prosecution of the crime to his detriment, but not to the *respublica's* prejudice<sup>42</sup>. Brunnemann<sup>43</sup> agrees with Carpzov, and adds that a settlement with the victim is one of the reasons for beginning an inquisitorial trial<sup>44</sup>. The parties are also not permitted to settle a matter that has already been judged. Indeed, Wesenbeck affirms that since the right of the parties is made certain by the *res judicata*, the settlement is no longer needed, in that there are no longer dubious and uncertain matters which have to be settled<sup>45</sup>. Brunnemann states that it is not permitted – not even to the judge – to end the

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40 On the matter please see: M. Sbriccoli, Giustizia negoziata, giustizia egemonica. Riflessioni su una nuova fase degli studi di storia della giustizia criminale, in: M. Bellabarba, G. Schwerhoff, A. Zorzi (Eds.), Criminalità e giustizia in Germania e in Italia. Pratiche giudiziarie e linguaggi giuridici tra tardo medioevo ed età moderna, Bologna 2001, pp. 363-364.

41 Clarus J., Sententiarum receptarum liber quintus (Anm. 35), § *finalis*, quaestio 58, n. 1 vers. *Sequens*, and n. 2 versic. *Sed punctus*. On the point, I.B. Baiardus, Additiones ad Iulii Clari Librum Quintum sive Practicam Criminalem, in: J. Clarus, Liber Quintus sive Practica Criminalis, Venetiis 1626, § *finalis*, quaestio 58, additio at *Parum prodesset*, declares that in the Papal States, settlements are permitted only in case of light offenses like *verba iniuriosa* (verbal offences), *pugna* (fight). On settlements in criminal matters, please see: M. Sbriccoli, Lex delictum facit. Tiberio Deciani e la criminalistica italiana nella fase cinquecentesca del penale egemonico, in: M. Cavina, Tiberio Deciani (1509-1582). Alle origini del pensiero giuridico moderno, Udine 2004, pp. 110-111.

42 Carpzov, Practica nova imperialis Saxonica rerum criminalium (Anm. 35), pars 3, quaestio 148, nn. 1-18.

43 J. Brunnemann, De inquisitionis processu, Francofurti et Lipsiae 1747, cap. 6 *De personis contra quas formanda est inquisitio*, nn. 12-14.

44 Brunnemann, De inquisitionis processu (Anm. 43), cap. 4 *De causis impulsivis inquisitionis*, n. 38. In the civil proceeding, the intervened settlement between the parties allows them to plead against demurrer (*exceptio peremptoria*) during the trial. On the point, please see: Brunnemann, Commentarius in Codicem (Anm. 35), tomus 2, lib. 7, tit. 50 *Sententiam rescindi non posse*, lex 2 *Peremptorias*, nn. 1-4.

45 M. Wesenbeck, Responsa iuris quae vulgo consilia appellantur, Basileae 1579, cons. 70, n. 12: «Quod ad secundam dubitationem attinet, videtur non potuisse transigi super re iudicata ... Nam res iudicata iam certa est per sententiam ... Transactio autem fit super dubiis, non certis ... Sed hoc accipiendum est per modum transactionis, ut aliquid pro remissione detur, ... non recte transigi super re iudicata, sicut nec iudicatur, cum nulla subsit talis remissionis causa». On settlement and *res judicata*, see also: U. Zasy, Commentaria, seu lecturas eiusdem in titulos tertiae Pandectarum partis, in: U. Zasy, Opera



proceeding with a settlement. Once the inquisitorial trial is started judges can only inquire, convict or acquit, because to this purpose are they appointed<sup>46</sup>.

Shame punishments inflicted by the law and the community lose some of their significant consequences. For example, with reference to testimony: we saw that infamous people cannot testify in that their words cannot be fully trusted (they lack *fides*). With a stratagem this obstacle is avoided: the testimony of infamous witnesses can be accepted if it is corroborated by torture<sup>47</sup>. At the beginning of the Seventeenth century, Farinacius complains of the fact that it is not correct to state that infamous witnesses can give testimony if purged with torture, because such a statement means that infamous people can always give testimony if tortured. It is not so, explains the jurist, because they can give testimony only in those cases expressly indicated by the law (when there is no other way to ascertain the truth, and in the crimes of lese-majesty and heresy). Moreover, torture, notices the jurist, does not purge infamy completely and the testimony of infamous people never has the value of full evidence, rather only that of circumstantial evidence. The necessity of specifying the principle could well mean that in practice the other interpretation is followed<sup>48</sup>.

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Besides, there is a *communis opinio*, founded on the sound authority of Baldus<sup>49</sup> an authoritative Fourteenth-century jurist, which sustains that the testimony of people, infamous by law, can validly give origin to a general inquisition. Farinacius<sup>50</sup>, who on this point agrees with Baldus, refers to and refutes the opinion of those who hold that the testimony of infamous people can be used in order to initiate a special inquisition. He

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omnia, Lugduni 1550, [anast. Aalen 1964], vol. 3, lib. 42, tit. 1 *De re iudicata*, lex 4 *Si se non obtulit*, § 3 *Ait praetor*, nn. 1-5.

46 Brunnemann, *De inquisitionis processu* (Anm. 43), cap. 6 *De executione sententiae condemnatoriae*, nn. 2-9. These matters are also dealt with in: A. Bettoni, *Res iudicata and null and void judgement in the Italian and German doctrine of Sixteenth- and Seventeenth-century criminal law. Certain interpretative profiles*, in: *Crime, Histoire & Sociétés / Crime, History & Societies* 12 (2008), 1, pp. 65-96.

47 A. Bonfranceschi, *Additiones ad Angeli Aretini De maleficiis tractatum ...*, Venetiis 1555, vers. *Qui iudex statuit terminum quatuor dierum*, n. 28; Jason Maynus, *In primam Codicis partem Commentaria* (Anm. 35), lib. 1, tit. 4 *De summa trinitate et fide catholica* (critical edition 1), lex 1 *cunctos populos*, n. 46; Bossi, *Tractatus varii qui omnem fere criminalem* (Anm. 35) tit. *De tortura testium*, n. 3; Menochius, *De arbitrariis iudicium* (Anm. 35), lib. 2, casus 474, n. 52; M. Freher, *Tractatus de existimatione acquirenda, conservanda et amittenda. Sub quo et de gloria, et de infamia*, Basileae 1591, lib. 3, cap. 27, n. 30 *in principio*; P. Theodoricus, *Iudicium criminale practicum*, Jenae 1671 [anast. Goldbach 1996], cap. 4 *De inquisitione*, aphorismus 9, n. 31; A. Matthaeus, *De criminibus*, Trajecti ad Rhenum 1644, lib. 48, tit. 16, cap. 2, n. 4.

48 Farinacius, *Praxis et Theorica criminalis* (Anm. 35), lib. 2, quaestio 56, nn. 37-40 and 56-57. Regarding the torture of infamous witnesses, please see: P. Fiorelli, *La tortura giudiziaria nel diritto comune*, Milano 1953, tomus 1, pp. 265-267.

49 Baldus de Ubaldis, *In primum, secundum et tertium Codicis libros commentaria* (Anm. 34), lib. 1, tit. 4 *De summa trinitate et fide catholica* (critical edition 1), lex *cunctos populos*, n. 42 *in fine*.

50 Farinacius, *Praxis et Theorica criminalis* (Anm. 35), lib. 2, quaestio 56, n. 62.

sustains that, if witnesses who are infamous by law testify in cases in which they should not be admitted, their words would be considered only as presumptions<sup>51</sup>, with a very limited value of trustworthiness. In the next section, the jurist affirms that the judge can start a general inquisition on the basis of such a presumption<sup>52</sup> and firmly rejects the hypothesis that on its basis a special inquisition could be started<sup>53</sup>. Difference of opinions in the juridical doctrine makes us believe that maybe there are different practices followed.

Furthermore, if the judge has the power to judge *ex aequitate et sola facti veritate inspecta*<sup>54</sup> (taking only equity and truth into consideration), he may allow infamous people to testify<sup>55</sup>. 53

The tripartition of *infamia iuris* elaborated by Glossators is a source of diverging opinions in the Sixteenth and Seventeenth centuries. In treatises of the time dealing with this matter, we can notice the absence of the *infamia ex genere poenae*. Farinacius in his *Praxis et Theorica criminalis* affirms that among infamous people because of *infamia iuris*, there are those who become infamous owing to *infamia ipso iure* and those who become infamous because of *infamia per sententiam*<sup>56</sup>. Such bipartition of *infamia iuris* is preponderant among jurists<sup>57</sup>, and some of them in declaring it give reasons for the 54

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51 Farinacius, *Praxis et Theorica criminalis* (Anm. 35), lib. 2, quaestio 56, n. 61.

52 Farinacius, *Praxis et Theorica criminalis* (Anm. 35), lib. 2, quaestio 56, n. 62. «Ex hoc qualiquali inditio, vel praesumptione resultante ex dicto infamium possit iudex ... inquirere»; n. 66. «Dico sic, si agimus de inquisitione generali, hoc est, ut iudex ex dicto alicuius infamius possit inquirere de veritate eius, quod deponit, et sic quod tale dictum aperiat iudici viam se informandi, instruendi, et inquirendi veritatem».

53 Farinacius, *Praxis et Theorica criminalis* (Anm. 35), lib. 2, quaestio 56, n. 67. «Ex hoc qualiquali inditio possit quis torqueri, vel specialiter inquirere absurdissimum est, et contra omnium mentem».

54 On the complex questions connected to *arbitrium* and *aequitas*, we suggest consulting: Meccarelli, *Arbitrium. Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune* (Anm. 25), especially at pages 117-121.

55 Farinacius, *Praxis et Theorica criminalis* (Anm. 35), lib. 2, quaestio 56, nn. 88-89; Menochius, *De arbitrariis iudicium* (Anm. 35), lib. 1, quaestio 27, n. 1.

56 Farinacius, *Praxis et Theorica criminalis* (Anm. 35), pars 2, quaestio 56, n. 5 also in: P. Farinacius, *Variae quaestiones et communes opiniones criminales*, Lugduni 1621, lib. 2, quaestio 56, n. 5.

57 Nicolaus de Tudeschis (Abbas Panormitanus), *Commentaria secundae partis in secundum librum Decretalium*, Venetiis 1588, tomus 4, lib. 2, tit. 20 *De testibus et attestationibus*, cap. 54 *Testimonium*, n. 6 *circa in medio*; Jason Maynus, *In primam Codicis partem Commentaria* (Anm. 35), lib. 1, tit. 4 *De summa trinitate et fide catholica* (critical edition 1), lex 1 *cunctos populos*, n. 44; J. Brunnemann, *Commentarius in quinquaginta libros Pandectarum*, Coloniae Allobrogum 1752, tomus 1, lib. 3, tit. 2 *De his qui notantur infamia*, lex 1, n. 1; Zasy, *Commentaria, seu lecturas ... primae Pandectarum partis* (Anm. 45), tomus 1, lib. 3, tit. 2, n. 2; S. Stryk, *Usus modernus pandectarum*, in: S. Stryk, *Opera omnia*, Florentiae 1841, vol. 14, lib. 3, tit. 2 *De his qui notantur infamia*, § 13; Matthaeus, *De criminibus* (Anm. 47), lib. 48, tit. 18, cap. 3, nn. 6-7; T. Decianus, *Tractatus criminalis*, Venetiis 1590, tomus 1, lib. 3, cap. 17, n. 1; Baiardus, *Additiones ad Iulii Clari Librum Quintum* (Anm. 41), § *finalis*, quaestio 72, n. 3; Theodoricus, *Iudicium criminale practicum* (Anm. 47), cap. 4 *De accusatione*, aphorismus 4, nn. 29-30; D. Tuschus, *Practicae conclusiones iuris*, Lugduni 1661, tomus 4, ad vocem *Infamia quid sit, et quotuplex, et eius poena*, n. 2; J.G. Heineccius, *Elementa iuris civilis secundum ordinem Pandectarum*, in: J.G. Heineccius, *Opera*, Genevae 1768, tomus 6, lib. 3, tit. 2, § 400.

absence of the *infamia ex genere poenae*. Carpzov, for example, even though he recognises that certain punishments, such as whipping and hanging, are considered infamous by popular opinion, sustains that punishment does not make people infamous but rather the cause (*causa*) to which it is due and therefore a sentence to relegation for a crime which does not generate *infamia iuris* does not make the convicted party juridically infamous<sup>58</sup>. Some jurists agree with Carpzov<sup>59</sup>. Others affirm that, since the punishment for a crime has a final judgement of conviction as essential prerequisite, it is not the punishment that makes people infamous, but rather the sentence<sup>60</sup>.

For jurists of this time, it is not only a problem of conferring a further power to the judge 55 leaving the decision of inflicting *infamia ex genere poenae* to his evaluation of the crime and its circumstances, there is also the question of popular opinion as Carpzov well outlines. People cannot make somebody infamous because he suffered whipping or hanging. That which matters is what the law has established about the infamy, or else, of the criminal deed. Therefore it is not only a matter of restricting the power of the judge, but is also a matter of educating people and teaching them that only the law has such power of making somebody infamous. The only source of infamy is law, not the community, or the judge, to whom the law does not give the power to condemn or make an innocent person infamous<sup>61</sup>.

The sphere of application of the *infamia per sententiam* is reduced. The *iniuria*, for 56 example, keeps on being mentioned among the criminal deeds that can cause infamy, but beside the mention of its infamous character jurists often indicate the path to follow in order to avoid infamy in the case that somebody has the misfortune of being involved in a criminal trial for *iniuria*. So Aretinus<sup>62</sup>, already in the Fifteenth century suggests that in

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58 Carpzov, *Practica nova imperialis Saxonica rerum criminalium* (Anm. 35), pars 3, quaestio 135, nn. 46-52.

59 Matthaeus, *De criminibus* (Anm. 47), lib. 48, tit. 18, cap. 3, nn. 6-7; Brunnemann, *Commentarius in quinquaginta libros Pandectarum* (Anm. 57), tomus 1, lib. 3, tit. 2 *De his qui notantur infamia*, lex 22 *Ictus fustium*, n. 1; Stryk, *Usus modernus pandectarum* (Anm. 57), vol. 14, lib. 3, tit. 2 *De his qui notantur infamia*, § 13; Heineccius, *Elementa iuris civilis secundum ordinem Pandectarum* (Anm. 57), tomus 6, lib. 3, tit. 2, § 412.

60 Brunnemann, *Commentarius in quinquaginta libros Pandectarum* (Anm. 57), tomus 1, lib. 3, tit. 2 *De his qui notantur infamia*, lex 22 *Ictus fustium*, n. 6.

61 Brunnemann, *Commentarius in quinquaginta libros Pandectarum* (Anm. 57), tomus 1, lib. 3, tit. 2 *De his qui notantur infamia*, lex 22 *Ictus fustium*, nn. 2-6: «Non tamen possum mihi persuadere, quod regulae illae de firmitate rei iudicatae, eo usque possint extendi, ut etiam res iudicata noceat corpori ac famae, quae vitae aequiparatur innocentis. Nec lex hanc potestatem dedit iudici, ut innocentem infamem facere possit».

62 Angelus de Gambilionis (called the Aretinus), *De maleficiis*, Venetiis 1555, vers. *Dictum Sempronium in CCC librum Bononiensem sententialiter condemnamus*, n. 3. Both possibilities are foreseen also by Carpzov, *Practica nova imperialis Saxonica rerum criminalium* (Anm. 35), pars 2, quaestio 94, nn. 82-83, 87.

order to avoid infamy in a trial for *iniuria* it is enough to appear in court with procurator or to pay the fine before the sentence is issued. There is also a large group of German jurists of a noteworthy calibre<sup>63</sup> operating at the end of the Sixteenth century and in the Seventeenth century who affirm that there is a practice in the *Reichskammergericht* to spare infamy to people convicted of *iniuria* using a formula included by the judge in the same sentence. Berlich at the beginning of the Seventeenth century refers to the practice in a well articulated way. Among the reasons which justify the preservation of the *fama*, the jurist indicates the high social costs which the infamous person suffers: he is excluded from colleges, associations, guilds, in short from society<sup>64</sup>. Such power of reserving the *fama* is a prerogative not only of the judges of the *Reichskammergericht* given that their sentences cannot be appealed, but according to the practice of the time it is a prerogative also of all the judges of the inferior courts. Berlich ends up saying that the *fama* cannot be reserved only in the cases of *iniuria atrociora*.

Moreover, the infamy coming from trials which originate from breaches of contract (*ex contractibus*) can be avoided if the defendant appears in court with procurator<sup>65</sup> or if he settles the dispute with the other party by way of a transaction<sup>66</sup>. 57

The *infamia ipso iure* maintains its importance given the particular nature of the criminal deeds which it is applied to. Anyway, we may notice that some of them, for example, the marriage of a widow during the first year of mourning or theatre plays, stop generating 58

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63 M. Berlich, *Conclusiones practicabiles*, Lipsiae 1670, pars 5, conclusio 63, nn. 33-40; A. von Gail, *Practicae observationes ad processum iudicarium imperialis Camerae*, Antuerpiae 1653, lib. 1, observ. 65 n. 6; Ch. Besold, *Consilia Tubingensia*, Tubingae 1661, pars 3, cons. 158, nn. 56-57; Freher, *Tractatus de existimatione* (Anm. 47), lib. 3, cap. 9, n. 26 *in fine*; J. Harpprecht, *Commentaria in quatuor libros Institutionum ...*, Francofurti 1657, tomus 4, lib. 4, tit. 4 *De iniuriis*, § *In summa sciendum*, nn. 117-119; Theodoricus, *Iudicium criminale practicum* (Anm. 47), cap. 2 *De delictis privatis et in specie de iniuriis*, aphorismus 20, nn. 22-23; Carpzov, *Practica nova imperialis Saxonica rerum criminalium* (Anm. 35), pars 2, quaestio 94, n. 78; Brunnemann, *Commentarius in quinquaginta libros Pandectarum* (Anm. 57), tomus 1, lib. 3, tit. 2 *De his qui notantur infamia*, lex 4 *Athletas autem*, nn. 5-6 and tomus 2, lib. 47, tit. *De extraordinariis criminibus*, lex 40 *Divus*, nn. 2-4; Brunnemann, *Commentarius in Codicem* (Anm. 35), tomus 1, lib. 2, tit. 12 *Ex quibus causis infamia irrogatur*, lex 5 *Decuriones*, nn. 4-5; Stryk, *Usus modernus pandectarum* (Anm. 57), vol. 14, lib. 3, tit. 2 *De his qui notantur infamia*, § 14.

64 Berlich, *Conclusiones practicabiles* (Anm. 63), pars 5, conclusio 63, n. 36. «Si iniurians est opifex, et in aliquo collegio constitutus, tunc enim illi in sententia existimatio honoris merito reservatur, quondam esset admodum crudele, si quis propter levissimas iniurias, ex iracundia forte prolatas, societate, ordine, collegioque suo, tanquam infamis ejiceretur, et alia graviora consequeretur».

65 H. Doneau, *Commentaria de iure civili*, in: H. Doneau, *Opera omnia*, Romae 1828, tomus 5, lib. 18, cap. 8, § 5; Brunnemann, *Commentarius in Codicem* (Anm. 35), tomus 1, lib. 2, tit. 12 *Ex quibus causis infamia irrogatur*, lex 22 *Fidem rumpens societatis*, n. 1.

66 Harpprecht, *Commentaria in quatuor libros Institutionum* (Anm. 63), tomus 4, lib. 4, tit. 16 *De poena temere litigantium*, § *Ex quibusdam*, n. 17; Freher, *Tractatus de existimatione* (Anm. 47), lib. 3, cap. 8, n. 25; Brunnemann, *Commentarius in quinquaginta libros Pandectarum* (Anm. 57), tomus 1, lib. 3, tit. 2 *De his qui notantur infamia*, lex 7 *In actionibus*, n. 2.

scandal and they therefore lose their criminal character and are omitted in the lists of the cases causing *infamia ipso iure*.

There is, nevertheless, a lasting duration of the *infamia facti* since, being inflicted directly by the people does not see narrowing its range of application following the institutionalisation of justice administration, as instead happens to the *infamia iuris* which, being connected with the work of the judge, necessarily follows trends of criminal politics. 59

The *infamia facti* presents a strange capacity for surviving<sup>67</sup>, an extraordinary resistance and impenetrability even to the orders of power. It shares – with the natural qualities of man – the characteristics of non-modifiability due to external intervention. Therefore, if it is evident that the Prince cannot change the quality of man or woman, old or young, for many jurists<sup>68</sup> it is also evident that the bad *fama* cannot be remitted, quashed, cancelled by the Prince or the Pope. They indeed do not have the power to change the *vox populi* (popular opinion). Farinacius affirms: «However the prince cannot take away or remove the *infamia facti*, because the opinion of men about the goodness or badness of someone cannot be removed by the prince, neither can the prince make people believe good a man that they believe and want to believe bad»<sup>69</sup>. Nevertheless, the Roman jurist refers also to the existence of a contrary opinion maintained by Oddus Sfortia who, in his *Tractatus de restitutione in integrum*, dedicates a *quaestio*<sup>70</sup> to the matter whether the *fama* can be given back by the Pope, the College of Cardinals, the bishop, the inquisitor, the emperor, the Roman senate, the judge, the prince, or the lord, and in the next *quaestio*<sup>71</sup> dispels the doubt, sustaining that the Prince can also give back *bona fama* (good reputation) if he 60

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67 Baldus de Ubaldis, In sextum Codicis ..., Venetiis 1577, tit. 7, lex 2, n. 9, very well states: «Unde videtur facilis descensus et c. quem semel horrendis maculis infamia nigrat ad bene tergendum multa laborat aqua».

68 Decianus, Tractatus criminalis (Anm. 57), tomus 1, lib. 5, cap. 48, n. 31; F. Duaren, In primam partem Pandectarum sive Digestorum methodica enarratio, in: F. Duaren, Opera omnia, Lucae 1765, vol. 1, lib. 3, tit. 2 *De his qui notantur infamia*, cap. 2; Freher, Tractatus de existimatione (Anm. 47), lib. 3, cap. 30, n. 12; Farinacius, Praxis et Theorica criminalis (Anm. 35), lib. 2, quaestio 56, n. 343; Besold, Consilia Tubingensia (Anm. 63), pars 3, cons. 117, nn. 27-32; Ch. Woldenberg, J. Jegerus, Disputatio iuridica de infamia et infamibus, Rostochii 1656, thesis 1, nn. 54-55; O. Hilligerus, Notae ad Hugonis Donelli opera omnia, Maceratae 1831, tomus 5, lib. 18, cap. 6, § 7, note 9 *circa in medio*. On the matter for the medieval period, please see: Migliorino, Fama e infamia (Anm. 23), p. 185; E. Peters, Wounded names: the medieval doctrine of infamy, in: E.B. King, S.J. Ridyard (Eds.), Law in medieval life and thought, Sewanee 1990, pp. 43-89, quotation on p. 84, note 94.

69 Farinacius, Praxis et Theorica criminalis (Anm. 35), lib. 2, quaestio 56, n. 343: «Non tamen potest [principes] tollere, et removere infamiam facti, quia opinio hominum de bonitate, vel de malitia alicuius non potest removeri a principe, nec princeps potest facere, ut homines credant illum esse bonum, quem credunt, et credere volunt esse malum».

70 O. Sfortia, Tractatus de restitutione in integrum, Venetiis 1584, quaestio 93.

71 Sfortia, Tractatus de restitutione in integrum (Anm. 70), quaestio 97, articulus 2, n. 9.

72 See also the quotation of the passage in: Farinacius, Praxis et Theorica criminalis (Anm. 35), lib. 1,

pleases to do so<sup>72</sup>. However the answer, clearly understandable, takes the Prince's prerogatives more into consideration than the effective change of popular feeling.

In Germany, many norms are issued with the purpose of sparing defiled trades *infamia facti*. German jurists are well aware of the fact that such an attempt even though supported by those who carry on those trades<sup>73</sup>, is not shared by the vast majority of the population, which, notwithstanding the norms issued, continues to consider such individuals infamous<sup>74</sup> and reserves the privilege of deciding who has to be stricken by *infamia facti*. 61

Kathy Stuart, in her *Defiled trades and social outcasts*<sup>75</sup>, describes such a situation. The social historian reasserts and stresses that which was affirmed by Seventeenth-century German jurists, Stryk<sup>76</sup> and Heineccius<sup>77</sup> among others, and that is, that the stigma on these trades comes especially from the members of the town guilds which force those who carry them on to exclusion and separation, often against the express order of governments: «For centuries artisans defied governmental attempts to rehabilitate dishonourable people. From 1548 through the Eighteenth century imperial and local governments regularly issued mandates attempting to cleanse defiled trades of their stigma of dishonor»<sup>78</sup>. Artisans, continues Stuart, appeal to their norms of honour and dishonour in the attempt of keeping areas of corporative autonomy against the growing interference of governments 62

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quaestio 6, n. 45 vers. *Et in proposito scias*.

73 For example Stryk, *Usus modernus pandectarum* (Anm. 57), vol. 14, lib. 3, tit. 2 *De his qui notantur infamia*, § 5 so refers in one of his *responsa*, which expresses a favourable opinion, and which was given to pig-gelders who asked for admission to the guilds. Therefore people who carry on these trades ask for and urge their admittance to town life. The fiercest opposition, as the same jurist narrates, comes from the guilds which are strongly reluctant to accept them, especially because they fear a passage of the infamy from those people to all the other members.

74 H. Bocer, *Disputatio de infamia et infamibus*, in: H. Bocer, *Disputationes de universo quo utimur iure ...*, Argentorati 1634, tomus 2, classis 6, disputatio 8, thesis 1, n. 27; Brunnemann, *Commentarius in quinquaginta libros Pandectarum* (Anm. 57), tomus 1, lib. 3, tit. 2 *De his qui notantur infamia, ad rubricam*, n. 7; Brunnemann, *Commentarius in Codicem* (Anm. 35), tomus 1, lib. 2, tit. 12 *Ex quibus causis infamia irrogatur*, lex 17 *Verbum* and lex 19 *Interlocutio*, n. 9; Stryk, *Usus modernus pandectarum* (Anm. 57), vol. 14, lib. 3, tit. 2 *De his qui notantur infamia*, § 5; J.G. Heineccius, *Elementa iuris Germanici tum veteris, tum hodierni*, in: J.G. Heineccius, *Opera*, Genevae 1769, tomus 7, lib. 1, tit. 17, § 410. At the quoted passage Heineccius affirms: «Contra tortis, fustibus ictis, excoriatoribus, lictoribus, castratoribus suum, quos Romani numquam notarunt infamia, maculam aliquam haerere, vulgo creditur, eaque opinio tam altas in hominum animis radices egit, ut tot severis imperii legibus evelli vix potuerit».

75 K. Stuart, *Defiled trades and social outcasts. Honor and ritual pollution in Early Modern Germany*, Oxford 1999, pp. 1-2.

76 Stryk, *Usus modernus pandectarum* (Anm. 57), vol. 14, lib. 3, tit. 2 *De his qui notantur infamia*, § 5.

77 Heineccius, *Elementa iuris civilis secundum ordinem Pandectarum* (Anm. 57), tomus 6, lib. 3, tit. 2, § 410.

78 Stuart, *Defiled trades and social outcasts* (Anm. 75), p. 7.

79 Stuart, *Defiled trades and social outcasts* (Anm. 75), p. 16. The authoress thus continues: «While

which are more and more authoritarian<sup>79</sup>. This is, therefore, the meaning we must give to her affirmation according to which «State formation, application of “social disciplining” and expansion of dishonour in the early modern period are interdependent historical processes»<sup>80</sup>.

## Conclusion

As far as infamy and shame punishments are concerned, we can point out two paths along which States of the early modern period moved: one path is directed towards gradually emptying the infamy of its content, therefore subtracting it of its value (for example, admitting infamous witnesses to testimony and accusation); the other path leads to limiting the sphere of application of infamy to the only cases envisaged by law and sanctioned by the judge’s declaratory pronouncement or by the judge’s sentence (therefore eliminating *infamia ex genere poenae* and trying to curb *infamia facti*). More generally, the question of shame punishments falls within criminal politics of the new States directed to taking away the power of justice administration from the community. 63

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seeming to pay obeisance to the absolutist pretensions of their patrician lords, acknowledging the patricians’ claim to sovereignty in deferential language and gestures, artisans were absolutely intransigent in question of honor. Ritual pollution conflicts over dishonor followed a typical pattern. A person of dishonorable background tried to gain admission to a guild, or a guild member violated pollution prohibitions, thus dishonoring himself. The honorable guildsmen denied admission or expelled the dishonorable person from the guild, whereupon the dishonorable person appealed to the city government. The authorities saw dishonor as a kind of social cancer that caused the economic destruction of individuals who became defiled, and threatened to spread beyond them to swell urban welfare rolls. Accordingly, the magistracy proclaimed that the dishonorable candidate was in fact honorable, and ordered the guild to accept him. But the authorities were frequently unable to enforce their command. Dishonor conflicts dragged on for years or decades, and in most cases the dishonorable candidate never gained admission to the guild».

80 Stuart, Disonore, contaminazione e giustizia criminale ad Augusta nella prima età moderna, in: Quaderni Storici 33 (1998), 3, pp. 677-705, see especially p. 679.