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Norme, scienza e pratica giuridica tra Genova e l'Occidente medievale e moderno

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The Itinerant Merchant and the Fugitive Merchant in the Middle Ages

The various types of status enjoyed by the merchant for several centuries, between the Middle Ages and the modern era, hold a special position among the numerous types of marginality.

In our historiographical perspective derived from a more than century-old tradition, we are used to considering the medieval merchant as the great protagonist of what, in a memorable expression, Roberto Lopez, defined as the 'commercial revolution' [1].

It is therefore difficult to relate this figure, which appears almost triumphant, within the political society often created and shaped by its own ambitions, to the idea of marginality or even of exclusion from that society.

Yet exclusion and marginality are sometimes associated with the merchant precisely because of the nature of the merchant's own activities. I am thinking, for example, of the guilds, whose aim was to insure the maintenance of an economic monopoly – profession, industry or handicraft – within a given community. Consequently this monopolization created a rigorous procedure of selection of its members which excluded foreigners, and even those fellow citizens who had not undergone a strict apprenticeship. The present brief outline of the merchant, as political subject and protagonist of the medieval economy, is limited, I should point out, to the period from the eleventh century onwards. Previous to this, in the early Middle Ages, the merchant's social and economic position was very different and certainly less advantageous.

The Church, above all, regarded his activities with suspicion. In fact, it is in the sources of canon law that we are first able to discern the marginality of

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* Pubbl. in *Of Strangers and Foreigners (Late Antiquity - Middle Ages)*, a cura di L. MAYALI - M.M. MART, Berkeley 1993, pp. 81-96.

[1] R.S. LOPEZ, *The Commercial Revolution of the Middle Ages*, Prentice Hall 1971. See also J. HILAIRE, *Introduction historique au droit commercial*, Paris 1986; V. PIERGIOVANNI, *Diritto commerciale nel diritto medievale e moderno*, in *Digesto*, Torino 1989[4].

the merchant and, subsequently, his progressive acceptance by the society in which he operated.

When the merchant class became the protagonist of the commercial revolution its members themselves promoted new legal norms which allowed them to carry out their enterprises. It was precisely within the context of these new regulations that new forms of marginalization of the merchant emerged. This was an inevitable result of the institution of bankruptcy, which brought into being a series of legal measures which not only produced legal consequences but also introduced important social implications.

The first form of marginalization had a social origin and was reflected in everyday life as well as in legal doctrine. The second one evolved from a legal institution and had significant repercussions for the individual merchant, his social group and society as a whole. Feudal society, in fact, rural and hierarchical as it was, had no place in its structure for the merchants, who remained at its margins.

The Church, at least until the Gregorian Reform of the XIth century, was an integral part of this society and its polemicists and jurists reproduced the patristic tradition. Hoping to encourage the spiritual improvement both of the clerics and the faithful, the Church warned them against any danger of sin. Commerce, because of its materialistic nature which promoted personal gain, was viewed by the Church as one of the activities to be avoided at all costs. There were, however, other unrelated professions which were also subject to this rigorous moral attitude – the professions of soldier, butcher, landlord, lawyer, surgeon, notary, judge and, perhaps more understandably, those of prostitute and jester [2].

As Baldwin has noticed about the evangelical and patristic tradition, « Characteristically during the Middle Ages economic theories were discussed against a background of general suspicion toward merchants and mercantile activities ». Moreover, he adds, « Neither the Old nor the New Testament

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[2] J. LE GOFF, *Mercanti e banchieri nel Medioevo*, Messina-Firenze 1969, p. 68; V. PIERGIOVANNI, *Il Mercante e il Diritto canonico medievale: 'Mercatores in itinere dicuntur miserabiles personae'*, in *Proceedings of the Eighth International Congress of Medieval Canon Law*, San Diego, 21-27 August 1988, a cura di S. CHODOROW, Città del Vaticano 1992 (*Monumenta Iuris Canonici*, *Series C*, *Subsidia*, 9), pp. 617-634.

contained a systematic exposé concerning the subjects of material goods or mercantile activity » [3].

The main starting-point for all Church writings was certainly the Gospel according to St. Matthew (6:25-34) which recounts the famous Sermon on the Mount in which « Not only did Christ teach the priority of spiritual aims over material goods, but he seemed also at times to have attacked an excessive accumulation of earthly goods » [4].

This negative attitude towards wealth was rapidly associated with the means by which it was acquired and above all to the practice of commerce, which presupposed the lust for gain and the frequent use of illicit means. Such notable Fathers of the Church and authorities as Tertullian, Augustine and Ambrose, warned against the spiritual dangers of commerce. Official sanction was found in an epistle of Leo the Great, according to which « It is difficult for buyers and sellers not to fall into sin » [5].

Several of these statements were taken up again in Gratian's fundamental work, *The Decretum* (1138-1142), and influenced the doctrinal tradition of canon law. Certainly, one of the most famous opinions was expressed by Joannes Chrisostomus (D. 88 c. 11), according to whom:

> « Eiciens Dominus vendentes et ementes de tempio, significavit quia homo mercator vix aut numquam potest Deo placere. Et ideo nullus Christianus debet esse mercator, aut si voluerit esse proiciatur de ecclesia dei, dicente Propheta 'Quia non cognovi negotiationes introibo in potentias Domini'. Quemadmodum enim, qui ambulat inter duos inimicos, ambobus placere volens, et se commendare, sine maliloquio esse non potest ... sic qui emit et vendit sine mendacio et periurio esse non potest ... » [6].

Cassiodorus, too, expressed a scathing judgement of merchants:

> « Quid aliud est negotium nisi quae possint vilius comparare, carius velle distrahere? Negotiatores ergo illi abominabiles existimantur qui iustitiam Dei minime considerantes per immoderatum pecuniae ambitum polluntur, merces suas plus periuriis onerando quam pretiis. Tales eiecit Dominus de tempio dicens 'Nolite facere domum patris mei domum negotiationis' ».

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[3] J.W. BALDWIN, *The Medieval Theories of the Just Price; Romanists, Canonists and Theologians in the Twelfth and Thirteenth Centuries*, in « Transactions of American Philosophical Society », n.s., XLIX/4 (1959), p. 12.

[4] J.W. BALDWIN, *The Medieval Theories* cit., p. 13.

[5] *Ibidem*, p. 14.

[6] D. 88 c. 11.

Alongside these unequivocal condemnations, some authors displayed more flexible attitudes towards an activity which was not only condemned but for which it was necessary to provide rules of ethical conduct. Gratian's *Decretum* contains two interesting texts from Augustine who belonged to this second group of authors. The first text concerns the relationship between clerics and commerce (D. 88 c. 10): « Fornicari omnibus semper non licet: negotiari vero aliquando licet, aliquando non licet. Antequam enim ecclesiasticus quis fit, licet ei negotiari: facto iam, non licet ».

The second text, which imagines a dialogue between Augustine and a merchant, also introduces the view that the practice of commerce might be acceptable (D. 88 c. 12):

> « ... Ergo si propterea iste tota die laudem Dei dicit, quia non cognovit negotiationes, corrigant se Christiani, non negotientur. Sed ait mihi negotiator: Affero ex longiquo merces, mercedem laboris mei, unde vivam, peto: dignus est operarius mercede sua. De mendacio, de periurio agitur, non de negotio. Ego enim mentior, non negotium. Possem enim dicere, tanto emi, tanto vendam, si places eme. Quomodo ergo revocas a negotiatione? Omnes artifices mentiuntur, sutores, agricolae. Vis, ut optem carum tempus, ut possim vendere annonam, quam servavi? Sed non hoc faciunt, inquis, agricolae boni, nec illa negotiatores boni ... omnia ista hominum, non rerum peccata sunt. Quaere ergo episcope – dicit mihi negotiator – quomodo psalmistam intelligas, et noli me prohibere a negotiatione: negotiatio enim me non facit malum, sed iniquitas mea et mendacium meum ... ».

It has been observed that

> « Augustine cleared the profession of commerce from its fundamental stain of opprobrium ... This passage was quoted and requoted by the canon lawyers and theologians throughout the twelfth and thirteenth centuries and played an important role in the medieval theories of the merchant and sale ... In this way Augustine suggested a system of value based on the satisfaction of human needs, which was extremely important to the scholastic analysis of value when Thomas reexamined the problem » [7].

With such doctrine and with its adherence to the rigid hierarchy of feudal society, the Church undoubtedly contributed to the merchant's definition as a social outcast in the early Middle Ages.

During the Gregorian period, however, the contrasts between the feudal world and the new economic reality transformed the political and practical terms of the relationship with the newly-emerging social classes. In addition

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[7] J.W. BALDWIN, *The Medieval Theories* cit., p. 15.

to the use of merchants by the Church itself, from the rich monasteries upwards, there was a need in the secular world, in the towns in particular, for a political and not exclusively spiritual presence. This led, if not to a total change, at least to a moderation of certain negative attitudes and judgements. Such a change was brought about in the course of everyday life rather than in the rulings of legislators and doctors' opinions – either in theology or law.

However, the canonists found it difficult to free themselves from a continuous tradition of mistrust of the merchants. It was only in the XIIth-XIIIth centuries, at the impetus of theological resolutions, that some doctrinal solutions were developed in a perspective more adapted to the new conditions of commercial practice.

The consistent attitude expressed in canon law texts could be best defined as ambivalent. Even as late as the XIVth century, this attitude produced the paradoxical result of the simultaneous recognition and condemnation of the merchant's activity [8].

In several texts the ambivalence of the judgements on trade can be compared with another concept equally ambiguous in medieval society – that is, the concept of poverty. In its social significance, it embraced a great variety of terms and nuances from indigence, to feebleness due to old age, destitution and so on. In the religious sense, however, poverty became a condition of spiritual perfection and a virtue which delineated the eternal human conflict between material gain and spiritual aspirations [9].

It became possible to view commerce in the same light as poverty once it was realized that they shared a common social condition which found expression in the term *miserabiles personae*.

This term, borrowed from Justinian law, referred to those who were deprived of any means of subsistence and who, like widows and orphans, did not know how to manage their personal possessions. This meaning can also be found in canon law and especially in Gratian's *Decretum.* As a matter of fact, clerics were allowed to transgress the ban on commercial activities

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[8] J. GILCHRIST, *The church and Economic Activity in the middle ages*, London 1969, pp. 50-53.

[9] M. MOLLAT, *La notion de la pauvreté au Moyen Age; positions des problèmes*, in « Revue d'Histoire de l'Eglise de France », 52 (1966), pp. 5-23.

for the specific purpose of assisting *miserabiles personae* such as orphans and widows [10].

This understanding attitude of the Church was based on charity and Christian fraternity. It found its counterpart – albeit on a different social and cultural level – in the feudal world, which developed the concept of protection provided by the person of high standing to the persons of lower status. The poor indigent was not inferior but weak, and therefore needed to be protected along with the other groups. The merchant – for whom itinerance was still an inherent part of his vocation – became included in the ranks of the weak in need of protection. The reason is to be found not only in the objective conditions of inferiority and danger he was subjected to but also in his classification with – for him almost a representation by – an individual typical of the medieval world, the pilgrim.

In fact, both in ecclesiastical and feudal circles the *pauperes Christi* came to be spontaneously, almost naturally, grouped together with the pilgrims, who because of their faith exposed themselves to privations and dangers. The pilgrims represented *l'homo viator* who, in the same way as the *pauper*, was following a difficult road to salvation and, like him was not considered to be a person of inferior status but merely as weak and in need of protection [11].

The help and assistance offered to the pilgrim were doubly meritorious, because they were spiritually motivated as were those who took up the cross to tight for and liberate the Holy Land. The merchant, too, was without protection, poor and a pilgrim at the same time. His placement in the same category was, therefore, understandable.

Following this tradition, a late canonist, Joannes of Agnani, said: « Nota quod mercatoribus in mercimoniis debet adhiberi favor ... tales sunt personae miserabiles, quamdiu sunt in mercimoniis sicut peregrini ... » [12].

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[10] B. Tierney, *Medieval Poor Law. A Sketch of Canonical Theory and its Application in England*, Berkeley-Los Angeles 1959, pp. 15-19.

[11] F. Garrison, *À propos des pèlerins et de leur condition juridique*, in *Études d'histoire du droit canonique dédiées à Gabriel Le Bras*, II, Paris 1965, pp. 1165-1189; L. Schmugge, *Die Pilger*, in *Unterwegsein im Mittelalter*, (« Zeitschrift für historische Forschung », 1, 1985), pp. 17-47.

[12] Ioannes de Anania, *Super Quinto Decretalium*, Lugduni MDLIII, c. 86 *r*.

In Gratian's *Decretum* two passages in C. 24 9.3 c. 24, and c. 25, on the theme of excommunication, address this question. Canon 25 quotes Pope Nicholas II who after threatening with excommunication « qui peregrinos vel Oratores cuiuscumque Sancti, sive Clericos, sive Monachos, vel foeminas aut inermes pauperes depraedati fuerint vel bona eorum rapuerint, vel malum eis obviaverint », enjoined that the *pax* or *treuga* established locally by the bishops be respected. This canon is part of the deliberations of the Lateran Council of 1059. It defined for the universal Church the institution of the *pax* which had developed in Frankish territories, following the tradition of local truces. These had emphasized the injustices suffered by the poor as a result of their conflicts with the rich. The Pope, therefore, outlined the model of a general *pax dei* for the defense of weak and unarmed persons [13].

The identification of the merchants with these categories was accomplished in the canon 23 of the same *Quaestio* which is quite a recent text with respect to the original formation of the *Decretum.* It is part of the deliberations of the Lateran Council of 1123:

> « Si quis Romipetas et peregrinos, apostolorum limina et aliorum sanctorum visitantes, capere seu rebus quas ferunt spoliare vel mercatores novis teloneorum seu pedaticorum exactionibus molestare tentaverit, donec satisfecerit, comrnunione careat christiana » [14].

The text should not be considered as a surprising example of a favorable attitude on the part of the Church towards the merchant, but rather as the step in the process of depreciating both his figure and his function. We are dealing, in fact, with a formal definition of a precise social, political and cultural practice which was first produced by a classical, then a patristic tradition. After branding the merchant as an exploiter of the poor, this traditional attitude lowered him to the worst possible position in terms of social prestige. It also denied his profession any public utility whatsoever and finally identified him with the poor, *miserabiles personae*, that is, with the weakest of the weak and the most needy of protection.

The decretal set out to protect groups of itinerant laymen from two sorts of illegal behavior: robbery and unjust fiscal exactions.

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[13] H. HOFFMANN, *Gottesfriede und Treuga Dei*, Stuttgart 1964, p. 218 ff.

[14] C. 24 q. 3 c. 23.

Gratian wanted to show how the Church used its harshest penalty to punish those even if they were powerful, who inflicted unjust loss on the poor and defenseless. On moral grounds the intervention of the Church was, without doubt, beyond criticism but there were also some advantageous political implications for the Church which become evident when we think that in practice this could mean the beginning of a new area for ecclesiatical jurisdictions.

The regulations contained in the *Decretum* and outlined above were taken up again and clarified by papal legislators such as Alexander III and Innocent III [15]. The following doctrinal movement, however, seemed to be fluctuating between the endorsement of the traditional classifications and more recent opinions, in accord with the different economic situation at the beginning of the XIIIth century, condoning the differentiation between the merchant and the poor, or at least rejecting their direct and imperative identification with each other [16].

Thus the merchant acquired economic force and political power. His legitimization was to be achieved through the works of the great theologians of the XIIIth century from Albertus Magnus to Thomas Aquinas. They would rationalize this complex question with « the introduction of Aristotelian ideas which presented society as characterized by the division of labor and in which the exchange of goods carried out by the merchants was a natural need » [17].

In the context of the same social process, the number of poor increased and their characteristics changed. They were now living on the margins of society and they began to be perceived as dangerous. As a result, one can notice the development of a social contempt which tended to group the concept of poverty together with that of idleness and of crime.

Baldus de Ubaldis, for example, made no reference to the poor, when, in the second half of the XIVth century, he outlined an original classification of the various *peregrinationes* (X.I.34):

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[15] X. I. 34. 2, X. V. 39. 31, V. PIERGIOVANNI, *La punibilità degli innocenti del diritto canonico nell'età classica*, II, *Le "poenae" e le "causae" nella dottrina del secolo XIII*, Milano 1974 (« Annali della Facoltà di Giurisprudenza di Genova », Collana di monografie, 38), p. 96 ff.

[16] V. PIERGIOVANNI, *Il Mercante* cit., (see note 2).

[17] J.W. BALDWIN, *The Medieval Theories* cit., p. 77.

« Peregrinatio alia mala, ut exilii vel causae piraticae, et ista non prodest: Nam contra istos possunt fieri processus ... Alia bona, cum pro lucro captando, ut causa mercantiae, ut faciunt Genuenses, et ista est amica populis, quia mundus non potest sine mercatoribus vivere, tamen non est privilegiata aliquo privilegio redacto in corpore iuris, licet gratiose a principibus saepe multas habeant immunitates et exemptiones, quae eis benigne et sine cavillatione custodiendae sunt. Municipia autem non possunt has immunitates concedere ... Alia melior pro virtute quaerenda, causa studiorum, et ista est in aliquibus privilegiata ... Alia optima pro salute animae, ut quando visitantur limina Apostolorum ... Alia impetuosa ex vi divina ... Alia necessaria sed non praecisa in causa appellationis. Alia necessaria et praecisa, ut si Papa vocat praelatos ad concilium ... » [18].

The socio-cultural consequence which appears in this text is the positive judgement of commerce which has lost every negative connotation and is now considered as a means for promoting the economy. *Captare lucrum* is viewed positively as a means for increasing the general wealth and the well-being of the community. The canonists, caught between uncertainties of interpretation and attempts at systematization, adapted the ancient texts to the new reality.

Within the doctrine of canon law, which in the XIIth century shaped the legal tradition inherited from the previous centuries, the marginality of the merchant was characterized by two different approaches. The first approach was the product of the ecclesiastical tradition. It was useful to the reclassification of the merchant according to newly accepted social categories. The contribution of commerce to the benefit of society was considered marginal and as having a detrimental effect on the spiritual improvement and salvation of the individual soul. The marginality was therefore operative both at the level of the system of values proposed and at the level of an ideal social hierarchy.

The second approach was more practical. It served as an indication of how far doctrine had been accomodated to practical necessities. The characterization of the merchants as *miserabiles personae* in need of protection when defenseless in *itinere*, just like the *peregrini*, constituted the response of Christian charity when confronted with people, i.e. merchants whose low moral status was not offset by the functions they carried out, as yet of little advantage to the community. In this case, marginality was compounded with

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[18] V. PIERGIOVANNI, *La "peregrinatio bona" dei mercanti medievali: a proposito di un commento di Baldo degli Ubaldi a X. I. 34*, in « Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung », LXXIV (1988), pp. 348-356.

the reality of a life full of dangers and abuses, similar to that of *miserabiles personae* who could at least benefit from individual acts of magnanimity and limited legal protection.

Two centuries later, the commercial revolution had completely overturned ideas and practice. The first approach was largely justificatory even if it had not yet fully allayed all the suspicion of the religious community. It even developed a doctrine stating that commerce served a natural function in society and justified contracts suspected of usury, like the *commenda*, money-changing and insurance. A jurist such as Baldus de Ubaldis, both a canon and a civil lawyer, adopted an almost triumphant tone: the public usefulness of the merchants was beneficial to the life of the community, which could not work without them as mediators in trade. Models were even proposed, such as the city of Genoa, which owes its fame and prosperity to commerce.

The merchant, in Baldus de Ubaldis opinion, was by now someone who exercised some direct political power and was in control of a large part of the economies of various nations, and had therefore obtained social prestige.

The merchant class hence displayed the forms of organization and codes of behavior appropriate to the new conditions regulating the practice of their profession within the local as well as the international business community.

The expression of mercantile ethics is found, more than in theological or juridical writings, in the literary genres produced by the merchants themselves, such as correspondence, memoirs and handbooks which exalted the 'art of commerce'. Benedetto Cotrugli of Ragusa's work, for example, has been recently published. Written in 1458, it is a real hymn to the honesty, temperance and charity of the perfect merchant [19].

The jurists were more interested in defining the characteristics of mercantile organization, which assumed the form of a guild which had the autonomous power of establishing its own regulations, or statutes, which created a law particular to that profession. It was not simply a question of internal self-regulation even if it established a monopoly within the profession allowing for the potential exclusion from practice those who, like foreigners, could create problems of competition.

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[19] BENEDETTO COTRUGLI RAGUSEO, *Il Libro dell'Arte di Mercatura*, a cura di U. TUCCI, Venezia 1990.

The procedural aspect was most important: the merchants settled their own disagreements, through special courts, the socalled 'Mercanzie,' which were often in conflict with official courts. The rules governing trials were new and different with respect to Roman law. They sought equity and brevity of judgement and legal defense was sometimes dispensed with. This simplification, vital to mercantile life, frenetic as it was and relying upon speed and clarity in everyday matters, revolved principally around trust, that is, confidence and good faith which the merchant's judge sought and rewarded.

If these were the premises which regulated mercantile relations, it was natural that whoever violated them was immediately cast out and discriminated against. This is the basis on which a judicial institution was developed, a creation typical of the late Middle Ages, the institution of bankruptcy.

It was often the case that a merchant, through lack of fortune, improvidence or fraud, failed to pay his debts. This situation brought with it some legal problems but more important were the social repercussions both within the merchant class itself and within the entire community. The merchant had contravened the principal ethical rule of his profession, which consisted of honoring what he had undertaken. As Santarelli has written,

> « If trade, trust and credit were the three hinges on which was based the entire dynamic of mercantile society, bankruptcy – which invalidated credit, rendered useless and damaged the trust which had been placed in the now bankrupt merchant – revealed itself as the event and the behavior which ran counter to the fundamental beliefs of that society. All the more so since that economic, social, cultural and ultimately political hegemony which the merchant class had conquered for itself and had conserved for a long time, could be seriously damaged by nothing so much as by the contestation that it was imprudent to have faith in whoever practiced commerce and to extend credit to him or entrust him with capital so that he might invest it or make it increase » [20].

An example of the potential consequences of such a procedure for a merchant can be found in the *Libro Segreto* of Goro Dati, the Fiorentine merchant, written in 1408. Goro remembered the difficulties he had to face in Barcelona because his partners incompetence had generated suspicion, and had made it impossible to obtain credit, avoid bankruptcy and ultimately save their reputation. He preferred financial ruin to a stain on his honor.

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[20] U. SANTARELLI, *Mercanti e società tra mercanti*, Torino 1989, p. 61; ID., *Fallimento* (*storia del*), in *Digesto*, Torino 1990[4].

Here, then, emerges the first legal and social element which accompanies bankruptcy, that is to say, dishonor.

The merchant then recalled the problems confronted upon his return to Florence. His partner, Pietro Lana, accused him, in front of the *Tribunale della Mercanzia*, of being a bankrupt and asked that he be subjected to the penalty prescribed by the statutes, that is, that he be banned from the city. We can here identify the second element accompanying bankruptcy which also has legal and social effects, that is the possible exclusion not just from the corporation but even from the entire community.

The Florentine merchant seems almost more preoccupied by the consequences for his own social credibility than he is by the legal consequences, but it is difficult to separate the two[21].

Bankruptcy is certainly a behavior which negates many common assumptions about life within a community and has strong associations with illegality. This is the fact underlined by jurists and legislators who considered bankruptcy a crime, and prescribed harsh sanctions against it. The severity of the penalties indicates that the aim was not only to punish and recover part of the credit, but rather to exclude the bankrupt from every public and private activity.

The path which leads to such types of exclusion is rather unusual since it derives from the practice, to be considered general, of the flight of the merchant who found it difficult to honor his debts. An example is given by a decree of the Duke of Milan, in 1473:

> «... Non ignorantes quanta ... saepenumero ex perfidia mercatorum et aliorum fidem fallentium damna obveniant, qui nulla permoti conscientia dum privatorum pecunias, et bona sub spe fidei congesserint, et fidem fallunt ipsam, et aufugientes alio novas artes doloque, et commota in utilitatem propriam, aes alienum creditorumque pecunias convertunt, ad hoc ipsum ne longius huiusmodi crescat abusus, opportune instituimus providere, quo circa per huius nostrae constitutionis auctoritatem. Ex certa scientia, animo mature deliberato, et de nostra plenitudine potestatis etiam absolutae, volumus et declaramus quod quicunque in dominio nostro mercator in mercatorum numero matriculaque descriptus, et quilibet negotiator et artifex vel a mercatura seu negociatione dependentia habens ut supra privatorum pecunias et bona in mercaturis exercens per fugam actualem e dominio nostro a fide defecerit, et idcirco creditoribus suis non satisfecerit, nisi nobis de aliquo fortassis

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[21] *Mercanti scrittori. Ricordi nella Firenze tra Medioevo e Rinascimento*, ed. V. BRANCA, Milano 1986, pp. 552-554.

eius infortunio vel de legitima fraudanda fidei causa constiterit, ipso facto post fidem fraudatam et praedicta secuta noster et status nostris rebellis factus sit et censeatur et rebellium quorumcunque aliorumque poenam incurrat ... » [22].

It is evident from this text that the political-social values are singled out in the case of bankruptcy which are deemed worthy of an exemplary punishment. As it has been stated,

« The insistence of legal statutes from the thirteenth to the sixteenth centuries on exclusion as a penal sanction typical of bankruptcy reveals to us in full one of the fundamental constants of this legislation, at the base of which lies and operates ... the conviction that bankruptcy is, because of its consequences, an event which causes direct, fundamental damage to the ordered life of the community. Since there is a tendency on the part of the legislators of these centuries to presume that what lies at the base of bankruptcy is fraud, which in turn is the reason for the severity of the penalty, this is seen as perfect retribution for the injury suffered, considering that such a penalty has the nature of excommunication from civil society. In so far as the *cessatio et fuga* is felt as a serious attack on public interest and most of all on public order and the conditions necessary for ordered community life, the sanction of exclusion – which is given concrete expression in a *eiectio a civitate* of the bankrupt – tends to compensate for and eliminate that damage in a form which I would call specific » [23].

For the merchant, exile carried with it exclusion from the town community and comprised other *capitis diminutiones* such as deprivation of citizenship, loss of protection from a potential attacker, deprivation of the right to ask for justice and the use of legal counsel.

The fleeing merchant thus lost protection by the merchant corporation but above all the privileges which made him a citizen *pleno iure*. A typical example is the Genoese legislation of 1589, which imposed external signs indicative of these financial difficulties:

« Rupti intelligantur et sint ipso iure privati nobilitate, et non possint admitti ad aliquod officium, magistratum, honorem aut beneficium Reipublicae, et ipsi eorumque uxores etiam post factum accordium non possint deferre pro ornatu neque pro vestitu aurum, argentum, gemmas, anulos neque setam sub poena scutorum quinquaginta pro qualibet vice ... » [24].

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[22] *Statuto Civitatis Cremonae*, Cremonae 1578, pp. 251-252.

[23] U. SANTARELLI, *Per la storia del fallimento nelle legislazioni italiane dell'età intermedia*, Padova 1964, p. 126.

[24] *Statutorum civilium serenissimae Reipublicae Januensis*, Genuae 1597, p. 101.

This urge to render externally visible the dishonorable aspect of bankruptcy is found even more clearly in other medieval statutes from central Northern Italy which provides for the socalled 'pittura infamante' which consisted in portraying the bankrupt, often in caricatured form, on the walls of public buildings *ad perpetuam eius infamiam* [25].

These were the sanctions enforced by the community as a whole against the bankrupt merchant who had transgressed its social norms. No less significant were the specific provisions for exclusion implemented by the merchant group itself. The Florentine statute of 1415 provided that:

> « ... et non possint ipsi, vel eorum filli, vel descendentes masculi per lineam masculinam nec eorum heredes esse de arte illa de qua erant tempore cessationis, vel ipsam artem ... exercere ... vel habere aliquod benefitium, vel offitium ab arte ... » [26].

This was, as we can see, an exclusion which, in order to punish at once the individual and protect the corporation, extended its effects to the merchant's relatives and descendants, and could only be repealed by the payment of all his debts and the subsequent rehabilitation.

The extension of the effects of bankruptcy to the relatives was not only the result of a procedure increasingly similar to the one followed in the case of the punishment of exile for political crimes. It was also a direct consequence of the particular character of the world of medieval commerce where, in fact, a system of regulations extended to the agnatic group and added social bonds to the traditional family ties.

Bankruptcy, as we have said, is born in medieval mercantile society. Its particular form reflected the values that society had set up for itself: honesty and trust. These values were, at least formally, among the fundamental principles of society. To fail to live up to them meant putting oneself outside the rules regulating life within the community. With the rise of the political power of the merchants such rules became enforced as the law.

In his famous *Book of the Art of Commerce*, written in 1458, Benedetto Cotrugli, a merchant of Ragusa, spoke at length about the professional morals of the merchant class and maintained that:

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[25] G. ORTALLI, *"Pingantur in Palatio". La pittura infamante nei secoli XII-XVI*, Roma 1979.

[26] *Statuto Populi et Communis Florentiae*, I, Friburgi MDCCLXXVII-MDCCLXXXI, p. 519.

« Et nota che non solo in facto debbe essere integro, ma etiandio in pensamento, et saldo d'animo et indubitato lo nome, che mai coinquinò l'animo suo a fraude. Et però i falliti mai più dovrebbono havere fede ne credito, maxime quelli che per captività hanno fallito, ma si debbono havere come persone infame et adulteratori della mercatura. Quia qui semel malus, semper presumitur malus » [27].

This would become the tradition of exclusion handed down in the doctrinal works as well as in the professional practice of later centuries. It would be taken up again in the sixteenth century when commercial law became an autonomous branch of legal knowledge. Its founder, the Ancona jurist Benvenuto Stracca, active in the second half of the XVIth century, is author of the fundamental *Tractatus de mercatura seu mercatore* and also wrote the *Tractatus de conturbatoribus seu decoctoribus*. In the very title of that work the concept of bankruptcy is associated with the disorder and the disruption caused by the merchant misfortune or the fraudulent exercise of his activity. The justification of the penalties was both legal and social, in so far as, according to Stracca: « Pessimum quidem genus hominum decoctores esse, id nobis est etiam argumento maximo, quod in variis mundi partibus municipalia iura ad improbitatem eorum compescendam sunt constituta » [28].

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[27] Benedetto Cotrugli Raguseo, *Il Libro dell'Arte di Mercatura* cit., p. 216.

[28] Benvenuti Stracchae *Tractatus de conturbatoribus sive decoctoribus*, in *De Mercatura Decisiones et Tractatus varii*, Lugduni MDCX, p. 483.

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