



## SOCIAL CONTROL THROUGH SHAME SANCTION: AN AMERICAN PERSPECTIVE

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### ABSTRACT

This paper aims to investigate why we can identify in the so called Post-modern Western Civilization the increase of shame sanctions with the scope of social rehabilitation instead of the traditional coercive power of Law. The hypothesis that I will work on is the possibility of Individualization process dispenses the reference of the Alter, i.e. the State as Institution of Law, in the conduct establishment process as well as its control in a social perspective. This movement would be clarified through the contemporary psychoanalysis debate, in its social standards. The present paper will be structured as it follows, always considering a theoretical perspective: 1) The presentation of the modern shame sanction matter; 2) Identification of what kind of relation there is judges of modern and democratic civilizations, decisions and Shame Sanctions 3) Identification of perspective in Post-modern society change in a psychoanalysis perspective and 4) Its impact in the comprehension of the dynamic between Law and Society, considering the social generalization of Law through guilt and its individual subjective potential tendency through the Shame.

**Key-words:** Modern Shame-sanctions. Rule of Law: Western Civilization. Post-Modern mentality. Psychoanalysis in social theory.

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## 1 INTRODUCTION

Western Law in its modern standards used to reject Shame as a legitimate way of enforcement. The reasons relay on heritage middle age forms of use shame as punishment, usually associate that with some kind of physically or psychologically violence. So, in modern form of law, the Rule of Law, followed by Due process of law and the idea that Freedom was suppose to be the most important value in an western society, turning at this point the medieval concept of punishment in a more rational and civilized way, which resulted in an banishment of shame of every modern European law doctrine or jurisprudence tradition. The political reason of that was consolidated in the Democracy mentality, especially under the argument the State should not be responsible of revenge acts. Instead of it, the rationality must be the guiding line to government decisions and juridical sentences.

However, the modern World has seen in the cradle of modern way of democracy, local sentences that inflict Shame as sanctions manifested in many forms. Almost instantly there were critical papers about it, as well some defenders one. In this way I believe the works of James Q. Whitman<sup>2</sup> and Tony M. Massaro<sup>3</sup> can be used as outstanding references, among others. This debate enlighten us of some moral perspective in using shame sanctions in modern law systems whose can be raised in two premises: (1) Differentiate Modern and Medieval ways of Shame sanctions arguing that both has no similarity with each other, especially when the first one is not allowed causing, through shame, violence, specially physical one. (2) Through this statement, the discussions about the forms of Modern Shame Sanctions were established in the attempt of answer the same question: Are shame sanctions, in a modern perspective, morally good and congruent of Modern Law Systems those democratically legitimate?

I do not believe that I could contribute to this kind of discussion, specially because I truly believe the works cited above would be able to reach the most important points in the pursuit of answering the question earlier cited. However, I believe that there is a deeper point that the previous question does not have condition to reach and I believe that it could be the central problem of the Modern use of Shame Sanctions. It is about another perspective of the use of Shame as sanctions, not just about if it is *good* or *bad* the use of Shame sanctions in modern western societies but why modern judges and courts try to do social adjustment through the inflicting of shame sanctions, especially when the modern societies supposed to guide their sentences in a rational way, try to stipulate guilt in conducts and, then inflicting a civilized sentence?

This question cannot be answered precisely and certainly not without letting many other questions in the air. So I will attempt to pointing some theoretical references that could be able to make us organize and identify some good points of question with no intention of solve

2 WHITMAN, James Q. **What is Wrong with Inflicting Shame Sanctions?**. (1998). *Faculty Scholarship Series*. Paper 655.

3 MASSARO, Tony M. **Shame, culture and American criminal Law**. 89 *Michigan Law Review* 1880 (1991) Arizona Legal Studies Discussion Paper.

this problem in few pages. Much less than that, I will try to turn our eyes of some movements of society and then try to identify good points that could guide our answer or, better, improve my question.

## 2 THE PERSONAL PERSPECTIVE OF LAW

The question about the use of Shame Sanctions would be easily solved if we try relating some kind of bad responsibility on the Judges or Courts those sentenced Shame sanctions. In this way, we could simply say that those Judges are judging wrongly and they are exceptions in the Rule of Law's World. But it is not that simple. Contemporary and Western Judges know a lot about Democratic standards of Due process of Law and the duty of the Law pro Social Order by respecting some fundamental rights. This constitutional essence of Modern Law is present in every democratic western Nation. It would not be different in the United States of America, where lays the beginning of all of it.

We should, then, try understanding this phenomenon, in the first place, through the eyes of the Judges. They could have realized something, consciously or not, that turn practical the use of shame sanctions and, more, make that compatible with the democratic principles than the other sentences those I will entitle here as "Guilt Sanctions" (Which has its origins in an rational analysis of person responsibility). So, pragmatically, they try to make a choice whereas the Shame could support those principles, democratic ones and, more, could be eventually more effective than "Guilt Sanctions".

I cannot also simply agree that is just a Moral reaction matter of the Judges, in a response of an unorganized, chaotic and libertine society. The Christianity argument can be definitely use and present in these inferences, but it is not a new thing. It was always there. I believe that we have investigate what is changed in the last decades that make acceptable, the fact that Judges try to solve juridical issues with the use Shame. If we want identify that, we cannot call that a retrocession simply, reducing this phenomenon to some delay of part of the American Judges. We, then, have to suppose that, when this choice was made, it was due some possible change of social mentality. That is precisely my hypothesis.

## 3 BASICS PSYCHOANALISYS PERSPECTIVE

It is hard to suppose intuitively there could be any change in contemporary society that has as one of its consequences this type of change in Law mentality, especially when the social theory available discusses those kinds of emotion, i.e., Shame and Guilt having as reference in some level the psychoanalysis theory. Thanks to Freud, the Civilization Process has been understood and followed by some kind of emotions control, by suppressing them, and that was what make the Western Civilization possible, and, at the same time, brought the most important subjective pathologies to the mankind. Trying to explaining this movement, Freud in his most

used work in social theory<sup>4</sup> express some kind of appearance order of these emotions in primitive social groups. First came *Shame (Scham)* than *Guilt (Schuld)*.

Actually, there is just one passage of the work cited above that put those emotions in that order – a footnote, by the way (p. 229) – and Freud already had written about Guilt almost two decades earlier that<sup>5</sup>. Anyway, one of the greatest Social thinkers of 20<sup>th</sup> Century, Norbert Elias, as a ratification, described that passage as a process, the civilization process<sup>6</sup>. This Idea was adopted by the most part of European social thinkers and established as some kind of “theoretical common sense” about how the western civilization was developed. This positioning has been consolidated due to several serious works in this sense<sup>7</sup>.

At this point, the civilization theoretical status which establishes the Modern Law, could be understood exclusively through the management of Guilt in several degrees of Individual Life, what also covers the social and institutional spheres, relating to Shame just a relevant historical social perspective, which does not have a significant part in contemporary society, especially to the effectiveness of Rule of Law. To that, a third created “person” has the role (as a symbolical Father) – through the emotional mechanism of guilt – making possible the interaction of people.

In this sense, “modern Law” would be the concretization of this mechanism, consolidating the idea that the western Civilization was emotionally built under the management of Guilt in Conscious and Unconscious level. This symbolical Father is, in Psychoanalysis, the Superego, which could be manifested in many forms, depending on the psychic structure present in each person, *individually*; *Socially*, and to what is important in this work, that could be the Modern State.

What happens, though, if this symbolical figure has no longer the power of provoking Guilt, neither by its presence, nor by its rules and norms? To a relevant part of the authors of this area affirms that the psychic mechanism cited above must be rearranged. To explain that I will use as reference one of the most important contemporary thinkers of this mechanism, i.e., Dany-Robert Dufour, who says the change of capitalism forms, since 1929, was followed by a drastic change of social behavior, but internally of the individuals, those who became more egoistic. With that change, the Guilt, which requires a worry to others, was slowly losing its power of adjustment to Civilization. In that sense, all the legal Structure, based on Guilt, has no longer the same relevance, in an individual psychic perspective (Consciously or not), in the role of adjusting socially. According to Dufour (2013, p. 105-110), Shame became the most predominant feeling of so called post-modern society (that after 1929), precisely due to the narcissism reference

4 FREUD, Sigmund. **Das Unbehagen in der Kultur**. (1930). In *Studienausgabe – Bd. IX – Fragen der Gesellschaft Ursprünge der Religion*. Frankfurt a.M. Fischer. 2000. pp. 191-270.

5 **Totem und Tabu**. (1912-13). In *Studienausgabe – Bd. IX – Fragen der Gesellschaft Ursprünge der Religion*. Frankfurt a.M. Fischer. 2000. pp. 287-444.

6 ELIAS, Norbert. **Über den Prozess der Zivilisation**. Bd. II. Frankfurt a.M. Suhrkamp. 1976. pp. 397-8.

7 For instance: LOTTER, Maria-Sybilla. **Scham, Schuld, Verantwortung**. Frankfurt a.M. Suhrkamp. 2012, and LIETZMANN, Anja. **Theorie der Scham. Eine anthropologische Perspektive auf ein menschliches Charakteristikum**. Hamburg. Fischer. 2007.

of this kind of emotion. As consequent, would be almost “natural” that this type of dynamic urged in Law enforcement.

I am not saying – actually, I hardly doubt – that the Judges whose applied Shame Sanctions had read Dufour, not even have the awareness of all this process, or else, this kind of theoretical debate. But, this process can be perceptible in Society and a Judge, especially Counties one, can be the unconscious and intuitive comprehension of this phenomenon, trying solving the problem by changing the emotional framework of their sentences. *I can use, as example*, the interview given to Los Angeles Time, from a Texas district Judge about the reason that he use to inflict Shame Sanctions in some kind of crimes convicted persons. He said that: “*The people I see have too good a self-esteem, I want them to feel guilty about what they’ve done. I don’t want ‘em to leave the courthouse having warm fuzzies inside.*”<sup>8</sup>. Of course there is some serious consequences of this kind of emotional management in Juridical Sentences and the local Judges usually do not reflect the consequences of this sort of decision to Law System or mentality, precisely because they have a pragmatic perspective of Law. But what they have in mind when they inflict some Shame Sanctions it is precisely what all of western civilization can experience in some level. The change of some Social establishment, what comes also from inside the individuals and not just from some change of social references. All the new standards of Modern Society - New-liberalism, globalism, Internet, Democracy and so on – are leading changes in so many levels of society and individuals, that it is completely impossible to Law as whole keep the same sphere of act and *modus operandi*. The change came to everyone and everything.

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<sup>8</sup> SHATZKIN, Kate. Judges Are Resorting to Shame in Sentencing Criminals. **Los Angeles Times**. In April 26th 1998. Available at: <http://articles.latimes.com/1998/apr/26/news/mn-43159>

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## CONTROLE SOCIAL ATRAVÉS DA *SHAME SANCTION*: UMA PERSPECTIVA AMERICANA

### RESUMO

Esse artigo almeja investigar o porquê de podermos identificar na então chamada civilização ocidental pós-moderna o crescimento de *shame sanctions* com o escopo de reabilitação social ao invés do tradicional poder coercitivo da Lei. A hipótese que será utilizada é a possibilidade do processo de Individualização dispensar a referência ao Alter, ou seja, o Estado como uma Instituição de Direito, no processo de estabelecimento da conduta, bem como no seu controle em uma perspectiva social. Esse movimento vai ser evidenciado através do debate psicanalítico contemporâneo, nos seus parâmetros sociais. O presente artigo será estruturado assim como segue, sempre considerando uma perspectiva teórica: 1) A apresentação do assunto da moderna *shame sanction*; 2) Identificação de qual tipo de relação existe entre os juízes das modernas e democráticas civilizações, decisões e *shame sanction*; 3) Identificação da perspectiva de mudança na sociedade pós-moderna em um viés psicanalítico; e 4) O seu impacto na compreensão do dinamismo entre Lei e Sociedade, considerando a generalização da Lei através da culpa e sua tendência como potencial subjetivo individual sob o viés da vergonha.

**Palavras-chave:** *Shame sanctions* modernas. Estado de direito: Civilização Ocidental. Mentalidade pós-moderna. Psicanálise na teoria social.