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VSEBINA / *INDICE GENERALE* / *CONTENTS*

Gino Belloni: Contaminazione in filologia 153
Contamination in philology
Kontaminacija v filologiji

Giorgio Politi: Il ritorno del caos 169
The return of chaos
Vrnitev kaosa

Sergio Marinelli: Giambattista Tiepolo: la creazione della contaminazione 181
Giambattista Tiepolo: the creation of contamination
Giambattista Tiepolo: nastanek kontaminacije

Claudio Povolo: Feud and vendetta: customs and trial rites in Medieval and Modern Europe. A legal-anthropological approach 195
Faida e vendetta tra consuetudini e riti processuali nell'Europa medievale e moderna. Un approccio antropologico-giuridico
Fajda in maščevanje med običaji in pravdnimi postopki v srednjeveški in novoveški Evropi. antropološko-pravni pristop

Altynay Jumagaliyeva, Karima Sakharbayeva & Aigul Ulkenbayeva: World Modeling Element in Spiritual Culture Determining the Conceptual Picture of the World of Traditional Kazakh Music 245
L'elemento di modellazione del mondo nella cultura spirituale che definisce il quadro concettuale del mondo della musica tradizionale kazaka
Element oblikovanja sveta v duhovni kulturi, ki določa konceptualno podobo sveta tradicionalne kazaške glasbe

Svetlana Janseitova, Layla Kaliakbarova, Svetlana Balagazova & Aisulu Kaldayakova: Musical Terminoid Remarks as a Means for Interpretative Reading of the Text and Determinants of Musical Intonation Characteristics 265
Indicazioni musicali 'terminoidi' quale chiave di lettura interpretativa di un testo e determinante delle caratteristiche di intonazione musicale
'Terminoidne' glasbene označbe kot sredstvo za interpretativno branje besedila in opredeljevalec značilnosti glasbene intonacije

Gulzada Omarova, Gulnar Alpeissova & Amankeldi Kuseubay:
National Traditions of the 21st Century: Problems with the Preservation and Translation of Kazakh Traditional Music 285
Tradizioni nazionali del XXI secolo: problemi con la conservazione e traduzione della musica tradizionale kazaka
Nacionalna izročila 21. stoletja: težave pri ohranjanju in prevajanju tradicionalne kazaške glasbe

Navodila avtorjem 297
Istruzioni per gli autori 300
Instructions to authors 304

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FEUD AND VENDETTA: CUSTOMS AND TRIAL RITES IN MEDIEVAL AND MODERN EUROPE. A LEGAL-ANTHROPOLOGICAL APPROACH

Claudio POVOLO
Università Ca' Foscari Venezia, Dipartimento di Studi Umanistici, Dorsoduro 3484/D, 30123 Venezia, Italia
e-mail: clpovolo@gmail.com

SUMMARY

The challenge to the vendetta, understood as a genuine legal and cultural system that regulated the organization of conflict and thereby constituted an instrument of social control, was a very important phenomenon in almost all the countries of Europe. One of the instruments adopted by the new state realities was the introduction of inquisitorial procedures, whose aim was not only to impose a different legitimization of violence but also to put a end to the connections between customary rites and judicial practices that had for centuries characterized the legal system of the vendetta. The new punitive justice was marked by both the imposition of severe penalties and by the absence of an active role in the resolution of conflicts of the parties involved.

Key words: vendetta, custom, law, peace, trial, justice

FAIDA E VENDETTA TRA CONSUETUDINI E RITI PROCESSUALI NELL'EUROPA MEDIEVALE E MODERNA. UN APPROCCIO ANTROPOLOGICO-GIURIDICO

SINTESI

La messa in discussione della vendetta, intesa come vero e proprio sistema giuridico e culturale che regolamentava l'organizzazione dei conflitti e si poneva come strumento di controllo sociale, fu un fenomeno di grande portata che caratterizzò gran parte dei paesi europei. Uno degli strumenti utilizzati dalle nuove realtà statuali fu l'introduzione delle procedure inquisitorie, che non solo avevano il fine di imporre una diversa legittimità della violenza, ma avevano altresì l'obbiettivo di porre fine all'interrelazione tra riti consuetudinari e pratiche giudiziarie che per secoli aveva caratterizzato il sistema giuridico della vendetta. La nuova giustizia punitiva si caratterizzò sia per l'imposizione di pene severe, che per il venir meno del ruolo attivo delle parti nella risoluzione dei conflitti.

Parole chiave: vendetta, consuetudini, diritto, pace, processo, giustizia

PREMISE

The pages that follow develop a topic that in recent decades has attracted the attention of historians particularly interested in stimuli and suggestions coming from other disciplines, especially from anthropology. As we shall see, many medieval and modern historians have investigated this topic. In doing so, they adopt, even in the terminology they use, problems, suggestions and arguments reflecting the specific tradition of each period. Likewise, the different contexts examined have brought to the surface aspects of feud and violence that are not readily comparable considering the political and legal dynamics that surround them. The most analytic and accurate attempts (such as the studies of William Ian Miller and Christopher Boehm, which are discussed below) have substantially described the feud as a legal system aimed at regulating conflicts between mutually hostile groups with the aim of managing and controlling political and economic resources. This system often envisioned recourse to murder and reprisal, but it also expressed an essential need to restore peace, whether through monetary compensation, by handing over a woman, or through other forms of pacification that were interpreted by the individuals and the community involved according to the complex language of honour.

Here we should add that this qualified feud as a prevalently customary system, even when the society that used it possessed some written system of law. What is more, feuds could take place according to their customary rules only in the absence of a centralized, intrusive political power. Attempts at outside regulation (whether through forced containment of the tensions that marked the feud and/or through the imposition of peace pacts) not approved by the opposing groups, inevitably led to a great increase in violence, as well as to challenging the protagonists of the conflict, who were not willing to give up their role and social identity. To some degree this political and social process can already be identified in certain European countries starting from the late 16th century. However, it exists potentially whenever a political power tends to differentiate itself and emerge out of the social context it expresses.

The approach followed here makes use of a particular discipline, i.e., legal anthropology. This approach tends to use the domain of the law, understood in its pluralistic meaning, its procedures and practices seen in light of the conflictual dynamics that drove societies marked by the existence of politically influential classes, social and kin groups and imbued with the code of violence and honour.

Though along general lines, in the first part of this essay we deal with the complex and often exclusive relations existing between the world of custom and the society based on the specialized, chiefly written law which began to be established with the introduction of the ius commune in Europe from the late 12th century on. We focus in particular on the trial rites[1] that rapidly absorbed, with a variety of interpretations, a customary legal tradition deeply marked by the existence of feud and the need to control conflict. Far from having an irrational system of proofs, the early Middle Ages had worked out a highly sophisticated legal system. This was a system that expressed a concept of justice clearly

1 Trial rites is a more historically appropriate definition than procedural rites.

reflecting both particular political systems and customary laws directed at affirming an essentially communitarian form of social control.

The affirmation of a new legal system, later to be known as common law, strongly based on Roman and canon law and marked by the use of writing, had among its consequences that of absorbing the variety of customary legal systems prevalent until then. These systems had been considered binding, in that they were the expression of the community they represented. The new legal system was based on the interpretation of jurists and was applied through sophisticated, complex judiciary procedures, and it had a profound influence on the resolution of conflicts in which the parties involved and the judgment of peers had previously had a preeminent role.

This has been referred to as the start of a form of hegemonic justice, considering the characteristics that have been emphasized: above all, the new system of proof and the *ex-officio* initiative of the judge. As we shall see, despite its undisguised goal of defending community values and interests, faced with a new social and economic reality the main goal of this legal system was to find different and more certain ways to manage conflicts that often involved highly influential urban social and kin groups. The customary rules that governed the feud system were partly absorbed into the new Roman – canon procedures. This was true both on the purely formal level and in some cases (such as the inclusion of agreements and acts of peace) in the determination of outcomes. Obviously, many of these rules lost their original character as they adapted to the new political and economic reality.

In short, the new hegemonic justice reflected a political and constitutional system that was deeply imbued both with urban community values and with an ideology of kinship closely tied to status and the idiom of honour. In its underlying logic, this justice joined the older early medieval tradition with the cultural and political need to deal incisively with the problems and tensions characteristic of a more complex and stratified society, one that required new forms of social control. In any case, it was a form of justice whose cultural and ideological features and whose territorial context expressed in primis the values of the community, its ruling class, and the economic and political relations that linked the city to its surrounding territory. Undoubtedly, it could be manipulated for political purposes, or could become an incisive instrument of social control over the poorer classes. At the same time, it never lost sight of its main purpose, which was to guarantee a balanced management of the conflicts that opposed groups and lineages.

The second part of this essay deals with the transformations that took place in the majority of European countries from the 16th century on, with the introduction of authentically inquisitorial procedures, the effort to control banditry, and the widespread affirmation of strict punitive justice. These were the novelties that first weakened and then neutralized the feud system. Nonetheless, this system still showed up frequently both in the form of bloody episodes of violence, and far more discreetly and commonly in the courtroom. There it met procedures highly sensitive to the need to channel it towards peaceful resolutions. Whenever research has examined judiciary practice in various courts, it has been possible to identify diverse levels of justice existing over the course of the modern age. These were characterized either by procedures in which the conflicting parties were es-

sentially excluded from active management of the trial, or on the contrary others that still allowed quite wide margins of discretionary power. But after the late 17th century the trial rites that prevailed were on the whole distinguished by the predominance of a form of justice which, though not denying the defendant adequate possibilities for his/her defence, put the role of the victim on the sideline and shifted the centre of gravity of proceedings towards the initial phase of the trial, which was directed by a fully autonomous judge. The form of trial that became prevalent was characterized by a genuine inquiry conducted by a judge, by close questioning and, above all, by the exclusion of any possible interference from the conflicting parties in the initial phase of proceedings. The feud system, considered chiefly as a manifestation of custom and a reflection of deeply rooted social conflicts of class and kinship, was weakened or in any case forced to accept the new rules imposed by the criminal trial and, consequently, to lose some of its distinctive features.

Still, the vendetta has maintained strong symbolic and emotive connotations to our day. This is not only or mainly because it is continually the focus of an animated discussion centring on the characteristics and goals of criminal justice, but rather because literature and cinema, though often from contrasting angles and with differing interpretive insight, have paid great attention to it. In this context, we need only think of the important explications of Clint Eastwood's *The Unforgiven* made by two highly qualified American scholars, in which vendetta is the heart of stories that are a key to the role of the narrators, stories aimed at revealing the symbolic dimension of an irrepressible emotional drive.[2]

In consideration of the specific purpose of this essay, we have deliberately avoided using a number of judiciary cases, as this would have made it much longer. Rather, we have preferred to refer to the existing bibliography on the subject. Still, though it presents numerous examples, this bibliography does not always permit an in-depth analysis of the hypotheses underlying our study. Nor does it always provide a consistent picture of the chronological and geographical development of the long, complex socio-political phenomenon that put the cultural system of the feud in relation to the development of institutions and judiciary procedures in the diverse countries of Italy and Europe.[3]

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2 Ian Miller deals with the theme of vendetta in its legal and social dimensions by examining its representations in cinema, where it is often considered as a sort of integration to the inefficiency of the law. As regards *The Unforgiven*, he comments: "The usual evolutionary story we tell ourselves is that revenge gives way to law and is inconsistent with it. Popular culture sees revenge as a necessary supplement to law, and it might well be that popular culture is not wrong as a matter of legal history and social theory" (Miller, 1998, 201). Austin Sarat has also examined the various narrations of vendetta in the films of Eastwood, focusing particularly on their relation to memory (Sarat, 2002, 236–259).

3 The complexity of this theme is still reflected in our day in the lively discussion about the function of the penalty (punitive, rehabilitative or reparative) and the role of the victim. A concise but effective examination, above all as regards the death penalty, has been made by Eva Cantarella (2007). This theme is particularly meaningful in the United States, where tensions have focused on the different concepts of *retributive* and *restorative justice*. These are concepts that at times tend to be interpreted in the light of contradictory social instances taken out of their specific historical origin. As has been observed, "increasingly, retributive justice is used not just as a synonym for punishment generally, but in the hands of critics, as a type of shorthand for all the numerous faults and failings of punishment practices. To many, 'retributive justice' is a dirty word, not a theory of punishment. The original meaning of retributive justice is further obscured by the tendency to use the terms 'vengeance', 'revenge' and 'retaliation'. On the contrary, "restorative justice

Another deliberate choice has been to avoid describing the frequent outbreaks of violence that characterized the medieval and modern ages. For though these were the most visible expressions of the feud system, they were perhaps not the most significant ones. In fact, the system was marked by peace pacts, and even more frequently by the interfering recourse to trial rites that had been created by a society deeply imbued with the values of honour and status.

Finally, this essay aims simply to present the fundamental lines of the long, complex course that led the feud system to be absorbed and metabolized into a sphere of judiciary procedures that deeply influenced its later developments,[4] even if it did not decisively eliminate latent social and cultural tensions between the needs of the victim and those of the existing political systems.[5]

FEUD AND VENDETTA: A PROBLEM OF DEFINITION AND COMPARISON

In conclusion to his in-depth Introduction to the volume Feud in Medieval and Early Modern Europe Jeppe Büchert Netterstrøm remarked that:

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advocates have consistently challenged the conventional wisdom that justice before the emergence of the nation-state was vengeful and barbaric, arguing that this overlooks numerous examples where informal processes were characterized by an emphasis on negotiation and compensation" (Roche, 2007, 78–81). On the close and surprising connection between justice and *vendetta* found today in the United States, see Terry K. Aladjem's introduction to his *The Culture of Vengeance and the Fate of American Justice* (Aladjem, 2008, XI–XVII). It seems clear that in centuries when the feud system was active, the dialectic between the different purposes of justice was measured essentially by the role of the conflicting parties and their social standing, taken both in the context of custom and of trial rites.

4 Following suggestions coming from anthropology, in recent years a noteworthy series of studies has come out about feud understood as a set of conflicts and practices able to interact actively both with local institutions and with external *super-community* ones. This approach has allowed us to appreciate important aspects of conflict and its strategies that have clear political features. Some significant examples regarding the Italian context are: Raggio, 1990; Lepori, 2010. On Corsica: Wilson, 1988. In these works there is a clear focus on judiciary activities coming from the outside, or on attempts by the political authority to enter the dynamics of conflicts with various forms of pacification. As Wilson observes in his conclusions: "It is true as a very general proposition that feuding is in the end incompatible with 'modernization' and the development of the State, or even 'that the higher the level of political complexity in a society, the less frequently feuding is found'. But the process by which one form of justice is replaced by another is itself complex and goes through a number of stages that are not irreversible. The two systems may exist side by side without interaction. Then, rulers or governments, unable or unwilling to ban feuding, may intervene to encourage settlements within the feuding, since it undermines the traditional controls on the old system of sanctions before supplying an effective replacement" (Wilson, 1988, 417). In reality, in European societies the interconnections between feud and justice can been understood in all their complexity and transformations by exploring trial rites and their capacity to absorb or neutralize customary practices. In this context, see the outstanding pioneering work of Pigliaru, 1959. In recent years, research on the administration of justice and the criminal trial has grown, especially as regards the Middle Ages; in this essay we make use of some of the most significant studies. For the modern period, particular mention goes to Bellabarba (1996); the complete and in-depth study of Angelozzi, Casanova, 2008; and that of Covino, 2013, which I also refer to for fuller and more precise bibliographical references concerning the Italian context (Covino, 2013, 375–378). Essential for an overall view is the excellent synthesis provided by Bellabarba, 2008.

5 These problems are outlined in Povolo, 2004a, I–XIV.

A comprehensive history of European feuding still remains to be written. The problem of writing such a history would not only be a problem of synthesising a large literature on feuding in many different historical contexts over a very long period of time. It would also be a problem of dealing with a historiography which had assigned a great variety of meanings and definitions to what would be the central concepts of such a history (Netterstrøm, 2007, 66).[6]

Indeed, a vast historiographical literature has shown that the concept of feud has been examined not only with the use of substantially different terminological definitions, but also with reference to social, economic and institutional contexts that are sometimes hardly comparable, because of the heterogeneity and varying complexity of the sources used. In effect, while the interest of historians in feud comes from the stimulus given by anthropology,[7] there is no doubt that the phenomenon immediately called for an interdisciplinary approach, in which the historical dimension comes through the history of law, institutions and the economy.

In Germany, as Hillay Zmora reminds us in a recent work,[8] the discussion started from the famous test of Otto Brunner, Land and Lordship, which appeared in 1939. Since then it has been carried on by Gadi Algazi, Christine Reinle and by Zmora himself.[9] As seen by Brunner, the feud system took place in ritualized legal forms that envisaged a solemn challenge reserved to members of the aristocracy. Thus, it was a legal practice that distinguished itself from the simple bloodfeud (blutrache),[10] amounting to a real con-

6 The editors of this work have also examined the detailed description of feud formulated by Miller (Miller, 1992) and by Boehm (Boehm, 1984). In particular, Miller's analytic description seems to be the one applicable to numerous context, but it seems clear that it is above all the expression of a social system whose rules were eminently customary.

7 A point of reference common to studies on the feud has been the study of Gluckman, 1955, 1–14. In this essay, it is stressed that the feud system performed a function essential to the inner equilibrium of highly conflictual societies, both by serving as an authentic regulatory system of social control, and by performing the function of preventing inevitable feared reprisals. In truth, from the second half of the 20th century on the interest of historians in feud has generally speaking been directed to the largely unstudied anthropology of European society. This interest at first focused on a vast though vaguely defined area of the Mediterranean, but it was then quickly broadened to include the rest of the continent (Goddard, 1994, 57–92). It is worthwhile noting that the interest in the Mediterranean of English-language anthropology stirred considerable critical reaction, also on the part of certain anthropologists who saw in it a sort of un-avowed superiority towards a world that seemed still to conserve cultural values that had by then been surpassed, such as honour, kinship and feud. Actually, as was observed during the great conference dedicated to the Mediterranean and held in Aix-en-Provence in May 1997, "ces valeurs connaissent une accentuation singulière dans la plupart des sociétés méditerranéennes; elles y sont davantage explicitées; elles sont érigées, dans les taxinomies locales, au rang de concepts, avec leur cohorte de nuances et de métaphores récurrentes; elles font l'objet d'interminable débats au sein des sociétés qui les ont développées [...]. C'est en termes d'intensité et de modulation, de reconnaissance institutionnelle, et non de présence ou d'absence, que l'on doit apprécier la prégnance spécifique de ces valeurs" (Bromberg, Durand, 2001, 735–736). Significant for this type of approach, also in reference to feud, are the works of Anton Blok (especially 1975 and 2011).

8 Zmora, 2011, 1–28, with an introduction significantly entitled: *The Struggle over the Feud in Early Modern Germany.*

9 A detailed analysis of the historiographical discussion in Netterstrøm, 2007, 20–28.

10 Marco Bellabarba in particular has dwelled on Brunner's work in his *La giustizia ai confini*: Brunner's thesis

stitutional system. In a contribution that appeared some years ago in Past and Present, Howard Kaminsky claimed that this system could in a certain measure also be broadened to include France and England (Kaminsky, 2002), countries for which, in his judgment, the analysis of historians had been conditioned by an over-estimation of the role played by the state. This interpretation has been convincingly contested.[11] Studying the reality of German history, it was easy enough for Algazi to see feud as a practice of class domination and control exercised by the nobility, and thereby bring to light a certain ideological slant underlying Brunner's vision. By contrast Christine Reinle, while reasserting the legitimacy of this cultural practice and its ties with honour, held that it was not the exclusive monopoly of the privileged classes (Netterstrøm, 2007, 24–27). And finally, Hillay Zmora in his latest contribution sums up the complex historiographical debate that went on in Germany and goes on to propose an interpretation that seems inclined to accept an essentially political vision of the aristocratic feud.[12]

Thus, interpretations of the feud in Germany from medieval to modern times emphasize the customary aspects[13] of a social practice that has clear legal and political dimen-

revolves around "a right felt by men to be good and old, like wise custom accepted simply as an earthly image of an ideal of justice [...]. This idea of law also informs the actions of feud, judged to be legitimate if declared in order to defend the laws of the territory and, on the contrary, repudiated when under the aspect of vendetta it is distorted to become a means of individual protection" (Bellabarba, 1996, 18–19). However, the author underscores certain ambiguities that underlie the Austrian historian's thesis: "Bruner's isolation of the chivalric feud from the *Blutrache*, 'bloodfeuds' that broke out in rural or urban environments and were therefore illegal in that they violated the exclusively aristocratic right to bear weapons, would seem to ignore the texts of German statutory rubrics which, well into the 16th century, define at length the legal profiles of a phenomenon not at all marginal in the disputes among council factions and which was a source of distraught comments on the irrepressible disorder of urban politics" (Bellabarba, 1996, 28–29). As we shall see for the late Middle Ages, this ambiguity came to the fore because the aristocratic right to feud, understood as a solemn challenge (and reserved to the nobility), can be grasped in all its complexity only in the context of trial rites for the resolution of conflicts (and therefore of feud understood in its broadest anthropological meaning), above all following the refusal of an oath made by one of the parties.

11 In his work on the feud system in France in the modern period, Stuart Carroll observes that "in many cases the German word *Fehde* could be translated by generic words such as dispute or war, especially in regards to conflicts between towns and nobles and between parties of vastly different social status, that are difficult to square with anthropological analysis" (Carroll, 2006, 6).

12 "These relationships, involving both cooperation and conflict, provided a set of powerful incentives to engage in feuding. They informed a set of beliefs, preferences and motivations that, in many cases, drove nobles to feud as the best available strategy for protecting and promoting their interests" (Zmora, 2011, 27). As Stuart Carroll has noted, "Zmora wishes to restore the role of the state, stressing the relative neglect of feuds between princes and nobles, which he argues were as important as feuds between nobles. Not only was feuding widely seen as legitimate, it served as a tool of state-building" (Carroll, 2012).

13 In the sense we speak about later on. As Marco Bellabarba has rightly stressed in comparing Brunner's theses to those formulated by Raymond Verdier, which are based on the values of blood and honour, "The unwritten criteria of honour, like the uncodified ancient norms of the *Landrecht,* are also close in denying real validity to the contents and techniques of the law; the pairs 'peace and feud' – 'revenge and punishment' dictate attitudes and sensibilities, solve conflicts and lacerations regardless of the existence of legal institutions and the relationships of authority they create. Unmasked irritation with a theoretical notion of law, which becomes an arid list of formulas and procedures, leads these authors to stress the weight of widespread rules supported by feelings of class loyalty and amity, by family devotion or by respect for the customs of a territory" (Bellabarba, 1996, 31–32).

sions, while still being connected to an anthropological vision of conflict, as in other European contexts. However, this interpretation still leaves wide margins of ambiguity, since conflicts and contrasts seem to take place in the absence of judicial procedures and rites which in reality interacted profoundly with the dynamics of feud.[14]

Likewise, the debate about feud and vendetta in Italy in medieval and modern times was certainly neither clear nor linear. Here the debate revolves mainly around the works of Edward Muir and Trevor Dean (Muir, 1993; Dean, 2007). Jeppe B. Netterstrøm and Helgi Porláksson have effectively summed up this long-standing Italian historiographical debate (Netterstrøm, 2007, 29–40; Porláksson, 2007, 78–80),[15] following a line of interpretation with some points in common, but also with methods that are notably different in their approach to the sources examined.[16] Netterstøm rightly observes that the concept of feud has been applied more widely than that of vendetta, which seems instead "to be more specific to Mediterranean, Southern European and Middle Eastern contexts." In these contexts the term vendetta is often used as a synonym of feud. But he goes on to say:

> *The word vendetta tends to have a more singular meaning of vengeance. In comparison, it is possible to interpret the word feud, on the one hand, as a broader category (enmity, contention, quarrel) than vendetta and, on the other hand, as an even more specific (but sequentially more prolonged) form of vengeance than vendetta, namely as an extended chain of revenge actions, when 'vendetta' is taken to signify either a single act of revenge or revenge as a more abstract concept (Netterstrøm, 2007, 38–39).*

A superimposition of meanings, therefore, that would seem to make comparison with studies regarding other European realities more difficult. And, referring to Trevor Dean's studies of late medieval Italy and those of Edward Muir on 16th-century Friuli, the editor of the volume *Feud in Medieval and Early Modern Europe* notes that the term vendetta is used to cover very different cultural practices. For Dean, in fact, the term vendetta indicates a "vengeance of limited extent for specific injury, whereas 'feud' was a state of continuous animosity" (Netterstrøm, 2007, 40).[17] Whereas Edward Muir is inclined to consider the vendetta as a synonym of feud, that is, a phenomenon that expresses not only the act of violent reprisal but also a prolonged system of conflict (Netterstrøm, 2007, 30). Such terminological distinctions in reality imply notably diverse interpretative evaluations.[18] For if feud and vendetta are generally understood as two different cultural and

14 As Stuart Carroll has to say, "Germans, like all other Europeans, craved legal redress and demanded greater access to the law courts, the consequence of which was an unprecedented boom in litigation during the sixteenth century. This put a stop to the *Fedhe*, but it did not put an end to 'inimical intimacy'" (Carroll, 2012).

15 On Muir's work and on that of O. Raggio, already mentioned, see Smail, 1996a. Obviously, the discussion suffers from the scarce attention to the bibliography in Italian.

16 In order of appearance, and so following a thread of reflection which, despite the various periods examined, has been chosen in light of the specific disciplinary approaches: Povolo, 1997, 158–227; Zorzi, 2002; Gentile, 2007; Zorzi, 2008, 163–178; also the summary, already mentioned, by Marco Bellabarba.

17 Besides the above-mentioned work by Dean, see also Dean, 1997.

18 I should add that Edward Muir is aware of what Julian Pitt-Rivers had previously affirmed about the comparison of words belonging to different cultures: "Language relates to culture we would all admit,

social processes, in the sense that the former does not necessarily include the latter, on the contrary there are not many who would give the term vendetta the wider meaning of feud, accepting only its aspects of violent reprisal.[19]

In realty the superimposition of the two terms finds justification in certain contexts of Mediterranean Europe, and in particular in much of the centre-north of the Italian peninsula, which in medieval and modern times was pervaded with an intense conception of honour centring on status and distinction. And even though in more than one instance the term vendetta seems to indicate a single act of violent retaliation against an individual or group, it always refers conceptually to a feud system with complicated rules,[20] in which the dimension of honour is central to both the identification of the adversary and the dynamics that drive the conflict.[21] In a highly hierarchical society, the language of honour marked out not only the spaces of conflict, but also the outcomes of ongoing feuds. As Julian Pitt-Rivers has remarked:

> *The claim to excellence is relative. It is always implicitly the claim to excel over others. Hence honour is the basis of precedence [...]. Where there is a hierarchy of honour, the person who submits to precedence of others recognizes his inferior status. He is dishonoured in the sense that he has disavowed his claim to the higher status to which he aspired (Pitt-Rivers, 1966, 23–24).*

Thus, honour involved competition among all social classes, and the person who came out the winner of the conflict took possession of the reputation previously enjoyed by the defeated person. The dimension of honour was closely connected to that of power, and where the nobility held both political and economic supremacy it tended to monopolize the judicial and customary dynamics of the feud. Inevitably, conflicts over the management of power and resources were far more heated among the privileged classes, and possible recourse to violence often became inevitable:

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but it is not identical with it, and to equate the two is merely to shirk the real problem of translation, for language places limitations on what can be said but it does not tell its speakers what to say; the problem of translation is not 'just a matter of words'" (Pitt-Rivers, 1977, xi).

19 Helgi Porláksson writes: "I take for granted that many people find it difficult to imagine feuds without any corpses, or not even shedding of human blood. I have made a distinction above between a feud and a bloodfeud, a bloodfeud beginning when, after some escalation, men are being hurt or killed by their opponents. Feud in the broader sense is about claiming rights and is characterised by action in turns and escalation when claims were rejected. It is not the same as *Blutrache* which usually involves two killings, one in revenge. However the feud can turn into *Blutrache* and the word 'feuding' can comprise meanings. Thus *Blutrache* or customary vengeance is feuding in the more narrow sense and often the final stage of a feud". (Porláksson, 2007, 85–86). In the 16th-century society studied by Edwuard Muir, the word *vendetta* evokes the feud system, of which it is a significant expression. We might add that *vendetta*, in the common sense of the term, could not have been used outside of a genuine feud system.

20 In this connection, see the observation of Bellabarba, 1996, 31.

21 Besides Povolo, 1997, 266–333 see also Schwerhoff, 2004. As has been significantly stated by Marco Bellabarba "A careful staging of complicity regulates the course of feuds: revenge is not indiscriminate, and a challenge is not accepted unless the social distance does not create embarrassment between the adversaries" (Bellabarba, 2008, 105).

Therefore, the act of resentment is the touchstone of honour, for a physical affront is a dishonour, regardless of the moral issues involved, and creates a situation in which the honour of the affronted person is in jeopardy and requires 'satisfaction' if it is to return to its normal condition. This satisfaction may be acquired through an apology which is a verbal act of self-humiliation or it may require, and if the apology is not forthcoming does require, avenging (Pitt-Rivers, 1966, 26).

FEUD, VENDETTA AND FORMS OF POWER

The notion of vendetta was therefore inseparable from feud and the notion of honour that underlay it. Obviously, all this did not prevent tensions both with medieval and modern morality (Dean, 1997, 31–34),[22] or with the need to organize the containment of violence by relying on forms of composition and on judicial procedures that can be considered an integral part of the feud itself.

The specificity of the features encountered in the Germanic and Italian territories, respectively, as well as the differences that distinguish them internally can obviously be explained in light of the diverse historiographical approaches used to study the medieval and modern feud. Undoubtedly, as some scholars have observed, the cultural and political conformation of Europe was all but homogeneous. In certain areas of southern Europe there can indeed be found a stronger presence of lineage, understood as extended family unit as concerns family and social relationships.[23] This presence was widespread at various social levels,[24] though obviously it was in the sphere of the aristocracy that it took on political importance. It is likely that the mixture of the ideology of kinship and political power which found its highest expression in the city and in the idea of *res publica*,[25] exalted a conception of honour tied to status and the right of precedence.[26] The prerogatives

22 For a later period, see Povolo, 1997, 293–301.

23 "Virtue, honour and 'honours', in the sense of titles and lands, were three pillars on which old regimes rested [...] Anthropologists working on Mediterranean peasant societies at the present day have tended to see status as a function of 'political' considerations (in the broad sense). It is not that wealth is not important to social stratification: it is very clearly is. But money needs to be channelled into socially acceptable ways. The wealthy must, as it were, 'purchase' consideration by the prominent public role which they adopt, involving the 'protection' of the less fortunate" (Casey, 1989, 19–20).

24 Black, 2001, 107–128: "We can usefully distinguish between (a) 'family': the nuclear or conjugal group of parents and children whether married or not; (b) 'lineage': a kin group of blood relations who recognise their relationship, but without clear and accurate knowledge of the precise relationship, lost way back in the family tree. The extent to which this extension was recognised and played a role in family strategies, economic arrangements and political ploys was again variable. Kinship factors were not only important for patricians and noble families, when much might be at stake financially and politically, but also for some peasant families, with smallholdings who used kinship relationships in planning marriages that would help keep properties together" (Black, 2001, 110).

25 As Angela De Benedictis maintained, this ideology carried in the sphere of the urban ruling class an idea of *equality*, in terms of rights and duties, that did not contradict the diverse levels of wealth or political influence, and which found in the sphere of participation in the institutional life of the city one of its most important expressions (De Benedictis, 2001, 384).

26 On this subject, also for a more ample bibliography, I refer to Povolo, 2009.

of power and the relations of friendship,[27] spread by the nobility to the rest of society, are aspects whose intensity distinguish southern Europe on the whole, or at least certain areas where political power was fragmentary:

> *By translating the ideal of beneficence into the reality of behaviour we can see that it implies a concern in acquisition, on the one hand, with a view to gaining honour through disposing generously of that which has been acquired, on the other. To give a thing away one must first of all get hold of it. The same concern in acquiring honour, through the act of beneficence rather than, as in Anglo-Saxon countries, through the fact of possession, explain these extreme views. For Mediterranean honour derives from the domination of persons rather than things.*[28]

Thus, in some areas of southern Europe there were close relations between the prominent position enjoyed by the aristocracy and the idiom of honour through which its prestige and role in society were sanctioned. And it is above all in aristocratic society that we

27 A term that historians and anthropologists have better defined as *patronage*. On this important aspect, which clearly had strong repercussions on the management of feud, see Aymard, 1987. This question has been more fully treated concerning France by Dewald (1993, in particular 104 and ff). For England: Stone, 1977. As Dewald observes, "Through the seventeenth century, writers commonly used the term 'friend' to refer to protectors and patrons, this was friendship not as intimacy but as a means of organizing political and social life (Dewald, 1993, 106). This was a decisive aspect of the society of the ancien régime, and in recent years it has been treated in numerous studies. Examples are: Tadmor, 2004; Gowing, Hunter, Rubin, 2005, in particular the chapter by N. Tadmor, which explores the tie between neighbour and friendship relations in early modern England (Tadmor, 2004, 150–176); a general synthesis is found in Österberg, 2010. This author, who focuses for a long period on diaries and autobiographies, remarks: "In the Middle Age and the sixteenth and seventeenth centuries, the language and gestures of friendship were also employed in unequal relationships: between old and young, regent and courtier, and so on. The dividing line with what perhaps ought to be termed patron-client relationships was often indistinct. Patron-client relationships are meant to incline towards the informal, personal, and reciprocal, and, with a bit of luck, equal besides". Later, however, "broadly speaking, friendship, like love between adults, came increasingly to inhabit the private sphere according to the discourses of the nineteenth and twentieth centuries" (Österberg, 2010, 190–192). It should be added that in a republican political context, relations of friendship and *patronage* were very complicated at both the institutional level and at the more informal one. Cfr. what was observed at the time in Povolo, 1997, in particular 180–190 and in Povolo, 2009.

28 Pitt-Rivers' penetrating observation obviously is linked to the religious dimension and the cult of saints, which determined a large gap between Catholic and reformed Europe (Pitt-Rivers, 1977, 36). This is a significant question, for which I refer particularly, concerning some important aspects, to some recent studies: Cameron, 2010; Shell, 2007. Pitt-Rivers' thesis about honour and more generally his equalitarian conception of the rural world were contested by John Davis (1977). But the complexity of Pitt-Rivers's interpretative work shows up in all its relevance in the previously mentioned collection of essays, *The Fate of Shechem* (1977), which opens with the pages dedicated to *The Anthropology of Honour*, in which Italian 16th-century society is egregiously investigated along the lines of F.R. Bryson's, *The Point of Honour in Sixteenth Century Italy: an Aspect of the Life of a Gentleman*, published in Chicago in 1935. Pitt-Rivers' pages significantly resume his prior *Honour and Social Status*, published in 1966, but in a manner that is autonomous respect to the analysis dedicated to the Andalusian community of Grazalema, to which a chapter was dedicated (*Honour and Social Status in Andalusia*).

can see the activity of the genuine networks that could interfere significantly both inside and outside of the political context where they originated.[29]

Actually, it is possible to fully understand the close links between feud and organizations of family and kin groups only by analysing the specificity of medieval and early modern political organization. Over this long period of time, the stratification of law covering various European countries, while not homogeneous, would seem to suggest the existence of social structures quite similar to what anthropologists have defined as semi-complex. In these structures political power is substantially separate from that of kin groups, even though the latter are still strong enough to make their interference felt in political life (Rouland, 1992, 190–191). At the same time, the legal dimension includes both myth and custom and a well-defined formal level centring on abstract, written rules.[30] All three of these aspects can be found, for example, in the system of ius commune, which spread to most of medieval and modern Europe.[31] As we shall see, the ius commune em-

29 Charles Tilly defined these as *trust groups*: "How will we recognize a trust network when we encounter or enter one? First, we will notice a number of people who are connected, directly or indirectly, by similar ties; they form a network. Second, we will see that the sheer existence of such a tie gives one member significant claims on the attention or aid of another; the network consists of strong ties. Third, we will discover that members of the network are collectively carrying on major long-term enterprises such as procreation, long distance trade, workers' mutual aid or practice of an underground religion. Finally, we will learn that the configuration of ties within the network sets the collective enterprise at risk to the malfeasance, mistakes, and failures of individual members [...] The quality of public politics in one regime or another depends significantly on relations between people's basic trust network and rulers' strategies of rule". The forms of integrations of the various trust networks are decisive in the political sphere: "Integration of trust networks into public politics varies from indirect to direct. *Indirect* integration occurs when trust networks extend into politically engaged actors such a local organisations, churches, or labor unions that in turn bargain with each other and with governments over the allocation of politically mediated costs and benefits. *Direct* integration occurs when trust networks extend into government itself, for example through the incorporation of kin group members into national armed forces, establishment of state churches exercising monopolies over political participation, or government creation of social security systems tying the futures of workers to governmental performance and the reliability of government employed providers of services" (Tilly, 2005, 4–7). In medieval and early modern society, the close mingling of political power and kin groups is visible in many Italian cities.

30 Abstraction is implicit in writing. As Jack Goody has observed, written culture is endowed with a high capacity for abstraction and a different control over time and things. "In oral cultures learning is inevitably a more contextualized process, taking place on the job rather than in special setting. Verbal accounts of acts and beliefs are little used compared with what happens in their written equivalents in literate cultures; there the medium in any case permits a more abstract, more generalized, more analytical approach. Oral learning entails a greater account of showing, of participation" (Goody, 2000, 24). The introduction of Roman law inevitably also led to the use of forms of legal reasoning with premises and conclusions that generally served to justify judicial decisions. As noted by Lawrence Friedman, differently from customary systems, where judges draw on custom and common sense in so-called *closed* systems "those who have to decide believe they must base their 'legal' premises; that is, they divide the universe of propositions into two categories, of which one is that of 'legal propositions', which – uniquely – can legitimately function as premises for juridical reasoning", cf. Friedman, 1987, 392–393. See also the observations of Berman in the following note.

31 Concerning the towns, which starting from the 12th century characterized the European political and social dimension, Harold Berman has noted: "The capacity of urban law for growth and its tendency toward growth were connected with its character as a legal system, which was also partly inspired by the systematic character of both Roman law and canon law. Especially in the Italian cities, but to a lesser degree elsewhere

bodied in its formulations and procedures a legal system directed at limiting violence and maintaining peace. It was a legal system rooted above all in the cities of Europe, which considered themselves authentic political entities, separate from ecclesiastical power:

> *Their tasks of maintaining peace and justice were independent of the tasks of the church in maintaining the Christian faith. And those independent tasks of maintaining peace and justice were themselves taken to be, though temporal, nevertheless ordained by God, worthy of unstinted devotion, and an important part of God's plan of salvation for mankind (Berman, 1983, 394).*

A decisive influence on the characteristics, development and intensity of the feud was the political and institutional structure framing the dimension of conflict. This dimension can be comprehended in the times and the ways in which the ius commune was received,[32] as well as in the concrete judicial practice that spread and legitimated it. While in many parts of Europe new monarchical territorial entities were formed, in the 13th-14th centuries in central-north Italy the cities acquired wide margins of political autonomy.[33] This autonomy significantly expressed the great economic and demographical expansion that took place in the 14th century, despite the fact that most European areas were still rural (Leguay, 2000, 103–104).

Thus, mythical, customary and formal-juridical aspects interacted in the political life of European cities, which was very soon monopolized by groups and families in continual conflict over the management of power. This new elite comprised bankers, merchants, lawyers and notaries, though representatives of the so-called popolo grasso also set themselves at the head of town councils (Leguay, 2000, 118–120).

FEUD BETWEEN CUSTOM AND TRIAL RITES

Both medieval and legal historians have stressed the importance of the new system of criminal justice that established itself almost all over Europe, as well as on the role of universities and jurists in the spread of common law.[34] As has been claimed, this was

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as well, urban laws was considered to be based, in the first instance, on custom (*mos*, *consuetudo*, *usus*), and in the second place, on rules enacted by rulemaking authorities, which were in turn divided into ordinances (*statuta*) of guilds and other associations and laws (*leges*) of the city legislative authority or of the king or emperor. Statuta and leges had the quality of being written, which gave them a special significance" (Berman, 1983, 397).

32 As it is possible to see in regards to Germany and Scotland.

33 "At no point was it possible to disregard the models transmitted by the Roman law of the glossators which, having crossed the Alps at the end of the twelfth century, dominated all the thought of the great continental jurists in the following century [...] Then began a threefold evolution which dominated the reorganisation of the states of the west. The empire did not disappear, but it fragmented while the national monarchies triumphed a little everywhere, except in the Italian peninsula where the city-states secured their success to varying degrees" (Rigaudière, 2000, 18–21).

34 As has been underscored by Manlio Bellomo, the system of law that took shape found its legitimization in the idea of empire, but the *ius commune* also accommodated local legal and customary systems (*iura*

a genuinely epochal revolution, whose influence can still be seen today in values and ideologies linked to the administration of justice. The phenomenon began to take on its characteristic features concretely in the late 12th century, with the adoption of Roman – canon law procedure. Very soon a bureaucracy grew up, made of judges, lawyers, notaries and court clerks, with the result that laymen were gradually excluded. The new procedure wase complicated, comprising various phases that took place both orally and in writing (*ordo iudiciarius*) (Brundage, 2008, 151–163). The role of the judge (*officium iudicis*) clearly indicated the separation of the person from the power exercised. However, both the Church and secular authorities felt the need for more incisive procedures in order to intervene in the autonomous organization of local conflicts. And so, very soon a new investigative procedure took shape, one promoted and controlled by the court (processum per inquisitionem) and entrusted to the initiative of the judge.[35]

This doubtlessly represented a profound transformation in the management of conflict and the implementation of social control. According to many scholars, albeit with considerable adjustments and modifications it continued to have an important influence in the centuries that followed. However, it is possible to consider the full reach of this transformation only by comparing it with the customary system of previous centuries. This system encompassed a complex regulation of conflicts and a highly sophisticated system of proofs. Despite its presumed irrationality, in the context of changing social and political realities it was a significant expression of prevailing cultural values.[36]

Raoul Van Caenegem has well summed up the system:

> *The means of proof were mainly irrational.[37] Justice employed divine and supernatural powers, as in the case of judicial duels and other ordeals, as well as in the oaths made by one party and its supporters. Rational proof, using documents and witnesses, was not excluded, but proof through the cross-examination of witnesses for both parties was not developed and was highly formalistic. When witnesses of the two parties refused to renew their testimony and consequently the judges found themselves in a*

propria). This system was able to represent both the instances of the Church and those of secular political entities, in particular the towns. It was a juridical order that weathered almost without harm the political transformations of the modern age, still influencing public politics in the 19th century. The medieval legal system, in fact, offered an exceptional synthesis for the complex political reality of the period, merging the two concepts of pluralism and universalism. It was a system that created a universalistic Christian cultural unity, and it was indissolubly tied to the idea of Europe as a cultural and spiritual phenomenon (Bellomo, 1995, in particular 55–78).

35 These themes have been fully treated in a comparative and historical key in Damaška, 1986.

36 "The most infamous form of dispute was undoubtedly the feud or blood feud. This was common in both continental and insular Europe, and had been described by the first-century Roman author Tacitus in his Germania. The feud can be defined as a conflict or series of conflicts between individuals or groups – resolved either through private vengeance or by means of the payment of compensation for the initial offence, which in many cases was an homicide. The killing of the slayer by the kinsmen of the victim should not necessarily be regarded as being symptomatic of a lawless society, though the payment of compensation was presumably a more socially acceptable means of resolution" (Thornton, 2009, 100).

37 As can be easily understood, this definition is inappropriate, or at any rate does not fully reflect the whole of a complex procedure whose goal was essentially to maintain social control.

blind alley, the duel was the only way out. In no case did judges effect a critical confrontation of the parties or of witnesses that might have revealed a contradiction (Van Caenegem, 1995, 47–48).

The probative system of the ordeal, which reached its high point during the Carolingian period and was definitively challenged with the fourth Lateran Council in 1215 (Taruffo, 2009, 3–4), was for a long time considered the most significant expression of a society that entrusted itself to the supernatural world in the search for truth, contrary to the subsequent modern recourse to testimony. In truth, as has been noted:

This antithesis was simply not important in many places and at many times during the Middle Ages, since medieval man was quite comfortable both with this reason and with the belief that God could intervene directly in human problems. The coexistence of both rational and irrational means of proof shows that medieval courts certainly embraced facts that could be established without divine intervention. Indeed, they turned to the ordeal, certainly the most dramatic of the so-called irrational proofs, only in special circumstances. We must, therefore, see the ordeal as part of a wide range of options for establishing truth and reaching a settlement (Ziegler, 2004, 2).

Underlying the cultural misunderstanding that began in the 18th century regarding the medieval world, its forms of justice and search for truth, there was a far deeper antithesis: one which opposed a customary world characterized chiefly by orality and the mingling of legal and social facts[38] with the world that prevailed afterwards, based mainly on written law as interpreted by an order of professionals. As was shown years ago by Rebecca V. Colman:

Early medieval social structures were at the same time simpler and more complex than our own [...]. In medieval villages wise men concerned themselves with social problems; distinctions and definitions came slowly as needed. The legal notion of evidence, for example, barely began to be clarified before the central Middle Ages, and in royal courts of England, as doubtless elsewhere, there was still much confusion between fact and law in the twelfth and thirteenth centuries (Colman, 1974, 580).

Justice by ordeal, which comprised both the legal duel and other proofs like those by water or by fire, was culturally and functionally rational: it was part of the Germanic model of process, characterized by a confrontation between the parties in which the judge was

38 In the customary world, as Norbert Rouland has clearly shown, "the legal rule takes on religious or moral norms and it operates in various sectors, from the economy to politics. Yet it differs from them, because while legal facts are social fact, not all social facts are legal ones: the legal fact is the object of a specific social control, of an institutional type [...]; only the institutions that take on the function of reproduction of social life are legal facts, being the ones that a society considers essential to its cohesion and personality" (Rouland, 1992, 145).

called upon only to decide which sort of proof should decide the controversy (Taruffo, 2009, 6–7).[39] But this confrontation took place primarily through the presentation of witnesses and documents and was borne out by the solemn proof of an oath referring directly to the supernatural world. If this proof was considered insufficient by the opposite party, the path towards a solemn declaration of feud was opened (Ziegler, 2004, 2–3).[40]

Thus, the solemn oath was held to be genuine proof by ordeal and the extremely important role it played was very different from our current-day oath, which is always subject to court verification:

> *If the oath were sworn, then the judge was bound by it and was forced to end the legal dispute. The swearer became his own judge and gave his own verdict. Not the verifiable fact, but the oath was the truth. As in the case of documents and seals, the truth resided in the properly performed oath [...] Faced with an accusation for which an oath constituted proof, the individual could take the oath alone, or he could offer compurgators; the determining factors were the crime and the status of the defendant (Ziegler, 2004, 2–3).*[41]

A contested oath could open the way to the ordeal of judicial duel, above all in the case of atrocious acts or crimes whose peculiar nature prevented recourse to compurgators. In a certain sense, ordeal could be considered a sort of control or containment of feud.[42] Thus, judiciary and trial practice in the early Middle Ages clearly reveals its close connections with the feud system and the cultural and customary values that legitimized

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39 Even during the Carolingian period, when it is obviously possible to find a decidedly stronger authority, conflicts by fuel underwent little limitation. As has been noted in a study dedicated to the Valley of the Rhine in the period 400–1000, "although disputes were articulated in term of personal claim and counterclaim, royal officials did, when necessary, step in. But kings and their officials made no attempt to define the patterns of legal interaction, or the conduct of disputes: they did not have a distinct coercitive agency with which they could impose their will. Rather, they worked through local forces to reinforce existing social norms [...]. Hence Carolingian legislation on the bloodfeud did not strike at the logic of reciprocal action per se, but gave official backing to the inevitable local forces for pacification and compromise" (Innes, 2000, 135).

40 For this reason, some early medieval scholars (see, for example, the position of Guy Halsall, below, note 49) have underscored the legal dimension of early medieval feud in alternative to the broader notion given it by anthropologists, which assumes a prolonged, latent conflict. As we have seen, for the Germanic area this distinction has profoundly engaged the historiographical debate.

41 See also Taruffo, 2009, 7, who states: "another widely used form was the oath made by a group of persons (usually called *coniuratores*) on behalf of one of the parties". It seems clear that the collective oath could be determining in avoiding the solemn opening of a feud. The fact that outsiders, slaves or anyone whose reputation was not held to be worthy were excluded from the oath underscores the community nature of the judicial conflict. All of the *coniuratores* could be forced to undergo the ordeal of fire or water (Ziegler, 2004, 6). I refer to the works of Zigler and of Taruffo for a fuller bibliography on the theme of proofs in the early Middle Ages. As it is not possible to develop here the early medieval judiciary and probative system in all its complexity, I limit myself to outlining it so as to give as best as possible an indirect glimpse of some aspects of feud.

42 "In the course of the Middle Ages the boundaries between the battle as a legal procedure and the battle as a defense of personal honour became less clear" (Zigler, 2004, 8).

it, though obviously varying geographical and political contexts determined modifications and particularities.[43]

The primary object of the early medieval feud and its procedural implications was to keep the peace and maintain social equilibrium. This aspect has been underscored by Kiril Petkov in an interesting analysis dealing with the so-called kiss of peace, which in the early Middle Ages and in the following centuries marked rituals of pacification:

> *The kiss of peace had a role and functions that none of the other judicial instruments possessed [...]. Performing the rite, the individual and the group he or she stood for admitted that peace existed, not only as a period of nonviolence, spacing the intermittent line of feuds in the premodern societies, but as a legal category in its own right [...]. The ritual was also an acknowledgment of the rights of the 'other' party in the feud to request, receive, and enjoy that peace. Contrary to expectations, the rite stimulated the development of the concepts of objectivity and equity in the legal practices of non-Roman origins (Petkov, 2003, 128–129).*[44]

The social and political changes of the 13th and 14th centuries worked especially to modify the relations existing between customary and written law, both by imposing different models of social control and by establishing a judicial system based on means of proof centred on testimony, torture and confession. In this system the presence of the judge prevailed over that of the opposing parties, and took on a more active role than in past centuries.

In this connection a hegemonic form of justice has been spoken of, one which weakened "the role of social mediation in the solution of conflicts born of a crime, because it imposes the idea that there is no justice without the punishment of the culprit" (Sbriccoli,

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43 The close connections between feud, kin groups and judicial rites has been shown for England and Ireland by David E. Thornton: "If methods such a distraint or the use of sureties failed to achieve a settlement, the parties could resort to independent judgement by a judge or court [...]. Such assemblies would appear to have been local public gatherings, involving legal experts who determined the final judgment and – like the later hundred-courts that replaced them – were held on or near boundaries, roads or rivers, or at places marked by stones or trees [...]. Such lawsuits could involve the use of witnesses, preferably independent eye-witnesses to a contract, and also compurgators or "oath-helpers" who would support the oath and pleadings given by the disputing parties but whose value as such depended on their respective status" (Thornton, 2009, 102). See more in general: Davies, Fouracre, 1986. The bibliography on feud in the centuries of the Early Middle Ages is very large: Smail, Gibson, 2009; Throop, Hyams, 2010; Tuten, White, Billado, 2010. A summary for France Rousseaux, 2006.

44 However, the author underscores the liminal state of this rite in the early Middle Ages, suspended as it is between the situation of truce and that of the closing of the feud. Its judicial use could channel the affair towards the latter solution: "The legal kiss created a normative, structural liminality [...]. The definitive end of the feud was not yet fully in sight, but open hostilities were suspended for a time, conditions to be fulfilled were carefully negotiated, and vengeance was held off. The obligation taken in the course of the ritual performance, whether active liability or passive duty, either specific or large and unspecified, was unstable, and new outbreak of violence could occur in spite of all ritual guarantees. It was legally actionable in court however, and although operating in a liminal field, paradoxically enough, channelled the affair into a more predictable course" (Petkov, 2003, 133).

2009, 8).[45] This thesis evidently assigned an important role to certain formal-judicial aspects that developed above all in the 13th–14th centuries. However, while on the one hand it underestimated already-existing similar forms of justice, on the other, as we shall see, it gave excessive importance to the relationship between political power and the administration of justice, which was in fact still profoundly characterized by the city-community dimension.

Similarly to Mario Sbriccoli, in their effective earlier summary of the history of criminality the British scholars, Geoffrey Parker and Bruce Lenman identified the late Middle Ages as the period when two distinct legal traditions began:

> *One [...] exalted restitutive justice and developed from the laws of the German tribes who invaded the Roman Empire; it will be called henceforth 'community law'. The other, to be called 'state law', emphasized punitive justice and was rooted, at least in part, in the legal system of that Empire and its Byzantine successors. The gradual displacement of the former by the latter, a process which began in the tenth century and lasted until the nineteenth century, was one of the central (yet most neglected) developments of European history, constituting a revolutionary change in legal methods and in the techniques of social control (Lenman, Parker, 1980, 23).*

This was a community legal system, therefore, based on peace pacts, feud and restitutive justice, but also inclined to use severe punishments against strangers and the lower classes and to assert the jurisdiction of the courts and personnel responsible for administering justice. However, it was a cultural system whose more traditional features included an initial general reluctance to resort to courts and a strong preference for punishing the criminal rather than the crime, but which in the end inevitably had to face the development of a form of justice with a decidedly punitive orientation.

These two scholars also state that the emergence of a state legal and judicial system was accompanied in continental Europe by reception of common law and its concrete use in the courts. The spread of the inquisitio from ecclesiastical to secular courts and the use of a new system of proofs (learned or legal proofs) intensified the punitive aspects of the administration of justice.

The two systems coexisted and interacted, though political and social factors worked to favour the prevalence of the state law, until it asserted itself completely in the 19th century. In the opinion of these two scholars, this long and difficult process clearly originated in the changes that took place in the 11th and 12th centuries as a consequence of the introduction of Roman canon law.

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45 According to the author, this form of justice rapidly replaced alternative forms of *negotiated justice*, which was based on mediation and acts of peace. This thesis has also been generally accepted in the numerous contributions included in Bellabarba, Schwerhoff, Zorzi, 2010; and it has recently be repeated in Meccarelli, 2009, 79–80. In realty, as we shall see, we can speak of actual *hegemonic justice* only starting from the 16th century, at the moment when trial rites are separated from the social contexts they are imposed on, and are certainly not inclined to represent conflicts of feud. In fact, underscoring the *hegemonic* and punitive aspects of medieval justice sets it against the background of the decisive role it played in sustaining the customary system of feud.

The picture drawn by Lenman and Parker is of doubtless historiographical importance. It has had much influence on later studies, especially those concerning crime and social control. Though the portrait it painted was not without ambiguities,[46] its nuances, with its highlights and shadows, traced a very persuasive picture of the two systems being confronted. Actually, the connection between the rediscovery of Roman law and the emergence of state law did not seem totally convincing, nor did the substantial continuity of the latter from its weak beginning in the Middle Ages until its decisive prevalence in the 18th and 19th centuries.[47] The hegemonic justice that was established in centre-northern Italy during the Middle Ages had above all the goal of representing the feud in the legal sphere of the trial, in order to contain the bloody outcomes of conflicts between factions and family groups.[48] In the following centuries, this cultural and political process would also occur in distinctly different lands, such as Germany and Scotland, when the reception of the ius commune favoured mingling the customary practices involving feud with the judicial procedures elaborated by jurists.

The comparison between areas where customary practices that included feud prevailed with territories where from the 12th century on the ius commune was established, with its new instruments of social control, is of great interest, for it allows us to grasp the various meanings attributed to the practices of conflict. In a dense contribution dedicated

46 Criticisms of Lenman and Parker's theses were made some years ago by two Danish scholars, who focused their research on the Island of Falster and the town of Elsenore (Denmark), cf. Johansen, Stevnsborg, 1986.

47 The two scholars rightly underscored the complexity and diversification of Roman law in an area as politically divided as continental Europe: "The matter is complicated by the fact that the 'reception' involved at least three different processes: the application of the maxims of the law itself; the adoption of the trial procedure known as *Inquisition*; and the acceptance of the need to harmonize all other legal codes with these imported practices", (Johansen, Stevnsborg, 1986, 29). But it could seem paradoxical that they then go on to claim: "it was inevitable that these two legal systems should have come into conflict, at least outside Italy" (Johansen, Stevnsborg, 1986, 32), that is, in the country that was the first to record the reception of common law. In reality, it was precisely in Italy that the complex legal discourse known as *ius commune*, far from attesting the establishment of a form of justice that was the hegemonic expression of *state law*, favoured the continuance of the community legal system, with its innate vocation for arbitration and feud, while at the same time fostering the growth of new ruling class. In a summary of great historical importance, Antonio Padoa Schioppa has observed in this context: "It would, however, be a mistake to suppose that the Roman model worked only in favour of the power of the state. One of the reasons for the extraordinary success of Justinian's compilation in the history of European law is its ambiguity, or rather its polyvalence. The rights of the individual could find firm support in Roman rules about private property, or the power to dispose by will, or freedom in shaping contracts, on the rights of women or of minors (to confine ourselves to a few examples only). With the help of the *Corpus iuris*, such rights could be defended not only against other individuals but also against public authority", cf. Padoa Schioppa, 1997, 341.

48 It seems clear that the definition *hegemonic* of state justice refers first of all to the political-territorial dimension (no longer the community or the city, which also possessed a surrounding territory or a rural district) and to the imposition of a punitive logic that was largely extraneous to the interests and values of the urban ruling classes. As has been observed, "it is clear that the European state did not spring directly out of cities. The leagues between cities – like the Lombard League of the late twelfth century or the Hanseatic League – at certain stages in their history developed their own political and judicial institutions, but they did not turn into states. Often it was precisely those regions where the city constitution had reached its fullest expression which failed to achieve the formation of true states, and this in spite of important anticipations..." (Padoa Schioppa, 1997, 344).

to the widespread violence found in early medieval Europe, Guy Halsall shows how the word faida reflected a totally legal practice, one that cannot really be likened to or included within the concept of feud formulated by anthropologists:

> *In most early medieval vengeance killing, however, the violence is tactical, and, provided that it is conducted according to the accepted norms, it terminates the dispute. These societies held to a law of Talion: an eye for an eye and a tooth for a tooth. In the settlement of post-Roman disputes, the strategic element was the threat of violence. Public declarations of enmity or anger made clear an intention to seek vengeance, publicized the wrong done, and moreover manifested the party's belief that it had the right, should it wish to do so, to extract vengeance. It is this legal right which was meant by the word faida and its cognates (Halsall, 1999, 12).*[49]

Feud, therefore, understood as a socially controlled legal practice whose aim was to limit violence. And which, as we have seen, can be fully comprehended only if seen in the context of the elaborate early medieval system of proof. Halsall's remarks would seem to reopen the debate on Brunner's thesis about the feud in late medieval and early modern times. And as Harold Berman has shown, the reception of the ius commune in Germany, which mainly took place in the first decades of the 16th century in the wake of political changes that served to exalt the role of the German princes, had the effect of significantly modifying the practices of conflict envisioned by customary laws. And though German jurists were inspired by the great statutory production of the Italian cities, the causes that led to the profound changes in modes of social control that took place in the German lands were very different. In the face of the problems of order caused by vagrancy and widespread social unrest, more radical measures were called for:

> *The preexisting system of criminal law, based as it was on the presupposition of stable local communal institutions, was not adequate to deal effectively with widespread and mobile crime of a quasi-professional and professional character. Moreover, the ecclesiastical courts, which had had a very broad criminal (as well as civil) jurisdiction, were losing substantial parts of that jurisdiction to princely and urban courts, whose procedures were, once again, not well suited to deal with the increased number and*

49 However, Halsall adds: "Nevertheless, feud can be used to describe other violent relationships, some of which did exist in the early middle ages. Of course, if mechanism failed, then *faida* could become feud, but this does not seem to have occurred often, because of the existence of numerous mediating factors: state, church, community" (Halsall, 1999, 27). In this regard, Jeppe Netterstrøm remarks: "Halsall's thesis seriously challenges the survival-of-feud tendency which more or less intentionally is part and parcel of much work on European feuding. Although much European feud research has made a point of rejecting straightforward evolutionist explanations of the development and decline of feud, many would probably still imagine the potential of widespread feuding to have been larger in the Early Middle Ages than in the Early Modern Period. And the later feuding in one way or the other had its roots in earlier feuding", (Netterstrøm, 2007, 63–64). Actually, the most important differences that can be found between the early medieval feud (in the sense proposed by Halsall) and that of following periods are due to the insertion of the customary system into that of the *ius commune* and in the trial rites that marked it.

variety of cases. Similar problems, though not so acute, exited in England, France and other countries of Europe (Berman, 2003).

Such transformations sensibly influenced the modalities of feuds, which no longer took place essentially within the sphere of the old customary practices, but instead were received and redefined within the ambit of learned procedures. A similar phenomenon was to occur towards the end of the 16th century in Scotland. As Jenny Wormald has stated, the customary procedures that drove feud were received and reformulated in the sphere of legal practices and trial procedures through the mediation of an influential class of lawyers and legal professionals (Wormald, 1980).[50]

It is obvious that the political and cultural context which in the 12th century saw the reception and spread of the ius commune in the cities of the Italian peninsula was very different. However, there is no doubt that the political formation of the new territorial realities centred on the autonomy of urban centres in the end led to a redefinition of the modes of social control, and in particular of the way feuds were carried on. Ancient customary practices and new legal institutions interacted in the sphere of trial procedures variously proposed and theoretically formulated by jurists with a Romanistic formation.

CUSTOM AND THE NEW JUDICIAL PROCEDURES

Research carried on in recent years on the concrete judiciary activity of some urban courts in central-north Italy have revealed that the procedures used in trials both of the accusatory and the inquisitorial type not only acknowledged an important role for the parties in conflict, but also adopted a flexible approach characterized by pacts of peace and by mediation (Maffei, 2005; Vallerani, 2005; Rubin Blanshei, 2010).[51] Obviously, this type of justice was socially selective, directly reflecting, as Sarah Rubin Blanshei has noted, the interference of local political dynamics with those who were responsible for its administration (Rubin Blanshei, 2010, 320). Massimo Vallerani has well illustrated how the distinction between accusatory and inquisitorial procedures was actually not very important, either as regards the interference of the parties or the frequent use recourse of procedural mechanisms. For instance, the ample use of procuratori and of guarantees (*pieggerie*) show that trial rites aimed chiefly at re-establishing the order of peace (Vallerani, 2005, 197–199), while the frequent recourse to the penalty of banishment reflected a justice whose aim was both to favour the composition of conflicts between parties and to exile elements felt to be hostile to the community (Maffei, 2005, 129, 145; Vallerani, 2005, 170). Thus, research suggests on the one hand a significant blending of custom

50 Michael Braddick has well summed up a process that was both political and cultural: "feuding could serve to control and resolve conflict and was a supplement to legal process since arbitration to end the feud might well include legal settlement. There were close connections between the principles and practice of the feud and legal procedure, not least in the way that compensation was built into formal legal settlements" (Braddick, 2004, 357–358).

51 A type justice, therefore, that can only with difficulty be defined as hegemonic or as the expression of state law.

with trial rites and on the other the tendency to adopt procedures inclined to re-establish equilibriums upset by conflict.[52]

It seems clear that a real understanding of the feud in ambits that adopted, in different periods and different ways, the learned procedures of the ius commune spread by expert legal professionals, can only come about through a historiographical approach that is willing to accept the tools typical of legal anthropology. As Thomas Kuehn has said, this approach has allowed us to appreciate the widespread legal pluralism existing in medieval and early modern society, and also:

> *In study of the Middle Ages, then, one finds that feud and vendetta lasted throughout the period as "normative" forms of dispute processing, flanked by other customary and extra-judicial forms. But it also clear that the Middle Ages were not just a negative backdrop or a stage to transcend in order to arrive at modern states and laws. There were moments of centralization of political power and courts, as with the Carolingian and Anglo-Saxon monarchs, that left a legacy of importance for later developments. There was also the legacy of the sophisticated and written Roman law. Legal developments of the Middle Ages were complex, bust among the most important of the period (Kuehn, 2009, 335–336).*

The contribution of legal anthropology can be of great interest for the study of the feud in showing the relationship existing between the procedures and protagonists of a trial with the social dimensions of the conflict. This contribution has been applied, at least theoretically, by the legal historian Peter Stein in his *Legal Institutions: the Development of Dispute Settlement*, following the approach developed by social anthropology (Stein, 1984).[53] The new forms of justice were characterized by the adoption of written procedures entrusted to genuine legal professionals, but also by a great flexibility in accepting customary practices that were still in force:

> *In such societies, informal mediation, arbitration and self help through retaliation are less prominent than in the societies which lack such institutions. But these methods of dispute settlement do not disappear. They may survive as alternatives to the regular court process, or they may be incorporated into that process and allowed after a court decision to that effect (Stein, 1984, 13).*

It is possible to appreciate this interrelation in the dynamics of trial proceedings, especially in reference to the feud which, more or less intensely according to the territories and the periods in question, was channelled into the new procedures, whether accusatory or inquisitorial. This phenomenon was to continue well into the modern period, even when a real hegemonic justice system prevailed, shifting the emphasis from an order of

52 Daniel Lord Smail has studied the relationship between *ex-officio* procedure and the spread of pacts of peace in the city of Marseilles (Smail, 1996b).

53 On Peter Stein, see Kuehn, 2009, 351.

peace, the expression of deep-rooted community law, to an authentic public order, the reflection of a society that demanded different parameters of social order and security (Povolo, 2007 and 2011).[54]

The more easily available trial records for the early modern period and accurate studies based on the scarcer and more fragmentary ones left us from the medieval period allow us to grasp the most important aspects of the management of feud in the sphere of trail rites. Despite their geographical particularities and the changes undergone over time, these rites reveal the existence of a community law legitimized by a constitutional and class system that originated in and referred back to the Middle Ages and did not definitively disappear until the end of the ancien regime.[55]

The main aspects of feud can be appreciated in the trial rites by focusing on the procedural phases that directly influenced the development of the conflict. This procedure was distinguished by customs and local norms, but it followed an underlying logic that can be summarized in the light of the feuds that pervaded it.[56]

- *Start of proceedings*. The start of proceedings, especially in the presence of an inquisitorial procedure (*ex-officio*), was often decisive in determining the subsequent development of the conflict. The various more or less solemn forms of summons adopted and their publication directly influenced the penalties inflicted. They were also essential for classifying a procedure more suitable for delimiting and carrying on feuds than for a different procedural mode, whose purpose was, instead, to punish behaviours considered detrimental to society's security and moral values. As we shall see, a non-solemn procedure allowed the defendant to defend him/herself by proxy or per patre, or else to obtain a safe-conduct. In murder cases this allowed him/her to defend him/herself in advance from certain aggravating circumstances, such as premeditation. A non-solemn summons aimed essentially at bringing into its sphere a type of conflict still carried on prevalently in an external social context, thereby facilitating pacification and the restoration of the equilibrium that had been upset. Defined as *processo informativo* (informative process), the start of proceedings was accompanied by the examination of witnesses. If the initiative was taken by one party, the witnesses were supplied by the injured party him/herself, while in the case of *ex-officio* initiatives they were summoned by the judge. These first statements were clearly decisive in determining both the type of citation deliberated and the possible arrest of the accused. The judge's discretion-

54 As we shall see, in certain social contexts even the more traditional forms of trial rites underwent substantial modifications that considerably complicated management of feud by the forces involved.

55 Fioravanti, 2002; Najemy, 2004a, in particular the contributions of Kent: *The Power of the Elites: Family, Patronage, and the State* (Kent, 2004); and of Najemy: *Governments and Governance* (Najemy, 2004b).

56 The following summary traces the general outlines of a procedure that reflected and embodied local customs. It should also be added that though these rites were modified over the centuries in medieval and modern times, nonetheless they continued to follow certain fundamental orientations up to the first half of the 17th century. Along with the works cited for the 13th and 14th centuries, this outline is based on Bellabarba, 1996, 257–300; Povolo, 2007; Povolo, 1996, 9–32 and Povolo, 2004b.

ary power in general was more or less important according to the danger that the crimes being tried were felt to represent to the community. In this first phase of the trial, the judge traced the boundary between two substantial dimensions of justice: one aiming at affirming the public jurisdiction of the city, and the other whose goal was to channel the feud into the trial sphere. It seems clear that when the city's dominion covered a fairly wide territory the court was inclined to use the former form of justice for conflicts and feuds existing there. The defendant's social position was, however, the crucial factor in having recourse to a flexible procedure that allowed wide room to feuds. The arrest or presentation of the reo was followed by his/her interrogation, the so-called costituto de plano, which could be accompanied by torture. The essential purpose of the interrogation was to ascertain the defendant's identity and his/her position in regard to the charges brought in the summons.[57] In this context we can explain the fact that a copy of the interrogation was communicated to the injured party to ask for possible objections. In this phase the defending attorney came onto the scene. This was generally necessary for the defendant to be granted release after interrogation, so that s/he could follow the trial while out on bail, with the obligation to present him/herself when the sentence was pronounced. What is more, certain types of summons could envision defence per *procuratorem* or *per patrem*. In this case the attorney or father of the defendant presented himself in his/her stead. It is therefore possible to say that on the whole both the *processo informativo* and the *processo offensivo*, while essentially entrusted to the figure of the judge, had the aim of encompassing the feud within the judicial proceedings, thereby facilitating it peaceful resolution.

- *Continuation of proceedings*. The central phase of the proceedings was called the *processo difensivo*, though in reality the two parties faced one another accompanied by their attorneys in an authentic judicial battle. This followed points of argumentation (chapters), which the witnesses presented by each of the parties were questioned about. Despite the very precise rules formulated by jurists, it seems clear that the witnesses followed the pattern of friendship and alliance networks. The defendant's attorney was also given the faculty to attach or to read a document for the defence, which in a certain sense reflected the outcomes of the conflict as it occurred both outside of and within the judicial proceedings. Obviously, and above all in cases felt to be particularly important or politically relevant, there were possible limits allowed for the defence of the accused. Low social standing or poverty, as well as the gravity of the crime, were elements tending to augment the judge's role and the inquisitorial nature of proceedings aimed at reaching a severe punishment. However, in contrast to the inquisitorial procedures that decidedly prevailed in the 16th century, the right of the accused to a defence, the assistance of a defending attorney, and above all the possibility to examine the accusations formulated by the opposing party and his/her witnesses were never

57 This phase distinguished what was called *processo offensivo* in the 16th century. Torture was used after the first interrogation if the defendant refused to give his/her identification and place of origin.

completely denied within the sphere of a procedure that had developed essentially as a means to settle conflicts.

- *Concluding phases of proceedings*. The sentence concluded the complicated trial procedures, even though an act of peace made in the meantime by the parties could interrupt the trial during preceding phases, or in any case sensibly affect the tenor of the sentence.[58] The judge's decision was in any case strongly influenced by the type of summons adopted previously, and by other acts which, like defence *per procuratorem* and *per patrem*, evidently precluded the death penalty.[59] The spread of pecuniary penalties and of banishment emphasized the close relationship between judicial rites and feud, in that the former kind of penalty aimed at settling the conflict and the latter at creating the conditions for establishing peace in the absence of the reo.[60] The penalty of banishment or those of blood, which varied according to the defendant's social condition and the how deeply the crime offended community values, evidently reflected the double dimension of medieval, ancien régime justice.

Thus, the judicial rites elaborated by common law jurists significantly represented conflicts of feud within the sphere of a community justice sensitive to an order of peace.[61] Obviously, they could also constitute only an important means of limiting widespread social violence.[62] In any case, the detailed written procedures elaborated by common law jurists played an important role in incorporating the wide variety of local customs, activating new modes of social control. This fusion clearly reflected the new political equilibrium that came into being from the 13th century on.[63]

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58 Before reaching a sentence, the judge could decide to use torture, obviously in cases marked by the atrocity of the crime and lack of sufficient proofs. The decisive role attributed to confession and to torture clearly shows the importance assigned to the truth that lay in the mind and personality of the defendant. Only here can we identify a real interrogation, but the position in which it was placed (i.e., at the end of trial proceedings) clearly excludes the possibility of considering the judge's activity as inquiry.

59 The former was carried on through a lawyer, the latter by the defendant's father. Both presupposed that the defendant could be absent from the court, even in the concluding phase of the trial. Defence *per patrem* was usually adopted in cases of unpremeditated homicide. For both, I refer to Povolo, 2007, 33.

60 On these aspects, see Povolo, 2013.

61 The ancient ritual of the kiss of peace, as Petkov observes in his study, indirectly takes on definitive or at least more lasting legal value from the moment when it inevitably is included in the new trial procedure, filtered by a notary contract, "As a special type of legally sustained promise, qualitatively different from the 'simple' (verbal) promise, the ritual kiss was of utmost importance for the legal background of the process of peacemaking. Only the obligation taken through it ensured the breaking of the vicious circle: feud, court decision, refusal to pay or to accept payment, and new feud. Throughout the premodern period, the taking of personal liability and, later, the acknowledgment of the personalized duty to compromise through ceasing hostilities and paying or accepting indemnity instead of fighting back, created the only legal guarantee that pacification would succeed" (Petkov, 2003, 130).

62 "Some societies have not wholly accepted the classical model of the legal process. They have seen the function of the legal process to be as much the reconciliation of the parties, in the light of their relationship in its totality, as the application of a rule of law to a particular issue" (Stein, 1984, 15). This English jurist is one of the few who have grasped the subtle and never explicit relations between feud and legal process.

63 Peter Stein has well summed up these changes: "From the thirteenth century onwards there was continuous

The specific nature of the political organization (republic, city-state, principality, monarchy) and its territorial extension notably influenced the introduction, permanence and changes in interrelations among trial rites. These were entrusted to specialized technical personnel competent in applying learned written procedure as well as customary practices that were highly sensitive to the status and characteristics of the parties in conflict. And the history of the complex and alternating changes that marked the feud in Europe in the medieval and modern periods is, in the end, traced by the political and judicial changes that took place in each one of them.[64] Where research has investigated the very strong ties between feud and trial rites, it is possible to see that the phenomenon of feud continued over a long period.[65] Indeed, various scholars have noted that justice and social control in 16th-century Europe is characterized by the wealth of local jurisdictions, each of which tenaciously defended its privileges and customs (Kamen, 2000, 189–190; Black, 2001, 194–196).[66]

Changes had obviously come also about in a judicial process whose ideological reference was the ius commune. These changes can be seen in the tensions created by the way in which the judicial organs responsible for guaranteeing social control operated. For example, in the course of the 16th century, some alarmed jurists reported the widespread use in many Italian cities of the *ad informandum curiam* summons, which did not clearly specify the reason why the person who received it was called on to present him/herself in court. This type of summons gave wide margins of discretional power to the judge, clearly threatening the traditional forms of justice aimed at incorporating the conflictual dynamics of the feud.[67]

However, these were still changes that took place within the sphere of trial rites linked to tradition, adopted and defended by the composite world of lawyers and jurists with a Romanist formation. Very different would be the impact of forms of justice coming from on high and directed at assuring a new concept of order and social control.[68]

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interaction in most European countries between the customary law and Roman law [...] The Italian city states recorded their individual local laws in a series of compilations, usually distinguishing customs, deriving originally from oral tradition, and *statuta*, legislative enactments of the local assembly [...] However, the cities insisted on being masters of their own legal destinies, and maintained that a specific custom or statute must override the Roman law" (Stein, 1984, 77–78).

64 The comparison is therefore possible only if we keep in mend the numerous political, legal and social variables within which feuds originated and developed.

65 Cf. *Infra*, in particular the pages dedicated to *The old community justice.*

66 For Italy, see the cogent summary made by Marco Bellabarba, who observes, "Through its proclamations justice designs moral boundaries, laying down the line between good and evil, between right and wrong conduct, while its guardians keep watch on this line day and night" (Bellabarba, 2008, 81).

67 Lorenzo Priori, a Venetian criminal lawyer who was writing in the late 16th century, based on the work of Giulio Claro, had to say of this type of summons, "which is truly hated in many cities and places for the prejudice that the accused persons feel, highly praising the observation of formal summons issued by most excellent doctors and practioners" (Povolo, 2004b, 155).

68 However these forms of justice responded to precise requests coming from society. As Michael Braddick has noted, in England "the impetus came from the localities at least as much as from the centre and the uses of state power were clearly patterned by social interest – by powerful groups in the hierarchies of class, gender and age" (Braddick, 2004, 429). In contrast to England, where social control had been effected since the Middle Ages in a sort of collaboration between the state, the Church and communities, in the rest of Europe it is only starting from the 16th and 17th centuries that it is possible to identify a diversification at several

THE NEW POLITICAL AND SOCIAL CLIMATE

A significant step forward in the historiographical fine-tuning of the construction of an idea of criminal justice based on a hierarchical organization of power and the figure of functionaries representative of offices held in a centralized bureaucracy was achieved in the in-depth comparative investigation of Mirjan Damaška.[69] This investigation has great value in helping us interpret the most significant aspects of the changes that occurred in the forms of social control and the way feuds were carried on.

In his *The Faces of Justice and State Authority*, published in 1986, while identifying the first significant changes in the administration of justice in the process of unification and bureaucratization that began within the Church in the 11th century, Damaška noted that this hierarchical and legalistic process, entrusted to the officium iudicis,[70] was essentially ideological and still far distant from the systematic juridical structure that would be developed only much later, in the course of the 16th century, above all in France as a result of the growth in the power of the monarchy:

> *It was not until the strengthening of princely absolutism in the sixteenth and seventeenth centuries that centralized bureaucracies started to dominate the governmental apparatus in the influential Continental countries. Even language was now affected by pressures toward regimentation [...] The idea of impersonal office was extended to the very heart of government [...] It is in this period that the idea of the state became detachable from the personal status of the ruler and converted into an institutionalized (impersonal) locus of allegiance (Damaška, 1986, 33).*[71]

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levels, "The late-sixteenth and seventeenth centuries constituted the high point for church discipline. Thus semiformal and informal means of control loomed large in the lives of villagers and townspeople. The state's penal system, however, was attuned to social control at a general level, that of maintaining public peace and order. Courts primarily dealt with serious violence and property offenses, next to challenges to the state's authority" (Spierenburg, 2004a, 14–15) But in this context, see the following observations by M. Damaška.

69 Damaška's work is directed above all to comparing the forms of trial that existed in the world of common law with that of civil law, connecting them to the power and state structures that produce them. This comparison is made while paying attention to the historical origins of these two juridical systems and above all to the constant tensions existing between different instances of justice. As we have already had occasion to observe, this is a question still found today in the discussion of the various ideologies of justice.

70 On this aspect, cf. also the observations of Padoa Schioppa, 1999, 127–128.

71 Obviously Damaška did not underestimate the strong continuity of the legal pluralism that existed almost everywhere. But it was precisely his comparative approach that allowed him to give just weight to the various aspects of the problem in his examination of certain key interpretative issues, "Much as the existence of a single central forum within a country does not presuppose rigid judicial hierarchization, so the existence of several independent tribunals does not rule it out. High Continental courts first and foremost exercised appellate jurisdiction. They were located on top of small judicial hierarchies, exercising strong overall leadership over the lower judiciary [...] It would seem that an apparatus of justice attached to order is disturbed less by the plurality of sources from which to choose the standard for a stable decision than by the possibility of one court of last resort destabilizing the decisions of the other" (Damaška, 1986, 34–35). In a similar fashion, in the summary made in *Legislation and Justice*, A. Padoa Schioppa has emphasized that "until the very threshold of the modern period, the structure of the entity called 'the state' by no means implied internal uniformity or the uprooting of the historic particularities of different regions,

Besides identifying the most significant aspects of the new dimension of criminal justice, this important analysis by Mirjan Damaška also comprehends the complexity of the ties between its formal and ideological implications and the wider ones of its political-territorial roots. This was a form of justice conceived as a genuine theatre of power, notably different from the one (prevalent in the system of common law, as well as in medieval Europe) that presents itself essentially as an encounter that takes place in an arena.[72]

Damaška's analysis aimed at grasping the close relations existing between the organization of power and the forms of the trial. Thus, he could observe how the changes that took place in the course of the modern period were decidedly new:

> *In the great majority of Continental countries judicial officials became career professionals [...] And unlike the judges of the church, secular adjudicators were no longer permitted to mould ordinances and other legal sources to conform to their conscience. The integrity of a powerful central authority was thought to require strict governance by rules. Highly placed judges found the resulting shrinkage of discretionary space quite acceptable: they became accustomed to deciding on the basis of orderly documents that screened out 'messy' situational and personal nuances likely to exert pressure toward leeway in decision making (Damaška, 1986, 33).*

Underlying Damaška's considerations, there was therefore a fundamental and well-focused definition of state law[73] which comprehended the links and continuity with what had developed in the Middle Ages (in the realm of ecclesiastical institutions), as well as the profound changes that began in modern times.

Studies of early-modern Europe have evidenced the changes that took place starting from the late 16th century.[74] The introduction in various European countries of authentic inquisitorial procedures, which limited the right to defence and the intervention of the parties concerned, represented a significant step forward in limiting at least the most bloody developments of the feud. From France to England to Germany, the new procedures were characterized not so much by *ex-officio* initiation of trials as by the public jurisdictional nature that the trials took on. As has been noted by John H. Langbein:

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large or small; these all flowed together into the higher political formation" (Padoa Schioppa, 1997, 339).

72 And which clearly reflected different forms and instances of social control.

73 He is able to grasp its essence in virtue of the comparison made in all his work between *common law* and *civil law* (up to their contemporary outcomes).

74 There is a summary in Rousseaux, 1993. By the same author, Rousseaux, 2010, where it is suggested that in many European nations, such as France, Spain and Portugal, where monarchical power was strong, "l'étatisation de la poursuite pénale" was meaningful and took place mainly through real "première ligne" jurisdictional control and the role played by the king's public prosecutor. The new state justice took advantage especially of the *Parlamenti*, to which were directly attributed a series of penal competences all over the realm. By contrast, in other European countries, like Germany, Italy and the Netherlands, where local powers enjoyed ample autonomy, recourse was made to the creation of particular jurisdictions for prosecuting crime. Actually, as well shall see for the Venetian Republic, there was notable similarity in the changes that took place in the various European countries.

Modern scholarship has deemphasized distinction between private and public modes of initiation. What is called Inquisitionsprozess could did flourish in legal systems which continue to permit private as well as official prosecution. Historians today attribute to Inquisitionsprozess two cardinal and interconnected features, both evident in the sixteenth-century codes. The one, called Offizialmaxime or Offizialprinzip, parallels the idea of official initiation upon which earlier scholars generally seized; what is meant, however, is officialization of all the important phases except initiation. Where the mode of initiation was reduced to a formalism, lacking functional importance to the conduct of the prosecution, it mattered not whether it too was officialized or left in private hands (Langbein, 1974, 130–131).

It would be misleading to give the introduction of inquisitorial procedures and the appearance of a repressive form of state justice a decisive role in the challenge to ancient judicial rites, which seem to have remained vital through much of the modern period. These rites were imbued with a highly complex and structured concept of violence and conflict.[75] And a more general examination of the procedures used in European courts of various orders and levels allows us to grasp the inter-relations existing between the cultural and social dimensions of feud and the new forms of regulation introduced by the institutions of the state, above all in the wake of new social instances not directly bound to tradition and custom.[76]

Inquisitorial procedures, the ongoing struggle against banditry and, in general, the social and cultural climate that witnessed the development of a new punitive type of justice throughout Europe are all meaningful elements that suggest how during the 16th century the feud system and violence itself came to be perceived in a significantly different way than in the past.[77] But taken together these were very likely only the point of an iceberg that reflected a far more complex phenomenon, in which tradition and innovation interacted intensely. Where, as for example in the territories of the Venetian Republic, research has investigated the close ties between feud and trial rites, it has been shown that

75 As Tomás A. Mantecón maintains, "beneath an administrative apparatus of the Crown, there lay theoretical justifications, local laws and customs which left a deep imprint on judicial administration [...] An analysis based on social practice around the concept of crime and not just the institutions, an examination of the execution of sentences and not simply their pronouncement, and a study of the social relations in each social structure and their sensitivity to change over a long period of time, all of these perspectives are making the hands which distributed discipline, at times repressive and at other times corrective, more visible." (Mantecón, 1998, 68). See also for the complexity of the relationship between the use of violence and the ideology of social control Schwerhoff: "The exercise of violence was sanctioned negatively both by the authorities and by societies in the Middle Ages as well as in early modern times; to bring about peace, to keep and to re-establish it if necessary, was one of the most treasured values of these centuries" (Schwerhoff, 2002, 13).

76 The study of procedure has not had many proselytes, as Rousseax pointed out in 1997, in his summary of studies on the history of crime (Rousseaux, 1997, 106). But see also the remarks of Cerutti, 2003, 11–22.

77 Besides the above-mentioned bibliography, see Ruff, 2004, 73–83; as regards the changes that involved what has been called *moral tradition* in some European countries, both Catholic and Protestant: Bossy, 2004; also, for the Church's intervention regarding customary practices that gave protection to those who, though guilty of a crime, took refuge in a sacred place: Shoemaker, 2011, 167–173.

the dynamics of conflict took place mainly on three distinct judicial levels.[78] Once again, it is above all the examination of procedure and trial rites that reveal the complexity of the direction taken by the feud and its outcomes in the social and political context.

THE NEW PUNITIVE JUSTICE

During the 16th century, a system of criminal justice controlled directly from the centre and aiming above all at punishing crimes considered socially dangerous was decisively established. Above all in the period between the late 16th and the first decades of the 17th century the procedures adopted were of the inquisitorial type. These were very severe, and strictly limited the defendant's possibility of defence, and explicitly introduced a punitive idea of justice. This was all the more meaningful when compared to more traditional forms of justice in that both the laws and the punishments inflicted were valid in all the lands of the state, thus ignoring the ancient jurisdictional arrangements.

The inquisitorial trial took on declaredly political features, putting a damper on the guarantees and respect for common law procedures formulated by jurists who based themselves explicitly on that system of law and on the ancient municipal statutes. This type of criminal trial was characterized in primis by the so-called self-defence, formally drawn up by a defence attorney who had to remain behind scenes, and who did not in any case have at his disposal a copy of the trial documents. Clearly he had slight possibility of challenging the political choices of the judging organ.[79] The type of interrogation that prevailed (called *costituto opposizionale*) marked the start of a genuine inquiry, although for a long time the probative system still kept prevalently to the old form of legal proof based on two testimonies in agreement and on confession. The role of the victim (the opposite party) was almost completely absent, and generally the sentence did not take the form of pecuniary damages.[80] Above all, there were many laws passed regarding banditry; these were superimposed over custom and local statutes. These political and social changes took place in all the ancient Italian states, along the lines of what was happening in the wider European context.[81]

78 But other in-depth studies, such as the one regarding the court of the Torrone of Bologna, reveal a plurality of levels of justice that attest the profound changes that took place in the course of the modern period.

79 Jean-Pierre Royer, focusing on the great *Ordonnance criminelle* of 1670, has remarked that "il n'est pas sûr par example que l'avocat ait toujours été absent du procès pénal courant et qu'il ne se soit fait connaître, dans les grandes causes, que par les *factums* et *mémoires* écrits dont la vogue va se répandre au XVIII siècle", cf. Royer, 2001, 39–40. Gaetano Cozzi also focused on self-defence in his studies, done in the eighties, which then appeared in one of the volumes published on occasion of the important conference held on the Leopoldina. See his: *Autodifesa o difesa? Imputati e avvocati davanti al Consiglio dei dieci*, later republished in Cozzi, 2000, 156–229.

80 A meaningful example is the trial held against Paolo Orgiano and other members of the Vicenza aristocracy in the first decade of the 17th century. The trial acts are published integrally in Povolo, 2003, and with an introduction by C. Povolo. Il *costituto opposizionale* arose and developed in the sphere of the inquisitorial trial. The older *costituto de plano* was not abolished, and often preceded the *opposizionale*, almost as if to indicate the difficulty in leaving behind totally the old judicial rites.

81 For Italy, see the summary by Marco Bellabarba in his *La giustizia nell'età moderna (*2008, in particular 115–128). On the phenomenon of banditry and the often summary procedures used to cope with problems of order and social control, cf. Fosi, 1995; Povolo, 1997; Lacché, 1998.

This criminal policy was initially very prudent and careful not to interfere with the jurisdiction of the local tribunes that had broad authority of banishment from cities, territories and the so-called fifteen miles outside of these territories. At first the central organs limited themselves to suspending for limited periods of time the possibility that bandits could be killed with impunity if they entered the forbidden territories. In this way, feuds were regulated from the centre without interfering explicitly with local jurisdictions. This policy clearly also aimed at encouraging the urban ruling classes to limit the use of violence, and for its characteristic features can be defined as a policy of suspension.[82]

Starting from the last two decades of the 16th century, this policy was definitively replaced by other choices of an interlocutory type, whose harsh and severe impact marked a decisive change. Indeed, the central organs started to pass laws against banditry, thereby annulling the ancient rights of municipal jurisdictions.[83] Initially, this body of laws was postponed for limited periods of time, but in the end it prevailed entirely. The penalty of banishment was made extremely strict and extended to all the lands of the state. Bandits could not only be killed with impunity, but the law also decreed that they could kill each other.[84] Killing a bandit guaranteed a reward and, above all, the right to free another banished person (the so-called *voce liberar bandito*).[85] The penalties of death and banishment were extended to cover the whole state and substituted traditional penalties. One of the consequences of this stricter use of the penalty of banishment was the rise and spread almost all over Europe of the figure of the outlaw openly antagonistic to the reigning political authorities.[86]

Not only did the imposition of inquisitorial procedures and the new legislation on banditry discourage the customary dialectic between feud and trial rites, it also had the effect of weakening powerful aristocratic lineages and the political control they exercised over other social classes. This higher level of justice and trial procedure reflected primarily the need to impose a concept of public order aimed at assuring social peace and order as well as protecting trade. The social and geographical mobility of the 16th century had clearly revealed the inadequacy of the usual parameters of social control and consequently the weakness of the municipal political contexts which insisted on claiming their prerogatives and jurisdictions.

The requirements of peace and order and the evident state of emergency facilitated the imposition of the new trial rules. But the most important changes on the whole occurred

82 In brief, what was suspended was municipal jurisdiction over banditry.

83 As we have said, the old penalty of banishment also had the function of containing the devastating effects of feud by sending away the person who had committed a blood crime, thereby facilitating the recomposition of the antagonistic groups. The new legislation definitively made this impossible for local tribunes, even if initially it was marked by limited periods of time (two or three years), which were however renewed after brief pauses. From the early 16th century on the laws on banditry, emanated from the dominant centre, automatically became definitive and so lost their provisional character, though from time to time they were taken up again to be integrated or modified.

84 For a general picture of this change cf. Povolo, 1997; Fosi, 1995.

85 The *interlocuzione* (interlocutory judgement) vis a vis local powers lay in the fact that from this time on it was a centralized law that periodically regulated the penalty of banishment. Measures of *suspension* were therefore followed by those of *extension*.

86 An example is found in Povolo, 2011.

in the administration of criminal justice. At first timidly but then with a brusque acceleration, from the late 16th century on this was directed and controlled by the dominant centres. However, even in this case the choices made at first highlighted the difficulty of bypassing and overcoming the polycentric structure of the jurisdictional state, centred as it was on a multiplicity of jurisdictions and privileges that were still unchanged and had kept their original profile.

These choices and times various from place to place, but they are indicative of the political and judiciary changes that began in the 16th century. In Bologna, for instance, the transfer of criminal activity from the tribune of the podestà to the Torrone constituted a political fact whereby "papal power was able to impose its effective control of the city almost always without injuring or openly denying its boasted privileges" (Angelozzi, Casanova, 2008, 10 and more fully in 57 and ff.). In Florence, Milan and Genoa, as in other parts of Europe, the severity of penalties and the inquisitorial procedures adopted clearly reveal the great changes that had taken place in the administration of criminal justice.[87] In a territory intensely characterized by jurisdictional autonomies and kin networks like Sardinia, the imposition of strict forms of justice clearly aimed at weakening antagonistic local powers was felt only in the second half of the 18th century (Lepori, 2010, 171 and ff.).

In the Venetian Republic the same phenomenon can be seen starting from the last two decades of the 16th century. But the new criminal policy is also apparent in previous decades, both in the direct transfer of politically meaningful cases by the Council of Ten and in the interference of the criminal Quarantia in the jurisdictional activity of the cities in the Terraferma. In the end, an intense activity of delegation to the rectors and their *corti pretorie*,[88] which enjoyed the same authority and procedural modes as the Council of Ten, imposed a higher level of administration of criminal justice,[89] one which no longer reflected local power dynamics or, especially, the feuds that had always found an important form of containment and legitimization in the sphere of justice and trial.[90]

The new delegated judicial activity was aimed at regulating and controlling what were considered to the most dangerous social phenomena. Its effects were devastating, above all as regards certain sectors of the aristocracy that did not accept this new state of things or the redefinition of their image and political role. The case of Brescia is significant:

87 For an overall view, see Mereu, 2000, 37–53; Sbriccoli, 2009, 131–154 and 279–320, in which the author indentifies a sort of continuity with the earlier form of a hegemonic type begun at the start of the 14th century, a moment when "it seems to grow and impose itself with unceasing continuity, reducing the spaces of negotiated justice" (Sbriccoli, 2009, 142). As we have already remarked, this hypothesis can only be accepted in its formal and jurisprudential traits.

88 The *Corte pretoria* comprised the Venetian podestà and his assessori, professional judges who accompanied him over the course of his appointment. Variable in number, their presence was marked chiefly in the most important cities. The proxy granted to the *Corte pretoria* included the inquisitorial rites of the Council of Ten, and it excluded from the preliminary trial inquiry both local notaries and, if hypothetically envisioned, the presence of citizen-judges. The preliminary inquiry was entrusted to the *giudice del maleficio*, an *assessore* of the podestà, while the trial transcript was drawn up by the *cancelliere pretorio*, another figure in the entourage of the Venetian rector.

89 Called, in fact, delegate. For the Reign of Naples, see the remarks of Bellabarba, 2008, 125.

90 For a general overview, see Povolo, 1997 and 2007.

along with that of Padua, its *Corte pretoria* became one of the most important courts in the Terraferma, administering by inquisitorial proceedings a notable amount of proxy judicial activity addressed to it by the Council of Ten. This activity was marked by the severe sentences inflicted and by a tight control over the powerful local aristocracy, and its impact on the local feud was undoubtedly devastating.

Paradoxically, in narrative, although with some distortion of the procedures used, the new punitive justice brought to the surface a system of conflicts that had the feud as its reference point, along with the related language of honour and status. In the course of the 17th century it is thus possible to see true rhetorical figures, such as the tyrannical, abusive nobleman, along with glaring social manifestations like the unwonted violence that resulted from apparently ill-advised clashes between antagonistic groups.[91] But the new punitive justice also carried with it forms of narration spoken in the voice of the protagonists of inquisitorial procedure – men and women who had suffered abuse and violence. Starting in the 19th century, these narrations attracted the attention of historians and novelists like Alessandro Manzoni, who were the first to turn their curiosity to 17th century society, viewing it through the prism of trial documents (Povolo, 2004c).[92] Though they did not grasp the language of feud that imbued these documents, these 19th-century authors placed themselves inside that society without hiding their amazement about social practices that seemed to belong to a distant and culturally obsolete world.[93]

THE OLD COMMUNITY JUSTICE

In the course of the modern period we can see forms of justice and trial rites marked by their continuity with tradition and the old idea of order that aimed at guaranteeing the peace. These forms of justice reflected the fragmented political panorama of the ancient régime, even if they clearly had to accommodate the emergence of the new punitive jus-

91 In his *Prattica e theorica del cancelliere*, the Vicentine Giacomo Marzari, treating the features of the *Inquisizione generale*, portrayed two stereotypes of imagined criminals: *Terripandrum Metonem mandantem* and *Arrionem Fallariun mandatarium et assassinum*, examples of perpetrators of an interminable series of crimes (Marzari, 1593).

92 Despite profound differences in the political and judicial context, it is possible to extend to the Italian situation what has been observed by Jonathan Grossman regarding the birth of the novel in England, "The novel, in becoming the ascendant literary genre of the nineteenth century, played an active role in a process through which a reinvented criminal trial supplanted the spectacle of the gallows as the culmination of justice [...]; in the era between gallows literature and the detective mystery, between Tyburn scaffold and 221-B Baker Street, the law courts crucially shaped the formal structures and political aims of the novel" (Grossman, 2002, 5).

93 One of the first witnesses is Giacomo Casanova. Shut up in the *Piombi* of the Ducal Palace, while pacing up and down in an attic next to his cell where he was allowed to walk, he came upon a genuine surprise, "I had seen lots of old pieces of furniture thrown onto the pavement, here and there, and in front of them there was a big pile of files: I picked up five or six, to amuse myself in reading them. They were criminal trials that I found very interesting; it was for me a new genre: evocative interrogations, singular replies about the seduction of virgins; forbidden courtesies paid to tutors, confessors, school masters and pupils. There were some dating back two or three centuries, which for their style and customs allowed me to pass whole days quite pleasantly", cf. Vianello, 2009, 70.

tice. It is in the realm of these trial rites that certain procedures, which allowed a considerable degree of initiative to the conflicting parties and to acts of peace, were still operative and vital.[94] These forms of justice were at times confined to outlying judicial organs, but often they could also be found in courts where the new inquisitorial procedures had come into use.

What determined the different procedures utilized was obviously both the type of crime and the social significance of the conflict and its protagonists. In Bologna, for instance, in a large important court like the Torrone, there were frequent trials in which there was interaction between forms of pacification, renunciation of proceedings on the part of the injured party, or even surety bonds that allowed the defendant to go free on bail (Angelozzi, Casanova, 2008, 441, 576, 603). In the large Lombard city of Brescia, whose court, as we have seen, together with Padua's had become the privileged reference point for a vast activity of delegation directly controlled from the centre, there was still a widespread type of justice strongly characterized by the feud and the defence of community values. The punishments inflicted were clearly aimed at stressing the dangerousness of the culprit, rather than the crime committed; the death penalty was rarely applied, and only in cases where fundamental community values were involved. The proxies obviously subtracted from the ordinary jurisdiction the more politically and socially important cases, which were handled with inquisitorial procedures, which excluded local notaries and jurists. In a similar fashion, in Verona and Vicenza procedures allowing the parties very wide margins of action, in which feud and the protagonists' status drove the typology of conflict were very common.[95] But in these two cities as well the inquisitorial rite of the Council of Ten, when delegated to the city court, signified the exclusion of ancient privileges that gave the local ruling class a determining role in both the management of the trial and the infliction of the penalty.

In the Northeast, in a vast territory like Friuli, studded with seigneurial jurisdictions as it was, the trial procedures formulated by common law jurists were still imbued with custom for much of the 17th century, despite that fact that the administration of justice was mainly entrusted to jurists with a Romanist background. The justice administered in Tolmezzo is emblematic in this sense: the court had broad jurisdiction over almost all of Carnia, where an order of jurists and lawyers was active. The trial procedures used here envisioned not only recourse to *per patrem* or *per procuratore* defence, but also frequent pacts of peace agreed on between the conflicting parties, followed by solemn oaths taken in the town cathedral in the presence of the entire community. These were age-old rites envisioned in the medieval statutes; their presence bore witness to the force of a tradition that seems not to have disappeared. In reality, in all of Friuli the most important cases were delegated to the court in Udine, where the *Corte pretoria* and the Venetian deputy

94 I refer once again to Povolo, 2007.

95 For instance, the practice of presentation at the start of the trial only for premeditation was still widespread. In this way, the accused could introduce the question of legitimate defence or *frenzy* in the trial. This practice clearly tended to legitimate the use of vendetta, even in this judicial context, where the need to limit violence through the adaption of more severe penalties and procedures was felt. An example can be found in Povolo, 2014.

administered justice according to the inquisitorial rite of the Council of Ten (Povolo, 2013, 529–532; Povolo 2007, 17–24).[96]

The fragmentary political-institutional structure was a key factor in determining the persistence of tradition, which was possible to find everywhere, mediated and filtered by Romanist jurists. In large cities like Brescia, Padua and Verona, only to mention the most outstanding cases, the role of the jurists and their activity in judicial offices clearly had greater weight, and the ties between custom and learned law were forged within the sphere of institutions which inevitably reflected the social and political changes that had occurred chiefly in the 16th century.

The same dynamics can also be seen, with different methods and rhythms, in the smaller towns, but there they were endowed with a decidedly institutional profile. A significant example is what took place at the beginning of the 17th century in the *Magnifica Patria of the Riviera del Garda*, a very old jurisdiction that united as many as thirty-six communities stretching along the western shore of the lake. A general council enjoyed broad jurisdictional authority united the representatives of all these communities. While civil justice was entrusted to a podestà periodically sent from Brescia, criminal justice was the competence of the Venetian superintendant, who resided in Salò, the main town of the *Riviera*. Around the middle of the 16th century there was created in Salò a college of jurists which united representatives of the most prominent families of the whole *Magnifica Patria*. The chancellor of the superintendant and his assistants were entrusted with management of the criminal office, where suits and denunciations were brought and trial proceedings were instituted. Endorsed by statutes approved by Venice at the start of the 15th century, the jurisdictional set-up thus filtered a type of community justice extremely sensitive to local conflicts and all forms of re-composition directed at maintaining the existing equilibrium.

Despite the opposition of the *Magnifica Patria*, in 1577 Salò obtained permission from Venice for the superintendant, during the course of his appointment, to be backed up by a *giudice del maleficio*, a Romanist jurist from another town of the Terraferma. The formal motivation given by for having a real criminal office, as was already the case in the more important cities of the state of the Terraferma, was the need to solve with suitable means the bitter conflicts between the families of the *Riviera* that led to numerous murders. A *giudice del maleficio* would in fact give more importance to the jurisdictional profile of the main centre, thereby weakening the action of containment and mediation performed by the jurists of the college, whose activity as lawyers and prosecutors had great importance in the criminal trials into which the numerous feuds between *Riviera* kin-groups inevitably flowed.

In 1607 the General Council of the *Magnifica Patria* rose up against what it by then felt to be a widespread, consolidated practice of the *giudici del maleficio*. Indeed, even in the absence of evidence that could justify the arrest or summons of a reo, it was a quite common practice to use a form of summons (*ad informandum curiam*) that did not state clearly if the person who received it had to present him/herself as witness or defendant. As the Council insisted, this practice not only contrasted with the terms of the statute, but

96 More fully and above all in reference to a very large abundant number of cases, cf. Povolo, 2004b, 137–138.

also went against "any sort whatsoever of natural law". It went on to say that it derived from the pretence of the *giudici del maleficio* to oblige the representative of the *Riviera* communities to report "every tiny thing, every little incident, even if verbal, in pure brawls". This pretence was so strongly consolidated that in the criminal clerk's office in Salò a large number of trials were instituted concerning "cases about which they should not and could not proceed."[97]

Despite the rather bombastic emphasis of the representatives of the *Riviera of Garda*, this conflict clearly reveals the tensions that still existed at the start of the 17th century between forms of justice that reflected the community dimension and feuds on the one hand and on the other the administration of a form of justice tending to emphasize the role of the criminal office and the action of jurisdictional containment it carried on to cope with the widespread social unrest. As we have already stressed, the practice of this new form of summons was explicitly denounced by 16th-century jurists over much the Italian territory, but this episode in the *Riviera of Garda* between the 16th and the 17th centuries clearly illuminates the tensions that inevitably arose between a consolidated tradition, according to which the essential role of trial was to facilitate the settlement of conflicts, and the imposition of a jurisdictional vision aimed at affirming the role of the office in confronting the logic of kinship and rival groups.[98]

FROM TRIAL RITES TO THE NEW CRIMINAL TRIAL

It should be no surprise that traditional trial rites, while adapting to the social and legal changes that were going on, had on the whole kept their distinctive features, i.e: the active role of the parties in conflict; the presence of ancient trial institutions such as the *per patrem defence*; inquiries characterized by non-incisive forms of interrogation; release of the defendant after deposit of suitable guarantees and bonds; and, most important, the interference of acts of peace and settlement. These were, in fact, rites grounded in a very fragmentary institutional structure, legitimated by a constitutional system whose symbolic reference points were the community and the *res publica*. Above all, these rites represented a social and cultural context where kinship, friendship and honour held an extremely important place, all the more significant when they merged with political power and status.

The emergence of a new punitive system of justice and trial rites considerably weakened the constitutive and symbolic elements of a tradition that had great difficulty in meeting the new requirements of social control. However, this was a form of justice and of procedures which, even when they were imposed severely and with continuity, always took on a character of extraordinariness, almost as if to underscore the irrepressible force of tradition.[99]

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97 On this, see Povolo, 2011, 175–176. The General Council appealed to Venice and obtained the possibility to oppose itself, case by case, to every *ad informandum curiam* summons that had not been adequately justified by the *giudice del maleficio*.

98 Such tensions can be constantly found in medieval and early modern times, but in this period they obviously reflected the new political and social climate that had led to the emergence of the new punitive justice.

99 In the 16th century, in France and the Netherlands, too, a *procédure ordinaire* is clearly distinguished from a *procédure extraordinaire*: the latter is characterized by the elimination of all forms of cross-examination

Actually, during the course of the 17th century, things progressed, and in the end the new form of criminal trial prevailed. It was endowed with a different kind of legitimacy and its more incisive procedures managed to weaken the role of the parties. Certainly, it would have been difficult for the inquisitorial procedures introduced in the 16th century to be adopted systematically in open infringement of certain rights which, like the right to a defence, were felt to be fundamental to the system of common law and the ideology underlying the statutes. Indeed, though the inquisitorial procedure continue to be used throughout the 18th century, its use was less systematic and chiefly for cases with important political relevance (Povolo, 1996, 26–32).

From the first decades of the 17th century on, in the Venetian Republic a particular type of procedure emerged, called *servatis servandis* or open.[100] Gradually this prevailed over both the old trial rites and the new inquisitorial procedures. In realty this was a procedure originating in traditional rites, but which in the context of the vast activity of delegation controlled by the Council of Ten rapidly took on new features. Initially, the essential aim of the delegation envisioned by the *servatis servandis* clause was to give the courts of the Terraferma the possibility to use stricter penalties, not envisioned in statutes that inevitably referred to the medieval political and legal structure. The old procedures should have been respected on the basis of the jurisdictional prerogatives of the city to which the court that had been granted a delegation from the centre was connected. But in the *servatis servandis* delegation there was room for a certain degree of ambiguity, which theoretically could lead to strained interpretations of procedure.[101]

Endowed with the authority granted by one of the highest political-judicial organs of the dominant centre, in the course of the 17th century the *servatis servandis*[102] trial was to undergo a change in the phase that *pratici* and criminal lawyers defined as *processo offensivo*. Following the lines of the inquisitorial procedure, an authentic interrogation was placed alongside the ancient *costituto de plano* (*costituto opposizionale*) whose purpose was to uncover the truth of what the defendant declared.[103] Research has shown that this type of interrogation is documented both in Lombardy and in the Venetian Terraferma (Povolo, 2007a, 60–61; Garlati Giugni, 1999, 148–150, 300–301). Endowed with this new and more effective authority, the judge and the delegated court felt the need to make the initiatives taken in the first phase of the trial (the so-called *processo informativo*) more incisive by accentuating the offensive action taken towards defendants arrested for

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and of release of the defendant. At the end of the first phase (in Italy comprising the *processo informativo e offensivo*) the judge decided whether to resort to the ordinary phase or the extraordinary one, thereby denying the defendant the possibility to defend him/herself with a lawyer (Rousseaux, 1993, 78–84).

100 Evidently to distinguish it from the inquisitorial one, which was not open to the parties and was secret.

101 For example, *cancellerie pretorie* (magistrate's clerk's offices), connected to the Venetian rector, very soon claimed a sort of jurisdiction over *servatis servandis* cases, excluding the notary boards (colleges), which had *ab antiquo* competence over the preliminary investigation of criminal trials. The competence of the *cancelliere pretorio* was in fact initially limited to trials delegated with the inquisitorial rite of the Council of Ten, which required the secrecy of witnesses.

102 Also called open to distinguish it from the inquisitorial trial.

103 The succession of the two forms of interrogation also seem to have been present in the trials held in the court of the Torrone of Bologna, cf. Angelozzi, Casanova, 2008, 492–496.

serious crimes. The *costituto opposizionale* became the trial space allowing the judge to get around the limits imposed by tradition, and so to conduct a real interrogation of the defendant. In this way what can be called an authentic inquiry was formalized, expressing the aims of the new criminal trial and some of the instances that had emerged with the start of punitive justice. Thus, the two phases of the trial, informativo and offensivo, were in the end united in the new role played by the judge and in the creation of a different relationship of power respect to the position of the defendant.[104]

The emergence of an authentic investigation very soon came to reflect on the existence of the age-old trial institutions, whose goal, as we have already seen, was to guarantee the more significant and direct involvement of the parties. Particular forms of defence, like *per patrem* or *per procuratore defence*, were excluded from the open *servatis servandis* trial, as was the defendant's possibility to defend him/herself by separating the accusation of premeditation from that of simple homicide (pure homicide). An institution like the *piezaria* with its surety bond (a sort of bail) was excluded in all homicide cases, thereby making it impossible for the defendant to defend him/herself while out of prison.[105] The same thing happened to the pecuniary penalty and traditional banishment,[106] which in cases of homicide often aimed to facilitate a settlement between the hostile groups.

Taken together, the old procedural and penal institutions had for centuries guaranteed the peaceful settlement of ongoing feuds. However, in this new phase of the administration of justice they were viewed as an interference in the search for truth in the trial. The structure of the former defensive trial remained substantially intact, even if the changes in the previous phases and in the overall idea of justice itself removed the primary aim of reaching a true settlement of the conflict from the cross-examination of parties and from the role of attorneys.

Thus, feuds met with vigorous acts aimed at limiting and controlling them. Their underlying logic and their very legal essence was weakened. This political and cultural process was to become more intense at the end of the 17th century, when a series of laws passed by the Council of Ten between 1680 and 1682 emphasized the new dimension of criminal justice: all cases of homicide, whether committed in Venice or in the rest of the state, were to be reported to the highest Venetian organ, which would then address them through a *servatis servandis* proxy to the various courts. Thus, a crime that had for centuries been the distinguishing mark of local feuds was essentially removed from local group and kinship dynamics (Povolo, 2004b, 25 and ff; Povolo, 2007, 49).

Between the 17th and 18th centuries the predominance of the new criminal trial can be seen in almost all the lands of Italy in the spread of unprecedented publications on *Pratiche criminali* (Criminal practices) which, in contrast with those of the previous century, were mainly written by court professionals and judges working within the sphere of the

104 This way of proceeding was obviously different from the traditional *inquisitio*, which did not deeply interfere with an idea of trial understood as a set of rites aimed essentially at underscoring the community's cultural values and mitigating the most violent and dangerous aspects of feud.

105 An institution similar to that of the security bond which characterizes today's accusatorial procedures.

106 That is, banishment based on statutory provisions, which involved the expulsion of the defendant from the city, the territory and the customary 15 miles beyond the border.

new procedures. These were works by and large lacking the theoretical tension that had characterized 16th-century works and which referred directly to the concrete judicial practice of the courts. Aimed at legal professionals, or in any case a narrow readership, they were very successful, testifying to the importance by then given to the sphere of criminal law in political and social life.[107] The distinctive feature of these works is the attention they pay to the judicial cases and precedents of the new criminal justice, clearly used to affirm its prerogatives and prevalence.

From the late medieval to late modern times, the interrelations between trial rites and the dynamics of feud grew more and more intense and underwent significant changes. Following profound political and social transformations, judicial procedures encompassed the development of conflicts more and more incisively. Obviously, certain displays and episodes of a particularly violent nature, recalling the old feuds, were recorded as late as the end of the modern period, but on the cultural plane the appeal of vendetta and the force of honour began to lose the legitimacy they had enjoyed in previous centuries.[108]

As a great Venetian intellectual acutely remarked towards the end of the 18th century in regard to the violence that had characterized the feud in prior centuries, a new sensibility had by then come to the fore:

> *In the present age the social facility of conversation, joined to its mellow way of life, though it has opened the door to other disorders, has however extinguished many of the old ones, having made man's heart less fierce, and less threatened the cloisters of sacred virgins and the occasions of violent abduction of women (Povolo, 1996, 64).*

SOME CONCLUDING REMARKS

The challenge to the vendetta, understood as a genuine legal and cultural system that regulated the organization of conflict and represented an essential instrument of social control, was a phenomenon of great import that involved most European countries. This phenomenon was openly reflected in the sphere of public law and rhetoric by the open condemnation of violent actions that clearly showed signs of retaliation, while the cultural and ideological context that had produced them and constituted their essence was by and large not made explicit.[109]

As we have noted more than once, the adoption of very strict inquisitorial procedures, whose primary goal was to interfere decisively in the logic underlying feud, was the instrument by which European states imposed a different concept of public order and new

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107 Such as, for instance, Savelli, 1681; Mirogli, 1758; Briganti, 1770, for which cf. Bellabarba, 2001. For Bologna, the two works of the uditore Gian Domenico Rinaldi, who worked in the court of the Torrone in the 1670s, cf. Angelozzi, Casanova, 2008, 375 and ff. Clearly different are the 16th-century *practicae* that Mario Sbriccoli indicated as a visible witness of the successful establishment of hegemonic justice. These were works that only marginally involved procedure, cf. Sbriccoli, 2009, 175–177.

108 In reference to 18th-century society and the new sensibility that led to the emergence of the phenomenon of the lady's escort in southern Europe, see Povolo, 2012.

109 Some examples are found in Povolo, 1997, 293–299.

forms of social control. But it would be rather misleading to attribute to the intervention of the central powers the whole initiative in a process that was clearly in act at the political and social level of European society. As we have already remarked, these powers were driven by requests and pressures coming from social sectors that required forms of control and order that could ensure both social peace and commerce.

Historiography has focused on the great transformation that characterized 17th and 18th century society, emphasizing in different ways the aspects that were decisive in the imposition of a new concept of order and justice.[110] What is more, philosophers and sociologists have dwelt on the diverse theories of criminal law that have arisen from the 19th century on.[111] Barbara Hudson has well summed up the theories of authors like Durkheim, Marx, Rusche-Kirchheimer[112] and Foucault, who have tried to interpret the social, cultural and economic factors that underlay these transformations:

> *The system they are describing and seeking to explain was a system of state punishment; a system in which imprisonment became the normal mode of punishment; a system which became less concerned with tormenting the body and more with disciplining the mind and character; a system which had a demonstrable relationship with the demand for labor [...]. Whether the aim of penalty is identified as normalization, and its character as disciplinary, or whether the aim is thought of a simple regulation of the labor supply, or whether the key characteristic is taken to be that it is increasingly secular and constitutional, we can readily perceive the contours of the penal system found in industrial democratic societies, and we can recognize that this modern penal system is different in important, defining ways from penal systems that preceded it (Hudson, 2003, 153–154).*

If we examine the great transformations that influenced the history of crime and of criminal justice in the modern and contemporary periods, focusing especially on the ways conflicts were organized and on the values and ideology that characterized them on the level of social control, one of the most important things that stands out is the significant delegitimization of the practice of vendetta and the political weakening of the contexts that considered it a determining and essential instrument for maintaining social equilibrium and control.[113] The use of inquisitorial procedures and severe punishments on

110 A summary focusing on a comparison between the theses of Foucault and Elias is offered by Spierenburg, 2004b.

111 A clear and efficacious summary is found in Hudson, 2003.

112 The text of G. Rusche and O. Kirchheimer: *Punishment and Social Structure*, which first appeared in 1938 and has undergone numerous re-editions (important is the New York 1968 edition) and is clearly Marxist in its approach, proposes a direct correlation between the labour market and the evolution and severity of punishments. Covering a long period (from the 13th century to the advent of capitalism), Rusche particularly held that the greater or lesser severity of punishment was a direct consequence of the greater or lesser availability of the workforce. This correlation may seem mechanical at first sight, but it appears more well-founded if examined in all its social and cultural implications.

113 A thesis emphatically proposed by Black, 1983. He remarks: "Much of the conduct described by anthropologists as conflicts managements, social control, or even law in tribal and other traditional societies

the part of the central powers was probably the consequence of the economic and demographic changes which, above all from the 16th century on, involved the majority of European countries. The system founded on feud and vendetta found its *raison d'être* in community contexts characterized by shared decision-making and by certain specific factors, among which custom and juridical pluralism were the most outstanding (Rouland, 1992, 196–200).

Invested by increasingly significant geographical and economic mobility, 16th century society had to adopt new parameters of order and social control. As has been stated by Henry Kamen:

> *Traditional communities, anxious to conserve their social norms and good order, attempted to correct divergent behaviour and remedy failures of conduct. In a changing world, the means to achieve this were not always available: policing systems, where they existed, had limited authority. Moreover, there were no commonly accepted norms about what represented incorrect behaviour, or in what way it could be regulated. Long before the sixteenth century, small societies in Europe had used their local processes of control to regulate conflict and instability (Kamen, 2000, 173).*

Only the central powers could ensure control over so vast and politically fragmented a territory, where there were phenomena felt to be extremely dangerous, such as vagrancy, pauperism and banditry. Nor is it by chance that the judicial activity that was equipped with inquisitorial rites was directed above all at controlling and repressing aristocratic violence as well as the attacks and robbery that threatened the security of highways and private property.

Thus, it was inevitable that the system of feud and vendetta that characterized the life of the communities and the social groups and lineages that had traditionally used it should in the end be traumatically involved, along with the system of custom and the judicial procedures that had for centuries marked it.

This political and cultural process did not actually involve all European societies. Not directly influenced by great economic and demographical changes, some areas around the Adriatic and the Mediterranean – in countries for instance like Montenegro, Albania and Greece – in large part kept their customs (Kanun) and an organization of conflict founded essentially on the vendetta system up to the 20th century (Trifa, 2008; Resta, 2002).[114] This was a system whose ideal roots lay in ancient early medieval customs, though it is clear that the features and changes that over the centuries distinguished it had been able to interact actively with the social context of non-intrusive po-

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is regarded as crime in modern societies. This is especially clear in the case of violent modes of redress such as assassination, feuding, fighting, maiming and beating, but it also applies to the confiscation and destruction of property and to other forms of deprivation and humiliation" (Black, 1983, 34).

114 In 1781–1782 the Venetian superintendant in Dalmatia and Albania, Paolo Boldù, wrote his *Osservazioni sopra li modi con cui li Veneziani avrebbero potuto render più fermo il loro possesso della Morea*, in which he tellingly describes the widespread system of vendetta existing in the Adriatic and Mediterranean area, cf. BNM, ms. cl. IV, cont. 193 (443). On Boldù's text, refer to Viggiano, 1998.

litical systems like the Ottoman Empire and the Venetian Republic. The long continuity of the feud and the vendetta in these areas suggests the extreme complexity of a cultural and juridical system which, in varying degrees and modes, profoundly influenced the European social context.

FAJDA IN MAŠČEVANJE MED OBIČAJI IN PRAVDNIMI POSTOPKI V SREDNJEVEŠKI IN NOVOVEŠKI EVROPI. ANTROPOLOŠKO-PRAVNI PRISTOP

Claudio POVOLO

Univerza Ca' Foscari v Benetkah, Oddelek za humanistiko, Dorsoduro 3484/D, 30123 Venezia, Italija

e-mail: clpovolo@gmail.com

POVZETEK

V članku je uporabljen interdisciplinarni pristop za razumevanje različnih vidikov družbenih praks, ki so, čeprav pod različnimi poimenovanji, kot fajda ali maščevanje, imele isti cilj, in sicer ureditev rabe sile ter osnovanje prvega pravega instrumenta družbenega nadzora. Avtor se v svojem razmišljanju sprva nasloni na nekaj nedavnih študij, opravljenih v nekaterih evropskih državah, npr. v Nemčiji, Franciji, Veliki Britaniji in Italiji v srednjem in novem veku, nato pa osvetli nekaj novih raziskovalnih smeri, ki imajo za cilj globlje preučiti odnos med postopki, značilnimi za maščevanje, ter sodnimi postopki, ki so maščevanje urejali v okviru javnih inštitucij.

V prvem delu članka so predstavljeni zapleteni in pogosto težko opredeljivi odnosi med svetom običajev in svetom, osredotočenim na specialistično in pretežno pisno pravo, ki se uveljavlja od druge polovice 12. stoletja dalje z uvedbo občega prava (ius commune) v različnih evropskih državah. Avtor posebej preuči pravdne postopke, ki so hitro asimilirali in nato na najrazličnejše načine naprej razvijali sodno tradicijo običajnega prava, močno prežeto s fajdo in s potrebo po obvladovanju konfliktov znotraj skupnosti. Namen pravd, v katere so se vpletala številna dejanja miru, posebne vrste pozivov ter kazni, kot sta denimo izgon ali globa, je bil olajšati reševanje sporov.

V drugem delu članka so analizirane spremembe, do katerih je od 16. stoletja dalje prihajalo v večjem delu evropskih držav z uvedbo pravih zasliševalnih postopkov, z bojem proti razbojništvu in uveljavitvijo stroge kaznovalne pravice, ki se je nanašala na zelo obsežna ozemlja. Prav te novosti so najprej oslabile, nato pa izničile sistem fajd, ki je dotlej imel posredovalno vlogo med običaji in pravdnimi postopki ter izražal močan pomen vrednot, kot sta čast in sorodstvo. Tovrstne spremembe nakazujejo drugačno legitimnost sile na ozemljih, meje katerih se od 16. stoletja naprej zaznavajo na osnovi reda in oblasti, ki zaznamujeta rojstvo novih držav, pa tudi potrebo različnih družbenih področij, da omejijo pojave, ki so se šteli za nevarne, denimo, potepuštvo, beraštvo in razbojništvo.

Ključne besede: maščevanje, običaji, pravo, mir, pravda, pravica

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