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Claiming apologies: a revival of *amende honorable*?

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In the Netherlands, a recent suggestion was made for the introduction of a civil remedy for apologies. Could this be seen as a plea for the revival of the action for *amende honorable* from early modern times? The latter remedy, aimed at retraction and apologies for insults and reputational injuries, had its roots in medieval Canon law and indigenous law. During the process of reception, it was shaped by moral-theological concepts and provided with Roman law elements. It was meant to undo the injury, not to punish the wrongdoer. The Dutch Civil Code of 1838 retained only a reminiscence of the old *amende honorable*, which was soon to disappear from legal practice. The current proposed claim would to some degree resemble the old remedy for *amende honorable*. Unlike the latter, however, it will be aimed at emotional recovery for some specific kinds of injury and not for defamation in general.

Keywords: *amende honorable*; compelled apologies; Roman-Dutch law; Roman-Utrecht law; Dutch law

I. Introduction

Most present-day jurisdictions belonging to the civilian tradition are unfamiliar with a remedy for imposed apologies, as nowadays is occasionally acknowledged in a number of Anglo-American jurisdictions. In academic literature, the introduction of such a remedy in contemporary law has often been suggested, since it may serve purposes and have effects which cannot be attained by mere damages. For certain situations, e.g. particular cases of published inaccuracies and cases of medical malpractice, apologies from the wrongdoer may be able to provide a more satisfactory outcome than monetary compensation alone. It is questionable, however, whether such a remedy should be seen as a novelty in the legal tradition of the Netherlands and other European jurisdictions, belonging to the civilian tradition, or rather, as a kind of 'revival' of a legal concept which we know from the past. In the early modern law of the Dutch Republic *amende honorable* was the

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rectification of offensive words or acts by confessing one's guilt and begging forgiveness, to which the wrongdoer, who had impugned e.g. another's honour and reputation, could be sentenced, together with payment of *amende profitable*, i.e. a monetary assessment of the injury. The claim for such a retraction existed, for example, in Roman-Dutch law, in the law of adjacent provinces of the Republic and in the *usus modernus pandectarum* of the German territories.

In the literature it has been suggested that the *amende honorable* of Roman-Dutch law can be seen as a precursor of enforced apologies.[1] This also holds good for South Africa, where the remedy of imposed apologies is nowadays acknowledged in case law. The courts base this on the African customary law principle of *ubuntu*, but the literature nevertheless speaks about a revival of the old remedy for *amende honorable* of Roman-Dutch law.[2] In this contribution, we would like to focus on the historical developments of this remedy in the Dutch Republic and the Netherlands from the early modern period until today in their European context. We will first map out what *amende honorable* was and the possible historical roots ascribed to *amende honorable* in early modern literature (II). A hypothesis concerning its actual genesis will follow later. Subsequently, we deal with liability for insults in the early modern law of Holland and Utrecht, and more specifically, with retraction and apologies. We focus here on the intended purpose of *amende honorable* (III).[3] Subsequently, we follow the fate of the remedy for retraction during the nineteenth-century process of codifying civil law (IV). Finally, we reflect on the rise and fall of *amende honorable* and its true nature (V) and return to our central question: to what extent can the introduction of a claim for compelled apologies in our contemporary law be seen as a 'revival' of the old *amende honorable* (VI)?[4]

[1] Andrea Zwart-Hink, Arno J Akkermans and Kiliaan van Wees, 'Compelled Apologies as a Legal Remedy. Some Thoughts from a Civil Law Jurisdiction' (2015) 38(1) *University of Western Australia Law Review* 100, 101–102. See also Eric Descheemaeker, 'Old and New Learning in the law of amende honorable' (2015) 132(4) *The South African Law Journal* 909.

[2] Gardiol van Niekerk, '*Amende honorable* and *Ubuntu*. An Intersection of *ars boni et aequi* in African and Roman-Dutch jurisprudence?' (2013) 19(2) *Fundamina* 391. Anne Keirse, 'Ubuntu, voor een verbintenissenrecht met ruggengraat. Over lessen van het Afrikaanse wereldbeeld en Grieks- en Romeinsrechtelijke grondbeginselen voor het hedendaagse verbintenissenrecht' (2014) 2014(3) *Tijdschrift voor Privaatrecht* 1055.

[3] Some other aspects of the remedy for *amende honorable*, e.g. the effect of remission by the one injured, answering the injury with physical force, insults uttered in a drunken fit and the limitation period of the remedy, for the greater part fall outside the scope of this contribution.

[4] Our study mainly focuses on legal sources, which do not reveal adequately the socio-cultural aspects involved, especially as regards notions such as honour and reputation. In order to gain a more profound insight into the historical development it could be supplemented by investigations from other perspectives, such as the history of emotions, which is nowadays a major research field of the Max Planck-Institute for Human Developments in Berlin.

II. The historical roots of *amende honorable*

1. *Amende honorable*

Amende honorable was the reparation of reputation. A person injured in his honour and reputation through an act or through words, either spoken or written, could claim such reparation from the wrongdoer, in addition to the so-called *amende profitable*, i.e. a monetary assessment of the injury. These two remedies existed in early modern times in most of the provinces of the Dutch Republic and in the adjacent German territories of the *usus modernus pandectarum*. The *amende honorable* usually consisted of three elements, viz. (i) confession of guilt, i.e. admitting to have made a false statement, (ii) offering apologies and (iii) declaration of honour. In case of real injuries, i.e. those inflicted by acts, there were no words which could be retracted and in that case the *amende honorable* was restricted to offering apologies or begging for forgiveness. *Amende honorable* and *amende profitable* cumulated and could be claimed with one and the same summons (*libellus*).

2. *Early modern jurists on the origin of* amende honorable

The term '*amende honorable*' suggests something of a French origin. The same holds good for the term *amende profitable*, which in the fifteenth century was used to indicate the additional payment which served to redeem (part of) the punishment, such as an imposed pilgrimage.[5] However, terminology can be deceptive and a possible French origin would not mean that the *amende honorable* of the early modern law is identical to a possible French predecessor. The origin of *amende honorable*, the term and the concept, was already discussed by the jurists in the Dutch Republic during the seventeenth and eighteenth centuries. We will now first explore the views of these jurists and further below expound our own hypothesis on the historical genesis of the concept.

Some of them did not at all consider that the *amende honorable* would have something to do with French indigenous law. They discussed its possible origin in Antiquity, in Roman law or in Canon law. The Utrecht Professor, Antonius Matthaeus II (1601–1654), somewhat speculatively considered it to derive from the purgatory oath used by the ancient Greeks and Romans to undo injuries.[6]

[5]In this sense it was used in the Southern Low Countries. Half of the payment was for the municipal authorities, half for the injured party. Jelle Haemers, 'Filthy and Indecent Words. Insults, Defamation, and Urban Politics in the Southern Low Countries, 1300–1550' in Jan Dumolyn, Jelle Haemers, Hipolito Rafael Oliva Herrer and Vincent Challet (eds), *The Voices of the People in Late Medieval Europe. Communication and Popular Politics* [Studies in European Urban History, 33] (Brepols, 2014) 253–254.

[6]Antonius Matthaeus, *De Criminibus ad libros XLVII et XLVIII Digestorum commentarius* (Franciscus Grasset, 5th edn 1761) 133 (ad D 47.4, caput 3, n 7).

This idea had been brought up previously by the French humanist jurist Barnabé Brisson (1531–1591) in his work *De formulis*.[7]

Other authors explicitly denied a possible origin of retraction in Roman law or in the *ius commune*, such as the Leiden Professor Arnoldus Vinnius (1588–1657) and Konrad Ritterhausen (1560–1613), who taught at Altdorf. Vinnius considered the introduction of a remedy for retraction to be based on a false popular conviction, viz. that one's honour and reputation can be harmed by scolding, slandering and reproaching and that they should be repaired by revocation of the injuries. This false opinion had resulted in the remedy for retraction or revocation, called *actio ad palinodiam vel recantationem*, which, according to the custom of the day, could accumulate with the *actio iniuriarum* for claiming a pecuniary penalty. In Roman law, the remedy was unknown. This was all according to Matthaeus.[8] The term *palinodia* derived from the Greek παλινῳδία, meaning palinode or retraction. Ritterhausen had discussed a *consilium* from the year 1493 of Martin Prenninger (Uranius, 1450–1501), who had argued that Roman law nowhere acknowledged the possibility of claiming retraction of injurious words.[9] For this reason the great medieval works of procedural law, such as the *Speculum iudiciale* of Guillaume Durand (*c.*1230–1296), were not familiar with a *libellus* to such a purpose. If the medieval practitioners, who wrote these works, would have thought it was possible to claim retraction, they would certainly have drafted a statement for such a claim. This was also the opinion of Hubert van Giffen (1534–1604) in his dissertation on injuries (Ingolstadt 1593). However, in Canon law and in the *forum conscientiae* the wrongdoer was obliged to retract his insulting words. Nowadays, Ritterhausen concluded, the remedy is granted according to customary law in some places and in others it is not.[10] The Utrecht Professor Paul Voet (1619–1667) stated that customary law introduced *amende honorable* for cases of verbal injuries because it wanted to adapt itself to Canon law (*moribus, quos juri canonico volunt esse conformes*).[11] This comes close to the opinion of Prenninger and van Giffen, who taught that retraction derived from the *forum conscientiae* and Canon law.

One of the few jurists in the Dutch Republic who considered that *amende honorable* may have a French origin was Simon van Groenewegen van der Made

[7]Barnabas Brissonius, *De formulis, et solemnibus populi romani veteris Libri VIII* (Philippus Jacobus Fischer, 1649) 715–716 (Liber VIII).
[8]Antonius Vinnius, *In quattuor libros institutionum imperialium commentarius academicus et forensis* (Elsevirius, 1665) 749 (Commentarius ad Inst 4.4.10, n 1).
[9]See: Martinus Uranius, *Consiliorum sive responsorum libri duo*, Tomus I (Officina Paltheniana/Nicolaus Bassaeus, 1597) 65 (consilium 7, n 26).
[10]Conradus Rittershusius, *De differentiarum iuris civilis et canonici seu pontificii libri septem* (Georgius Andreas Dolhopffius/Johannes Eberhardus Zetznerus, 1668) 200 (Liber VI, caput 4).
[11]Paulus Voet, *In quattuor libros institutionum commentaries* II (Paulus Vink, 1668) 386 (ad Inst 4.4.10, n 3).

(1613–1652), the city clerk of Delft. He did so in his edition (1644) of the *Inleidinge tot de Hollandse rechtsgeleerdheid* of Hugo de Groot (also Grotius, 1583–1645). In a note on the remedies for apologies in case of *hoon* (scorn) and for retraction in case of *lastering* (slander), Groenewegen referred to a number of writers, discussing a similar remedy in the law of the Southern Netherlands and France. Groenewegen could have done so either out of a comparative interest or because he regarded French legal practice as the origin of the remedies in Roman-Dutch law. In any event, the relevant writers were François van der Zype (Franciscus Zypaeus, 1580–1650), Loys le Caron (Charondas, 1536–1617), Jean Papon (1505–1590) and Eguinaire Baron (1495–1550).[12]

3. Canon law and the *forum internum*

As seen in the previous section, early modern authors such as Prenninger, van Giffen and Paul Voet suggested that retraction could have its origin in the *forum conscientiae* and Canon law. In the Christian Occident, causing damage was from the outset regarded to be offensive in various ways. It was an offence towards the victim by causing him a patrimonial loss; it was an offence towards the community by disturbing public legal order; and it was also an offence towards God by disobeying his commandment to love one's fellow-man. In the Middle Ages there were ecclesiastical as well as secular rituals to reconcile the wrongdoer with the one injured and with the community. The ancient ecclesiastical form, called 'canonical penance', took place publicly. However, since the early Middle Ages the latter had gradually retreated to the background in favour of the individual and secret tariff penance and was henceforth implemented primarily in cases of public crimes causing considerable scandal. In other cases, the sinner had to perform penance, determined by the confessor, according to a tariff. The penance would expiate his sins. This kind of penance was in its turn replaced by the sacramental form, which also took place in secret. The confession itself was now seen as the expiation, and the penance, now termed as satisfaction (*satisfactio*), as a kind of compulsory obligation to be fulfilled in order to acquire forgiveness of sins. This development was consolidated by canon 21 (*Omnis utriusque sexus*) of the Fourth Lateran Council of 1215, which was also adopted in the *Liber Extra* of 1234 (X 5.38.12).[13] The sacramental confession became obligatory for every baptized Christian. It had to be performed at least once a year, preferably during Lent in preparation of receiving the Eucharist at Easter.

[12]Simon van Groenewegen van der Made (ed), *Inleydinge tot de Hollandse regtsgeleertheyt beschreven by Hugo de Groot* (Hendrik Boom en de weduwe van Dirk Boom, 1706) 300 (ad Inl III.36).

[13]For the interpretation of this canon see: Mary Mansfield, The Humiliation of Sinners. Public Penance in Thirteenth-Century France (Cornell University Press, 1995) 66–78.

In cases of injury resulting from defamatory words, the confessor could demand retraction of the defamatory words, a major invention of the scholastic theologians. Telling lies, the 'sin of the tongue', was considered serious. According to the *Summa virtutum ac vitiorum* (1236) of the French theologian and Dominican Guillaume Perrault (Peraldus, 1200–1271) it was even a mortal sin. The Sentences of Peter Lombard († 1160), an elementary textbook for theological education, taught (Liber IV, distinctio 16, caput 1) that, when doing penance, three things had to be observed, viz. remorse of the heart (*contritio cordis*), confession by the tongue (*confessio oris*) and satisfaction through acts (*operis satisficatio*). The latter was devised and imposed by the confessor. It would always include an obligation to undo the harmful act. From some considerable time ago this obligation was derived from the words of the Church father Augustine (354–430), adopted in Gratian's *Decretum* (C 14 q6 c1) and in the *Liber Sextus* (*regula* IV), that remorse is feigned if the thing taken away is not restored. From around 1200 this principle of restitution was considerably influenced and governed by the Aristotelian idea of commutative justice: restitution had to restore the equality which was infringed by the wrongful act. That implied that the theological concept of restitution was, to use legal terminology, a reipersecutory remedy, rather than a penal remedy.

However, in the case of verbal injuries it was questionable what exactly was taken away which should be restored and how restitution could be achieved. Canon law provided hardly any starting points to apply the doctrine of restitution to defamation through words, spoken or written. The ancient law only ruled that a slandering cleric should ask to be pardoned (*veniam postulare*). This rule, possibly an obvious principle of Christian morality, was laid down as canon 44 of the *Statuta Ecclesiae Antiqua* (fifth century),[14] and was later adopted in Gratian's *Decretum* (D46 c5). However, asking to be pardoned is no restitution. It did become an independent element of penance in case of verbal injuries, but did not suffice as the required satisfaction. Neither could the *Liber Extra* of 1234 offer a clue. It contained an entire title dealing with injuries (X 5.36) but these decretals merely covered cases of damages to property and physical injuries.

Interestingly, the final fragment of this very title of the *Liber Extra*, the canon *Si culpa tua* (X 5.36.9), which is not a decretal or council decision but a *motu proprio* statement of Pope Gregory IX († 1241), is illustrative of the approach to the law of delict from the perspective of restitution. The rule does not focus on specific wrongful acts, which have to be punished, as in Roman law but rather, a general principle, viz. that the one, whose fault caused any kind of loss or injury, is under an obligation to provide satisfaction. The rule is generally

[14]Charles Munier, *Les Statuta Ecclesiae Antiqua. Édition – etudes critiques* (Presses universitaires de France, 1960) 87: 'Clericus maledicus, maximeque in sacerdotibus, cogatur ad postulandam veniam; si noluerit, regradetur, nec unquam ad officium absque satisfactione revocetur.'

phrased and not aimed at punishing the wrongdoer, but at reparation of the loss he caused. Roman law was unfamiliar with such a general rule. Although the maxim that one should not harm another (*alterum non laedere*) was qualified in the *Corpus iuris civilis* (Inst 1.1.3 and D 1.1.10.1) as one of the precepts of the law, in fact this maxim was nothing but a slogan and had little or no practical significance. In order to apply the general concept of restitution, as reflected in X 5.36.9, the theologians had to determine which kinds of interests need to be repaired, if infringed by another's wrongful act. This led to the discussion of whether the doctrine of restitution could be applied to injuries, harming another's freedom, honour and reputation and would result in the acknowledgment of a number of interests which deserve protection, comparable to what we nowadays on the Continent call personality rights. Some of these had been completely ignored by Roman law.

Application of the doctrine of restitution to infringement of honour or reputation was not easy. What was taken away should be given back, but honour and reputation were not tangible objects that could be restored by handing over or being replaced by other tangible objects. Nevertheless, restitution was required as satisfaction for injury of reputation. The answer was found in the concept of retraction: admitting openly to have lied. One of the first to discuss the question was Albert the Great (1193–1280) in his commentary on the Sentences: 'Something one possesses dearly', he argued, 'he will lose with great regret. However, one possesses his honour (*fama*) more dearly than silver or gold. Hence, one will lose it with greater regret. Hence restitution should certainly take place.'[15] Albert did not explain how restitution of honour should take place. It is in one of the leading manuals for confessors of the late Middle Ages, the *Summa de casibus poenitentiae* (1234–1236) of the Spanish Dominican Raymond of Peñafort (1175–1275), that we find some instructions. His opinion was followed by the canonist Hostiensis (Henricus de Segusio, † 1271) in his *Summa aurea* (*c*.1253). Here, it appears that the satisfaction through restitution is a separate element, added to the obligation to beg for forgiveness. This may be the origin of the two separate elements in the later secular remedy, viz. acknowledgment of being wrong (retraction) next to the petition for forgiveness (apologies). All acts which harm another's reputation (*fama*) imply a mortal sin, Peñafort argued. Those who commit such a sin are more despicable than robbers. The latter take away our external goods, but those who take away our reputation rob what is intrinsically ours. In such a case the wrongdoer not only has to pay money, but he should also acknowledge his error and guilt in the places where he spoke the injurious words and undo the defamation as far as possible, at

[15]Albertus Magnus, *Scriptum in tertium et quartum sententiarum* (Jakob Wolff, 1506) fol 248va (Liber IV, distinctio 15, articulus 43): 'Id quod carius possidetur, invitissime amittitur. Fama autem carius possidetur quam aurum et argentum. Ergo invitissime amittitur. Ergo videtur quod maxime debet restitui.'

least diminishing it. Moreover, he should reconcile himself with the one injured and humbly beg for forgiveness.[16]

In the early modern period, the moral theologians took the teachings of Thomas Aquinas (1225–1274) as a starting point. Aquinas basically followed the principles just described. The few lines in which he outlined the duty of restoration in case of harming reputation, yielded the paradigm with which to approach the problem in later times and is still reflected in the writings of Grotius. When dealing with harming reputation through words, Aquinas distinguished three situations. (i) If someone justly said something which was true, there would be no obligation whatsoever. (ii) If someone unjustly said something untrue, he should confess he lied. (iii) If someone said unjustly something true, he should admit he had spoken improperly. Alongside injury to reputation through words, there was injury to reputation through acts. Such an insulting act, Aquinas argued, could not be undone, but one should attempt to diminish its effect through a mark of honour (*exhibitio reverentiae*).[17] In later times, the authors of Early Modern Scholasticism (School of Salamanca) elaborated the statements of Aquinas for the circumstances of their own time. They described new means to repair honour and explained in which way social status of both parties was determinative for the required restitution.[18]

Since infringement of honour and reputation implied a sin, it made the ecclesiastical court, i.e. the *forum externum*, competent to *ratione peccati* take cognizance of the case. In case of a *denuntiatio evangelica* by the one injured, the court could apply the standards which held for the conscience. By threatening with excommunication, penalties such as the payment of alms to the poor, or one or more pilgrimages, the court could indirectly compel the wrongdoer to retract and apologize (*deprecatio*). By bringing a denunciation, the one injured more or less acted as a plaintiff in civil procedure.

4. The French *amende honorable*

The fact that public ecclesiastical penance fell into disuse, especially since the Fourth Lateran Council had made private, sacramental confession the compulsory form of penance, implied that only secular public rituals of reconciliation survived and, according to some, became even more important. So, if in the secular ritual

[16]Raymundus de Peniafort, *Summa* (Franciscus Mallard, Joannis Delorme, Joseph-Carolus Chastanier, 1715) 305–306 (Liber II, titulus 5, § 42). Henricus a Segusio, *Aurea summa* (Lazarus Zetzner, 1612) 1647 (ad X 5.37 n 61 § Quid de accusatoribus).
[17]Thomas Aquinas, *Opera omnia*, Tom. IX (Congregatio de Propaganda Fide, 1897) 43 (Summa Theologiae, Secunda secundae, quaestio 62, articulus 2, ad 2 and ad 3).
[18]James Gordley, *Foundations of Private Law. Property, Tort, Contract, Unjust Enrichment* (Oxford University Press, 2006) 218–225. Nils Jansen, *Theologie, Philosophie und Jurisprudenz in der spätscholastischen Lehre von der Restitution: außervertragliche Ausgleichansprüche im frühneuzeitlichen Naturrechtsdiskurs* (Mohr Siebeck, 2013) 106–111.

the wrongdoer had to apologize in front of the parish church or standing in the pulpit, this was because of the public and not the sacred character of the spot.

In France we find public rituals of self-humiliation that could be imposed on the wrongdoer.[19] The purpose was manifold. He should be reconciled with the one injured after having provided satisfaction for the harm caused. Towards the community, the infringement of a common sense of justice had to be undone.[20] Moreover, it was meant to have a deterrent effect. As a matter of fact, whether the rituals actually resulted in reconciliation remains open to question. The ritual and its name date back to the fourteenth century. In the *Olim*, the oldest registers of the *Parlement de Paris*, a claim for '*emendare*' is first mentioned for the year 1311.[21] The term *emenda honorabilis* was for the first time used in the later registers of the *Parlement* for the year 1357.[22] The meaning of this Latin term, in French *amende honorable*, is indemnification regarding honour.

The *amende honorable* was characterized by three aspects: (i) publicity, because it took place at a public place, preferably on market day; (ii) appearance of the defendant as penitent, wearing a linen vest without belt, while holding liturgical objects, usually candles; and (iii) reparation towards the one injured by gestures, words and the payment of money.[23] Various sources reveal the details and the character of the ritual. The authors, referred to by Simon Groenewegen van der Made, all referred to French legal practice, more specifically to a provision from the ordinance of King Charles IX (1550–1574) of the year 1563 which

[19]See Claude Gauvard, *"De grâce espécial". Crime, état et société en France à la fin du Moyen-Age* [Histoire ancienne et médiévale, 24] (Publications de la Sorbonne, 1991) 745–752. However, legal practice in the South of France (*pays de droit écrit*) was more strongly based on Roman law with its *actio iniuriarum*. Cf Jean-Marie Carbasse, 'Fiat emenda injuriam passo. La réparation de l'*injuria* dans le droit méridional de la fin du Moyen Âge (XII^{e} - XIV^{e} siècle)' in Olivier Vernier (ed), *Études d'histoire de droit privé en souvenir de Maryse Carlin* (La Mémoire du droit, 2008) 128.

[20]Jean-Marie Moeglin, 'Pénitence publique et amende honorable au Moyen Âge' (1997) 1997(3) (604) *Revue historique* 225.

[21]AA Beugnot, *Les Olim ou registres des arrêts*, Part III-1 (Imprimerie Royal, 1844) 682.

[22]Carbasse referred to the exact location in the registers: AN X2a 6, fol 357ff. See Jean-Marie Carbasse, 'Une forme de satisfaction à partie; l'image commémorative d'amende honorable à la fin du Moyen Ages' in Jaqueline Hoareau-Dodinau and Pascal Texier (eds), *Résolution des conflits. Jalons pour une anthropologie historique de droits* [Cahiers de l'Institut d'Anthropologie Juridique, 7] (Presses Universitaires de Limoges, 2003) 275, at 277. Du Cange referred to a sentence of the *Parlement* of 1394, see *Glossarium novum ad scriptores medii aevi*, Tom. II (Le Breton, 1766) 212.

[23]For a more detailed explanation of the three aspects see Claude Gauvard, 'L'honneur du roi. Peines et rituels judiciaires au Parlement de Paris à la fin du Moyen Âge' in Claude Gauvard and Robert Jacob (eds), *Les Rites de la justice. Gestes et rituels judiciaires au Moyen Âge* [Cahiers du Léopard d'Or, 9] (Le Léopard d'Or, 2000) 99, at 106ff and Claude Gauvard, *Violence et ordre public au Moyen Âge* [Les médiévistes français, 5] (Editions Picard, 2005) 161ff. For the humiliating effect of the linen vest see: Marjan Vrolijk, *Recht door gratie. Gratie bij doodslagen en andere delicten in Vlaanderen, Holland en Zeeland (1531-1567)* (Verloren, 2004) 438–439.

ruled that, if a magistrate was recused in an injurious way, the advocate could be compelled to retract the defamatory words. By far the majority of cases referred to by these writers dealt with verbal injuries in a procedural context, such as a case sentenced in 1557. For insulting the magistrate, the advocate was ordered to declare he regretted his act and to beg for forgiveness.[24] There are also images preserved, reflecting the performance of an *amende honorable*. It was, for some time, usual to offer the injured party a tangible image of the ritual in order to keep the memory of the reconciliation alive. Images of silver have been melted again in the course of time, but some of the statues and reliefs, carved in stone, have been preserved. They show the wrongdoer and his family kneeling bareheaded opposite the one injured and his family.[25] Moreover, the ritual is described by a number of early modern authors. Jacques du Breul (1528–1614) in his work *Le théâtre des antiquités de Paris* (1612) described an *amende honorable* which had taken place in the year 1440. The wrongdoers had to beg for forgiveness 'dressed in a vest, without a hood, bare-legged and on bare feet, each of them holding a torch of four pounds'.[26] Eguinaire Baron described an *amende honorable* which had taken place in the year 1557. 'Together with the monetary penalty', Baron stated:

> also a penalty in view of the defiled honour is inflicted upon the one who caused another horrible injury through words, i.e. a kind of punishment that is newly invented, viz. *amende honorable*. After all, the defendant is ordered to carry a burning torch on the market or other places in the city, destined for this purpose, bareheaded, while throwing himself on the ground, and bringing in the open the crime he committed. The supplicant will beg for forgiveness from God, the king and from the one he injured, thereby showing remorse for the wrong he did. Meanwhile, while his head is shaven and, except for linen underwear, he is deprived of his garments, he suffers this indignity, as well as through other well-known ways, which the crowd observes.[27]

[24]Franciscus Zypaeus, *Notitiae juris Belgici* (Hieronymus and Ioannes Baptista Verdussen, 1665) 291–292 (Liber IX, De iniuriis); Loys Charondas le Caron, *Observations du droit francois* (La vesue Claude de Monstr'oeil, 1614) 589–593 (Injure); Iehan Papon, *Recueil d'arrestz notables des courts souverains de France* (Jacques Macé, 1568) 186v–191r (Livre VIII, tiltre 3); Eguinaire Baron, *Institutionum civilium ab Iustiniano Caesare editarum Libri IIII* (Jean et Enguilbert de Marnef, 1546) 520 (De iniuriis, Comm. particula altera).

[25]Carbasse (n 22) 275.

[26]Pacques du Breul, *Le théâtre des antiquités de Paris* (Société des imprimeurs, 1639) 419 (Livre II, Des religieux mendians): 'en chemise, san chaperon, nuds iambes et nud pieds, tenant chacun en sa main une torche de quatre livres ardente.'

[27]Baron (n 24) 520 (De iniuriis, Comm. particula altera): 'Et multa honoraria interdum una cum pecuniaria indicitur ei qui atrocem iniuriam verbo fecit: quod genus poenae commentitium est, amende honorable. In foro enim, aut aliis locis in civitate ad hoc destinatis, facem caeream accensam ferre, aperto capite, in terramque procidens, reus iubetur et crimen a se commissum peruulgare. Veniam item a divino numine, Rege et ab eo quem laesit, supplex precari, maleficii admissi poenitentiam testatus. Interdum detonso capite, et veste praeter lineum indusium exutus, hanc infamiam suffert, et aliis quibusdam modis, quos vel vulgus notissimos habet.'

A sentence from the year 1556, recorded by Jean Papon, shows a very similar ritual. The wrongdoers had to beg for forgiveness 'in a public court session, on bare feet and bareheaded, kneeling, in a vest, with a rope around the neck, and holding a burning wax candle of a weight of two pounds'.[28] All this is confirmed by some specific French studies concerning fifteenth-century cases where *amende honorable* was imposed.[29]

The French *amende honorable* contained a number of penal and humiliating elements and apparently the ritual did not undergo considerable change in the course of time.[30] It was a punishment and at the same time reparation towards the one injured and society. A strict separation between public criminal law and private law did not exist. One could question what the underlying rationale of the self-humiliating ritual must have been. In the literature it is suggested that retaliation, the *talio*-principle, may have been determinative: the ritual had to cause suffering equivalent to that endured by the one injured. If the insults were defamatory, also the wrongdoer had to be dishonoured.[31]

5. *Traces of the French* amende honorable *in the Netherlands*

In late medieval times, the indigenous law of the Netherlands was also familiar with self-humiliation rituals. In cases of all kinds of delict, a settlement between parties, termed *compositio*, could be agreed upon or could be imposed in accusatorial criminal proceedings. A *compositio* could contain, in addition to reimbursing elements, a number of penal elements. A good

[28]Papon (n 24) 1102 (Livre XIX, Titre 8, arrest 9): 'à huis ouverts, nuds pieds, et teste, à genoux, en chemise, la corde au col, tenant en ses mains une torche de cire ardente, du poids de deux livres.'

[29]Veronique Beaulande-Barraud, 'A cause de la resistance, rebellion et desobeyssance par elle faicte contre ladite justice. Une amende honorable à Reims en 1456' in François Foronda, Christine Barralis and Bénédicte Sère (eds), *Violences souveraines au Moyen Age. Travaux d'une École historique* (Presses Universitaires de France, 2010) 57 and Julie Claustre, 'Se réconcilier avec la ville. Une amende honorable à Paris en 1479', in Franck Collard and Moniques Cottret (eds), *Conciliation, réconciliation aux temps médiévaux et modernes* (Presses universitaires de Paris Ouest, 2012) 101.

[30]The rituals accompanying retraction could vary somewhat and take, at least from a present-day perspective, sometimes odd forms. According to the Old Coutumier of Normandy the wrongdoer had to touch the other's tip of the nose and say: 'As regards the fact I called you a thief or a murderer, I lied, because you did not commit this crime. And as regards the tongue with which I have said this, I am untruthful.' [JL] Couppey, 'Recherches sur la législation Anglo-Normande (3me et dernier article.)' (1837) 5 *Revue Anglo-Française* 142, at 156: 'de ce que je t'ai appellé larron ou homicide, j'ai menti; car ce crime n'est pas en toi et de ma bouche dont je l'ai dit, je suis mensonger.' Joseph Laurent Couppey (1786–1852) was a magistrate in Cherbourg.

[31]See Martine Veldhuizen, 'Guard Your Tongue. Slander and its Punishment in a Late Medieval Courtroom', in Jan Dumolyn, Jelle Haemers, Hipolito Rafael Oliva Herrer and Vincent Challet (eds), *The Voices of the People in Late Medieval Europe. Communication and Popular Politics* [Studies in European Urban History, 33] (Brepols, 2014) 233, at 243.

example is the *voetval*, an expression of submission by the relatives of the wrongdoer. Kneeling, they had to beg for forgiveness. It was an ostentatious public act of self-humiliation to restore the defiled sense of honour of the family of the person injured.[32]

The term *amende honorable* was also used to designate the humiliating rituals of the fifteenth and sixteenth centuries that could be individually or collectively imposed, when repressing city revolts. For example, in 1540, the citizens of Ghent were compelled to wear a rope round their neck. Hence, the inhabitants of this city are nowadays still known by their nickname *stropkensdragers*.[33] Moreover, humiliating, public punishments could be imposed upon heretics by the inquisition. Also, these contained elements reminiscent of the late medieval French *amende honorable*, such as walking barefoot, kneeling, going in procession, holding a burning candle etc.[34]

In addition to these French-influenced *amende honorable* rituals in humiliating punishments, which were clearly present in the legal culture of the late medieval Burgundian Low Countries, also the more specific *amende honorable* was received from France, i.e. the retraction of insults, claimed in secular, civil litigation between individual citizens. In view of the central question of this contribution this remedy is the most relevant. We can trace it to both the law of Holland and that of Utrecht. From the practice of the Court of Holland we know that, in the second half of the fifteenth century, elements of self-humiliation could accompany the *amende honorable*, known under the Dutch name *eerlicke beterynge*. It was applied in case of injuries, such as insulting a court clerk or a bailiff. It was also applied in public criminal procedure and was not restricted to infringements of honour and reputation. The sentence could include an additional fine and/or an imposed pilgrimage.[35] The ritual was reminiscent of the French *amende honorable*. It could contain humiliating elements, such as asking

[32]Cf also the *deditio* as a way of reconciliation after manslaughter; Han Nijdam, *Lichaam eer en recht in middeleeuws Friesland. Een studie naar de Oudfriese boeteregisters* [Middeleeuwse studies en bronnen, 114] (Verloren, 2008) 133.

[33]Peter Arnade, 'City, State and Public Ritual in the Late-Medieval Burgundian Netherlands' (1997) 39(2) *Comparative Studies in Society and History* 300, at 310–311. Violet Soen, 'La reiteration de pardons collectives à finalités politiques pendant la Révolte des Pays-Bas', in Bernard Dauven and Xavier Rousseaux (eds), *Préférant miséricorde à rigueur de justice. Pratiques de la grâce (XIIIe-XVIIe siècles). Actes de la journée d'études de Louvain-la-Neuve, 15 octobre 2007* [Histoire, justice, sociétés] (Presses Universitaires de Louvain, 2012) 87, at 104. Peter Arnade, *Beggars, Iconoclasts, and Civic Patriots. The Political Culture of the Dutch Revolt* (Cornell University Press, 2015) 27–28, 35–36, 151.

[34]Aline Goosens, *Les inquisitions modernes dans les Pays-Bas méridionaux, 1520–1633* II [Spiritualités et pensées libres, 7] (Université de Bruxelles, 1998) 56–57.

[35]See for the criminal law persecution and punishment of verbal injuries in the Netherlands: Corien Glaudemans, *Om die wrake wille. Eigenrichting, veten en verzoening in laat-middeleeuws Holland en Zeeland* (Verloren, 2004) 122–126.

forgiveness bareheaded, in a vest, and kneeling with a burning candle.[36] In a case from the year 1522 which took place in Leiden, the wrongdoers had to walk in procession, bareheaded, with a burning wax candle of half a pound.[37] The ritual sometimes had to be performed by more people than just the wrongdoer (his relatives), at various places (parish church, marketplace), and towards several persons or institutions (the court, the one injured, the ruler).[38] As early as the fifteenth century in Utrecht, there was a 'forgiveness-procedure' for cases of verbal injuries. The injurer had to beg the City Council for forgiveness and state publicly that the injurious spoken words were a lie. The literature does not mention many humiliating elements, only the fact that the wrongdoer had to petition forgiveness, wearing a vest. Damages were not paid in case of verbal injuries.[39]

Elsewhere in the Netherlands the rituals accompanying retraction sometimes took odd forms. In a case before the court of the Veluwe dating from 1535, the defendant was required, when retracting before court, to turn around and knock on the mouth. In 1570 the defendant was required, when retracting, to turn three times in the opposite direction to the sun. These rituals probably had to ensure that all attendants could witness the retraction.[40]

6. *A possible origin in Castilian law?*

There were some early modern scholars, albeit not from Holland or Utrecht, who referred to Charles V (1500–1558) and the law of Castile for the origin of the two remedies, i.e. those for *amende honorable* and *amende profitable*.[41] Joachim Mynsinger (1514–1588), in his commentary on the Institutes (1559), stated that

[36]Marie-Charlotte Le Bailly, *Recht voor de Raad. Rechtspraak voor het Hof van Holland, Zeeland en West-Friesland in het midden van de vijftiende eeuw* (Verloren, 2001) 120, 184–186, 190 and 192–193. There is at 193 (n 380) a reference to 16 cases of *amende honorable* with humiliating elements.

[37]Pieter Johannes Blok (ed), *Leidsche rechtsbronnen uit de middeleeuwen* [Werken der Vereeniging tot uitgaaf der Bronnen van het Oud-Vaderlandsche Recht, 1,6] (Nijhoff, 1884) 80–81. See about this case: Dirk Arend Berents, *Het werk van de vos. Samenleving en criminaliteit in de late middeleeuwen* (Walburg Pers, 1985) 106–115.

[38]Le Bailly (n 36) 184 and 193.

[39]Dirk Arend Berents, *Misdaad in de middeleeuwen. Een onderzoek naar de criminaliteit in het laat-middeleeuwse Utrecht* [Stichtse Historische Reeks, 2] (Stichtse Historische Reeks, 1976) 52, 71–73.

[40]P van Meurs, 'Zich voor het volle gericht omwenden en op zijn mond kloppen' (1910) 6 *Verslagen en mededeelingen* [Vereeniging tot uitgave der bronnen van het oud-vaderlandsche recht] 477 and P van Meurs, 'Zich driemaal tegen de zon omkeeren' (1903) 4 *Verslagen en mededeelingen* [Vereeniging tot uitgave der bronnen van het oude vaderlandsche recht] 532.

[41]For protection of honour in medieval Spain see: Antonio Pérez Martín, 'La protección del honor y de la fama en el Derecho histórico español' (1991) 11 *Anales de derecho. Universidad de Murcia* 117.

for a long period of time, indigenous law was acquainted with claiming retraction of injurious words. Through prescription, the customary rule had become a rule of law and this was confirmed by the new procedural ordinance for the Imperial Chamber Court, approved of by Charles V.[42] In his *Singularium observationum centuriae* Mynsinger wrote that the remedy to claim revocation of offensive words and repair harmed reputation was frequently used and was eventually confirmed by Charles V in the new procedural ordinance.[43] We find the same in the *Tractatus criminalis* (1603) of Johann Harpprecht (1560–1639). The *actio ad palinodiam* or *ad recantationem* and the *revocatio* and *reclamatio* of injurious words were not only received in customary law but also validated by the emperor in the *Ordinatio imperialis camerae* part II, title 28 § *Und sonderlich setzen* etc.[44] Mynsinger and Harpprecht were referring here to the new procedural ordinance of the Imperial Chamber Court of 1555, which mentioned appeal for cases where retraction of verbal injuries had been claimed.[45] When compared to the same paragraph in the ordinances of 1521 and 1523, this was an addition. Actually, Charles V had validated the remedy for retraction before that time. Article 216 of the *Constitutio criminalis carolina*, established in 1530 at the Diet of Augsburg, only spoke about apologies, but it is obvious that these apologies must have included retraction.[46]

Later in the seventeenth century, it was the Spanish canonist Manuel González Téllez († 1673) who in his commentary on the Decretals maintained that actually the *actio ad palinodiam* already existed in Spain. To elucidate this, he referred to a constitution, adopted in the *Nueva Recopilación* (1567) of King Philip II (1527–1598), from the year 1566: Libro VIII, título 10, ley 2.[47] The constitution was part of the *Ordenanzas Reales de Castilla* (also called the *Ordenamiento de Montalvo*) of 1484.[48] In many respects this provision (*Ordenamiento de Montalvo* Libro VIII, título 9, ley 2) resembled the early modern remedy for retraction. It did not

[42]Joachim Mynsingerus, *Apotelesma hoc est corpus perfectum scholscholiorum ad Institutiones Justinianeas* (Jacobus Lucius, 1589) 493 (ad Inst 4.4.10, n 6).
[43]Joachimus Mynsingerus, *Singularium observationum imperialis camerae centuriae VI* (Antonius Candidus, 1608) 93 (Centuria II, observatio 98, n 1).
[44]Johannes Harpprechtus, *Tractatus criminalis* (Cellius, 1609) 444 and 465 (ad Inst 4.4.10 §§ 63 and 109).
[45]Adolf Laufs (ed), *Die Reichskammergerichtsordnung von 1555* [Quellen und Forschungen zur höchsten Gerichtsbarkeit im alten Reich, 3] (Böhlau, 1976) 206 (II.28.4).
[46]Gustav Radbruch (ed), *Die peinliche Gerichtsordnung Karls V. von 1532* (Reclam, 1960) 125: 'So aber eyn solcher überfarer bestimpter geldt peen nicht vermöcht, der soll imm kercker als lang gestrafft werden biß er dem verletzten nottürfftig entschuldigung thuoet, daß er jne an seinen ehren, damit nit woll geschmecht haben, vnd sich verpflicht fürter dergleich schmach zuuermeiden (…).'
[47]Emanuel Gonzalez Tellez, *Commentaria perpetua in singulos textus quique librorum decretalium Gregorii IX* Tom. II (Haeredes Balleonii, 1766), 448 (ad X 2.27.23).
[48]It had its origin in the *Fuero Real* of 1255; see Jan Hallebeek, 'Los remedios de "*amende honorable*" y "*amende profitable*". ¡Seguramente recibidos en nuestras costumbres!, – ¿pero de dónde?' (2016) 13 *Glossae: European Journal of Legal History* 329.

prescribe any rituals and combined public retraction of the injurious words with monetary fines, to be paid to the authorities and to the one injured:

> Anyone, who abuses another or brands him an idiot, poof, cuckold, apostate or heretic, or calls a married woman a whore, will retract this in the presence of the mayor and in the presence of decent men, or at a time as the mayor will order it. And he will pay 300 shillings, half of these to us and the other half to the complainant. And if he utters other abuses, he will retract these in the presence of the mayor and in the presence of decent men and declare that he lied in stating this (…).[49]

Christian Thomasius (1655–1728), one of the few early modern authors who sometimes explains the substantial origin of the remedies of his time, wrote in his dissertation *de actione iniuriarum* (1715) the following words on the remedy for retracting injurious words:

> I will not be wrong, I think, when I say that this remedy owes its origin to the Spaniards, albeit restricted to the more serious verbal injuries. The text of this Spanish provision and its commentators, you can see in González Téllez. The form itself of the retraction is, exactly as Perez described it, characterized by Spanish customs, namely that retraction often takes place with a burning torch the defendant holds in his hand, on bare feet, and the body wrapped in underwear, while apologies are offered to the one injured, and this form is commonly termed *amende honorable*. Thus, undoubtedly, Charles V brought this remedy along from Spain to Germany, and later validated it in the revised ordinance of the Chamber Court. However, Augustus, Elector of Saxony, who was strongly bound to this Emperor, introduced the remedy also in the courts of Saxony.[50]

[49] *Ordenanzas reales de Castilla recopiladas y compuestas por el doctor Alonzo Diaz de Montalvo* Tomo III (Josef Doblado, 1780) 236–240 (Libro VIII, titulo 9, ley 2): 'Qualquier, que à otro denostare, o le dixere gaso, ò sodometico, ò cornudo, ò traydor, ò hereje, ò à mujer que tenga marido, puta, desdigalo ante el alcalde y ante hombres buenos; ò al plazo que el alcalde le pusiere; y peche trescientos sueldos, la meytad para nos, y la otra meytad al quexoso: y si dixere otros denuestos desdigase ante el alcalde, y ante hombres buenos, y diga que mintió en ello (…).' According to the literature, in practice insults were most of the time avenged, rather than an appeal being made to this provision. See Julian Pitt-Rivers, 'Honour and Social Status' in JG Peristiany (ed), *Honour and Shame. The Values of Mediterranean Society* (Weidenfeld and Nicolson, 1965) 21, at 90–91, text at 126.

[50] Christianus Thomasius, *Theses inaugurales exhibentes varias theoretico-practicas de actione iniuriarium* (Johannes Christianus Zahnius, 1715) 23–24 (§ 19): 'Non errabo, credo, si dixero eam actionem originem debere Hispanis, ad graviores tamen injurias verbales restrictam. Textum legis Hispanicae et commentatores in eam vide citatos apud Gonzalez Tellez. Ipsa forma revocationis prout eam describit Perezius sapit mores Hispanos, scilicet, quod recantatio fiat plerumque cum face ardente, manu comprehensa rei, nudis pedibus, et indusio corpori advoluto, venia proclamata injuriato, et dicatur communiter forma amendae honorabilis. Hanc igitur actionem haud dubie Carolus V ex Hispania in Germanium secum attulit, et postea in revisa ordinatione Camerali confirmavit. Elector vero Saxoniae Augustus Imperatori huic multum obstrictus, eandem in fora etiam Saxonica

All this is according to Thomasius. For the ritual of the apologies and retraction, he quoted here the description of Antonio Perez (1583–1673), a Spanish jurist who had been teaching at the University of Louvain.[51] Perez was apparently supposed to know and to reflect the old Spanish customs. However, there are no indications whatsoever that, in the fragment quoted, Perez was referring to Spanish legal practice. Moreover, he used the term *emenda* or *emendatio honorabilis*, which rather points to French medieval practice.

III. *Amende honorable* in the early modern law of Holland and Utrecht

1. *Reception of the Roman law of delicts*

Early modern law of the various provinces of the Dutch Republic was familiar with remedies to undo injuries. As stated already, one of these was the remedy for retraction and apologies (*amende honorable*), which went hand in hand with the remedy for a monetary assessment of the injury (*amende profitable*). Since the provinces were sovereign as regards their private law, there were minor to major differences as regards this remedy between the regions. We will confine ourselves primarily to the law of Holland and Utrecht, since for these provinces the sources provide reasonably adequate details, and from the account of the Utrecht Professor Jacobus Voorda (1698–1768) it may be presumed that they are in some way representative of the other provinces, the law of which we touch upon only briefly.

From the sixteenth century in the Netherlands a reception of Roman law took place. As a result, the existing standards of indigenous law were mixed up with rules, derived from the *Corpus iuris civilis*. In fact, however, the process was more complicated because at the same time the law of contracts and delicts was generalized and conceptualized under the influence of principles, derived from Canon law and moral theology.[52] As a consequence, during the process of reception, major parts of the Roman law of delicts lost their penal nature. Henceforth, the term *actio legis Aquiliae* was used for a generally applicable remedy, aimed at monetary compensation for divergent kinds of extra-contractual damages, also termed *actio de damno dato*. Punishing reprehensible behaviour was now the task of the public authorities: *omnia crimina publica sunt*. Reaching a settlement (*compositio*) with the wrongdoer, as quite common in former indigenous law, was increasingly set aside. The ruling principle was that the injured party or his family

indtroduxit.' It has to be noted, however, that additional penalties in the Constitutions of Electoral Saxony (1572) gave the remedy for retraction a penal character.

[51]The words are literally copied from his commentary on C 9.35, see Antonius Perezus, *Praelectiones in codicem justineaneum* (Jan Fredericksz Stam and Gysbert Sybes, 1645) 325 (ad C 9.35, n 21).

[52]See for the law of contract Wim Decock, *Theologians and Contract Law. The Moral Transformation of the ius commune (ca. 1500–1650)* (Brill, 2013) and for the law of delict Jansen (n 18) *passim*.

was not in a position to claim a penalty because the authorities would do so. The wrongdoer should not be punished twice. Only when the authorities refrained from acting would the former competence of the injured party revive to claim a private penalty.

The Roman law of delicts did not acknowledge claims for retraction or apologies. In the case of damage to property one could claim a fine, which included compensation for material losses (*actio legis Aquiliae*). In case of personal harm one could claim a private fine or penalty (*actio iniuriarum*) but no damages or anything else. Roman law considered the body of a free man not to be valuable.[53] In the Middle Ages the *actio legis Aquiliae* was interpreted extensively, also covering material losses in cases of wounding or killing a free man. Liability for wounding could be based on a few single texts in the *Corpus iuris civilis* itself.[54] Liability for killing required a thorough misinterpretation of the Roman sources.[55]

As explained previously, early modern law did acknowledge a claim for retraction and apologies (*amende honorable*).[56] It could be brought in specific cases of injury and went hand in hand with that for *amende profitable*.[57] Many authors connected the latter liability with the Roman delict of *iniuria* and saw the remedy for *amende profitable*, also termed *actio aestimatoria*, as a contemporary version of the Roman *actio iniuriarum*. It is questionable, however, to what extent Roman law was taken over by the early modern law of delict since there were remarkable differences. The Roman *iniuria* covered all possible infringements on another's physical or psychological integrity, whereas the early modern remedies for injury could not be brought in case of inflicting wounds or permanent physical damage. According to Roman law, in case of insults, there was only one remedy available. This *actio iniuriarum* of the injured party was aimed at a monetary fine (*poena*) and not at damages. The remedy had merely a penal character. The injured party was allowed to estimate the fine under oath, while the judge could mitigate the sum mentioned. According to early modern law, apart from

[53]The famous maxim '*Liberum corpus nullam recipit aestimationem'*, based on D 9.1.3 and D 9.3.7.
[54]Such as D 9.1.3, D 9.2.5.3, D 9.2.13pr and D 9.3.7.
[55]See the gloss *gloriae causa* to D 9.2.7.4.
[56]See for *iniuria* in early modern law and legal doctrine: Adolph Dietrich Weber, *Über Injurien und Schmähschriften, Zweite Abteilung* (Boedner, 1820), C von Wallenrodt, 'Die Injurienklage auf Abbitte, Widerruf und Ehrenerklärung und ihre Entstehung, Fortbildung und Verfall' (1864) 3 *Zeitschrift für Rechtsgeschichte* 255, Manfred Hermann, *Der Schutz der Persönlichkeit in der Rechtslehre des 16. bis 18. Jahrhunderts* [Beiträge zur Neueren Privatrechtsgeschichte, 2] (W. Kohlhammer, 1968), Bhadra Ranchod, *Foundations of the South African Law of Defamation* (Leiden University Press, 1972) 62–91, Helmut Coing, *Europäisches Privatrecht, I Älteres gemeines Recht (1500 bis 1800)* (CH Beck, 1985) 513–516 and Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Juta, 1990) 1050–1094.
[57]This also appeared in a sentence of the *Hoge Raad* from 1727. Cornelis van Bijnkershoek, *Observationes tumultuariae* III (Tjeenk Willink, 1946) 242–243 (n 2351).

the possibility of criminal prosecution, there were two civil remedies, one aimed at retraction and apologies (*amende honorable*) and one aimed at a monetary assessment of the insult (*amende profitable*). However, what was the character of these civil remedies? Were they aimed at punishing the wrongdoer? Were they aimed at restoring the disturbed relationship? And what was the nature of the monetary assessment of the injury? Was it a fine or some kind of damages? Or, to speak in terms of Roman law, was the *actio aestimatoria* a penal or a reipersecutory action? And how did the civil law remedies relate to a possible criminal prosecution?

2. *The law of Holland*

For Roman-Dutch law, there are hardly any statutory provisions that provide insight into the use of a remedy for retraction and/or apologies.[58] The customary law of the province was not recorded as in various other provinces. Procedural ordinances and instructions, such as that for the Court of Holland and Zeeland of 20 August 1531[59] and that for the Supreme Court (*Hoge Raad*) of Holland and Zeeland of 31 May 1582,[60] do not contain references to actions for injury. Neither do early handbooks on procedural law, such as the *Manier van procederen* (first edition 1592) of Paulus Merula (1558–1607).

The earliest record of Roman-Dutch customary law can be found in the *Inleidinge tot de Hollandse Rechtsgeleerdheid*, which Hugo de Groot must have compiled around 1619, while in captivity at Loevestein. Grotius distinguished two kindred private delicts, i.e. a 'delict against freedom' or *hoon* (III.35) and a 'delict against honour' or *lastering* (III.36). *Hoon* included the defiling of another's honour through an act, such as adultery or homosexuality. The worst form was rape. *Lastering* included the defamation of another through injurious words, either spoken or in writing. Here Grotius laid the foundation of the distinction between real and verbal injuries. For both delicts, *hoon* and *lastering*, there were two remedies. One was directed at what Grotius called *weder-evening* or 'restoration of evenness', the other at the payment of a certain sum of money. The first consisted of a retraction, which would require confession of guilt, petition for forgiveness and declaration of honour. The second consisted in the payment of a sum of money, which the injured party was entitled to assess and the judge could

[58]For *amende honorable* in Roman-Dutch law see MS van Oosten, *Systematisch Compendium der Observationes Tumultuariae van Cornelis van Bijnkershoek* (Tjeenk Willink, 1962) 85 (§ 40), AS de Blécourt and HFWD Fischer, *Kort begrip van het oud-vaderlands burgerlijk recht* (Wolters, 7th edn 1967) 315–316 and Helge Walter, *Actio iniuriarum. Der Schutz der Persönlichkeit im südafrikanischen Privatrecht* [Schriften zur europäischen Rechts- und Verfassungsgeschichte, 17] (Duncker and Humblot, 1996) 64–111.

[59]Cornelis Cau, *Groot Placaet-boek* II (Weduwe en erfgenamen van Hillebrandt Jacobsz. van Wouw, 1664) 703–760.

[60]Cau (n 59) 790–838.

mitigate. In case of *lastering* the retraction could take two forms, depending on whether the defamatory words were false or true. If they were false, the retraction was identical to that in case of *hoon*, but if they were true, it was restricted to the acknowledgment not to have spoken properly.[61] Grotius did not yet use the later French terminology to indicate retraction/apologies and monetary assessment but later Roman-Dutch jurists did.

The *Papegay* (1642), a handbook on procedural law in Holland, written by the secretary of the court of Holland, Willem van Alphen (1608–1691), stated that the defendant should correct (*beteren*) the injuries he caused, both in an 'honourable and a profitable way' (*eerlijck ende profijtelijck*).[62] Groenewegen, in his *De legibus abrogatis* (1649), spoke about an action for retraction (*ad palinodiam*) and an action for a fine (*ad mulctam*), to be paid to the plaintiff or the poor. Moreover, he declared that his fellow-countrymen (*nostrates*) and the French (*Galli*) spoke about *amende honorable* and *amende profitable*.[63]

Some later authors pointed out that in case of a real injury (*iniuria realis*), there were no words which could be retracted (*palinodia* or *revocatio*) and the wrongdoer should only apologize (*deprecatio*). The category covered not only the things Grotius mentioned when discussing *hoon*, but also physical infringements, such as hitting or beating someone, threatening to beat him, covering him with mud, restricting his freedom etc. Also, real injuries to honour and reputation could be manifold: selling the pledge of a debtor who is willing to pay, suing someone without an appropriate reason, trespass etc.[64]

The exact nature of the civil remedies for injury was not beyond dispute in Roman-Dutch law. This may have been caused by the fact that some early modern authors, albeit not from the Netherlands, had considered retraction and apologies to have a penal nature. As regards sentences, ordering the wrongdoer to confess he lied and to state he regretted his act and wanted to undo the defamation, the Italian jurist Roberto Maranta (1490–1539) had argued that such

[61]Inleidinge III.35.2 and III.36.2–3; see F Dovring, HFWD Fischer and EM Meijers (eds), Hugo de Groot, *Inleidinge tot de Hollandsche rechts-geleerdheid* (Universitaire Pers Leiden, 1952) 307–308 and 310.

[62]Willem van Alphen, *Papegay ofte formulier-boeck* (Iohannes Verhoeve, 1642) 229.

[63]Simon à Groenewegen vander Made, *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* (Johannes Jansonius à Waesberge and the widow of Elizaeus Weterstraat, 1669) 58 (ad Inst 4.4.10). Just as in his annotations to *Inleidinge* III.35 he also referred to the gloss *iniuriarum aestimatio* ad D 47.10.21, but the role of this gloss in his reasoning is not clear.

[64]Johannes Voet, *Commentarius ad pandectas*, Tom. II (Johannes Verbessel, 1704) 1021–1022 (D 47.10, n 17). Margaret Hewett (ed) Jacobus Voorda, *Dictata ad ius hodiernum* II (Royal Netherlands Academy of Arts and Sciences, 2005) 1369–1371 (ad D 47.10). Ben Beinart and Paul van Warmelo (eds), Dionysius Godefridus van der Keessel, *Praelectiones in libros XLVII et XLVIII Digestorum* I (Juta, 1969) 302–303 (Book 47, title 10, § 12). Johannes van der Linden, *Regtsgeleerd, practicaal en koopmans handboek* (Johannes Allart, 1806) 172–174 (Book I, Section 16, § 4), cf also 250–251 (Book II, Section 5, § 16).

judgements were of a penal and not of a civil nature. First, he had mentioned the contrary opinion, viz. that the sentence is of a civil nature, because nothing was given to the fisc and the fine (still termed *poena*) benefitted the other party, but Maranta rejected this view. Azo († 1230) in his *Summa Codicis* had called such a satisfaction for insult a fine (*poena*) and he was followed by Paride de Pozzo (1410–1493) in his *Tractatus de formatione libelli in syndicatu quamplurium auctorum*. Moreover, Paride would have argued that the sentence to retract would imply a corporeal punishment, because of its disgraceful nature. Any punishment which does not exist in a payment of money or a loss of rights is necessarily corporeal, he had argued. If a punishment is corporeal and results from a delict, the nature of the sentence is penal. Also, when a death sentence is executed, the fisc will not obtain anything, but society is nevertheless said to be satisfied by the corporeal punishment, because it is in the interest of society that delicts are punished.[65]

This does not seem to be the opinion of the Roman-Dutch jurists, however. As stated previously, Grotius acknowledged two remedies for both real and verbal injuries. The one, directed at confession of guilt, petition for forgiveness and declaration of honour, he qualified as *weder-evening* or 'restoration of evenness'. The other, directed at a monetary assessment of the injury, he described in terms of paying a fine (*boete*). The notion *weder-evening* is reminiscent of the canonical and moral theological doctrine of restitution, as elaborated by the authors of Early Modern Scholasticism (School of Salamanca). Since, as seen already, the concept of restitution lacks any connotation with revenge or reckoning, it seems that the remedy for retraction was reipersecutory, whereas the one for the fine was penal.[66]

It was Arnold Vinnius who, in his influential commentary on the Institutes (1642), rejected the teachings of Maranta. The remedy for *amende honorable*, he observed, is not directed at corporeal punishment or payment to the fisc. Its sole purpose is to promote the honour and esteem of the injured party. Vinnius referred, for support, to the *Practicae Observationes* of Bernhard Wurmser († 1521)[67] and to

[65]Roberto Maranta, *Praxis, seu de ordine iudiciorum tractatus* (Johannes Gymnicus, 1628) 37–38 (Pars IV, dist 1, n 17–18). Maranta observed, by the way, that according to the law of the Kingdom of Naples one third of the private penalty is for the plaintiff and two thirds for the court; see 36–37 (n 10).

[66]In his work *De iure belli ac pacis* II.17.22, Grotius stated that in the case of defamation, just as in those of other delicts, a distinction had to be drawn between the reprehensible act itself and its effects. The former required punishment (*poena*), the latter reimbursement (*reparatio*). Here Grotius is absolutely clear about the nature of the two actions. The former is penal, the latter reipersecutory. It is only hard to say whether he identified the remedies of Roman-Dutch law with these liabilities according to the Law of Nature. Bernardina Johanna Aritia de Kanter-van Hettinga Tromp (ed), Hugo Grotius, *De iure belli ac pacis Libri tres* (Scientia Verlag, 2nd edn 1993) 433–434.

[67]Wurmser had maintained that the remedy was not penal, because nothing was demanded for the fisc. See Bernhardus Wurmserus, *Practicarum observationum libri duo* (Hartmann, Hartmann, 1579) 35 (Liber I, titulus 9, observatio 8) and 129 (Liber I, titulus 46, observatio

Joachim Mynsinger and Andreas Gaill (1526–1587) whose works dealt with the law of the German territories.[68] This opinion of Vinnius became prevalent under the authorities of Roman-Dutch law. The Leiden Professor Johannes Voet (1647–1713) supported it also with the argument that private persons are not in a position to prosecute crimes but can only claim reimbursement of their losses. Thus the retraction (*amende honorable*) they claim cannot have a penal nature.[69] Many Roman-Dutch jurists also consented that the action for retraction (in case of verbal injuries) or for apologies (in case of real injuries) can accumulate (in one and the same *libellus*) with claiming assessment of the injury in money, to be paid to the plaintiff or the poor.[70]

That the retraction no longer had a penal character seems to be confirmed by forensic practice which was not familiar with the self-humiliating elements of the French *amende honorable*. Grotius did not mention any such elements in the petition for forgiveness. Other sources, such as the *Papegay*, show that the defendant was just required to act in a humble way: bareheaded and kneeling (*bloots hoofts, op zijn knyen*).[71] This is confirmed by the records of the deliberation in the chamber of the Supreme Court. In a sentence of 1785 it is merely said that the defendant had to apologize, bareheaded.[72]

The question of whether the nature of *amende profitable* is penal seems to be more complicated. First it should be noted that some authors pointed out that not in all cases of injuries was there room for claiming *amende profitable*, although that seems to be what Grotius wrote. Simon van Leeuwen (1626–1682), in his *Censura forensis* of 1662, taught that in case of real injuries – he distinguished two types, viz. caused by an object and caused by an act – the wrongdoer was obliged to repair the loss of the injured party (*cum damni raparatione parti laesae*) but the penalty was not a private but a public one (*publica poena*).[73] In his handbook, *Het Rooms-Hollands-Regt*, written in Dutch and first published in 1664, he discussed for the delict of *hoon* primarily the consequences of public criminal law. For *lastering* he discussed the two civil remedies, using French and Dutch terminology: *amende honorable* or *eerlijke boete* and *amende profitable* or *voordelige boete*.[74] The majority of Roman-Dutch jurists considered the *amende profitable* to be a private fine. Groenewegen spoke about a fine (*mulcta*) and Vinnius taught that

8), with references to the Gloss and the commentary of Bartolus (1313–1357) ad D 47.12.3 (lex Praetor ait).

[68]Vinnius (n 8) 749 (Commentarius ad Inst 4.4.10, n 1).

[69]Johannes Voet (n 64) 1021–1022 (D 47.10, n 17).

[70]*Ibid*.

[71]Alphen (n 62) 229.

[72]Robert Feenstra et al (eds), Willem Pauw, *Observationes tumultuariae novae* III (Tjeenk Willink, 1972) 469 (n 1748).

[73]Simon van Leeuwen, *Censura forensis theoretico-practica* (Franciscus Moyardus and Petrus Leffen, 1662) 780–781 (Liber V, caput 25, n 7–8).

[74]Simon van Leeuwen, *Het Rooms-Hollands-Regt* (Hendrik and Dirk Boom, 5th edn 1678) 470–476 (Book IV, part 37, n 1–12).

this fine should punish the wrongdoer, while it cumulates with retraction.[75] The plaintiff had a choice between claiming this fine or leaving it to criminal law procedure, making the defendant pay a fine to the fisc, determinable by the court.[76]

Johannes Voet is a jurist who seems to be of a different opinion. He stated that private individuals cannot sue for a punishment and described the amount claimed (*amende profitable*) not as a fine (*mulcta* or *poena*) but as a monetary assessment of the injury (*pecuniaria injuriae aestimatio*). Moreover, he maintained that the fisc can also institute criminal proceedings, just as in all private delicts. This would imply that, if the *amende profitable* were a fine, the wrongdoer would be punished twice, which would be incompatible with the principle that one cannot be punished twice for the same crime. Thus, Voet seems to consider *amende profitable* to have a reipersecutory character, rather than penal.[77]

Finally, some other issues discussed by the 'Old Authorities' may be mentioned. The way retraction had to take place was sometimes considered to correspond with the way the injury was inflicted. This was the old *actus contrarius*-principle of Roman law: something should be nullified in the same way as it came into being (see D 50.17.35 and D 50.17.135). This meant that defamatory words had to be retracted orally when spoken, and by a public writing, if put in writing.[78] In addition, the Supreme Court (*Hoge Raad*) of Holland and Zeeland decided that an oral insult could only be retracted orally. It confirmed sentences of the court in first instance (from 1708) and the court of first appeal (1718) which had ruled that a written declaration of honour, offered before being sued, could not undo an oral insult. In the case under dispute the defendants had publicly called the plaintiff a prostitute. However, they maintained that their written retraction and declaration of honour would suffice and denied liability. According to the court, however, the oral insult had to be retracted by an oral declaration of honour in court. The majority of councillors in the Supreme Court argued that it would be unacceptable for people to be allowed to call another all sorts of names with impunity by promptly retracting all these words in writing.[79] For the question of in which way retraction could be enforced, if the wrongdoer was absent or refused to comply, Voet referred to two authors, i.e. Matthias Berlich (1586–1638) and Benedikt Carpzov (1599–1666) who were both writing on legal practice in the German territories.[80] It appears that

[75]Carpzov and Böhmer denied the possible accumulation of the remedy for retraction and that for monetary assessment, as if one of the two would suffice. See van der Keessel (n 64) 302–303 (Book 47, title 10, § 12).
[76]Vinnius (n 8) 749 (Commentarius ad Inst 4.4.10, n 2).
[77]Johannes Voet (n 64) 1021–1022 (D 47.10, n 17).
[78]Johannes Voet (n 64) 1021–1022 (D 47.10, n 17).
[79]Bijnkershoek (n 57) II (Tjeenk Willink, 1934) 393–394 (n 1590) at 394: 'Sic enim impune liceret aliquem proscindere injuriis et conviciis et mox in actis omnia revocare.'
[80]Matthias Berlichius, *Quinta pars conclusionum practicalium* (Grosse, 1670) 149 (Conclusio 62, n 36–42). Benedictus Carpzovius, *Practica nova imperialis Saxonica rerum criminalium, Pars secunda* (Gleditsch, 1723) 324–325 (Pars II, q 94, n 21–30).

in such cases the courts could put pressure on the defendant by monetary penalties or incarceration. If this had no effect, a bailiff or court clerk (*carnifex*, *lictor*) would publicly perform the retraction in the presence and on behalf of the defendant.[81]

Roman-Dutch law acknowledged the possibility for the injurer to offer a statement, declaring to have acted on the spur of the moment and to regret his words. If this was done before litiscontestation (joinder of issue), i.e. the moment the defendant brought his defences, litigation would come to an end. Thus, in such cases the extrajudicial declaration could prevent a condemning sentence. The origin of this rule is unclear. It is reminiscent of similar rulings in Roman law (D 47.10.5.8 and D 12.2.34). A similar declaration was known in the indigenous law of the German territories which did not result in dissolution of liability but in a more lenient sentence. Justus Henning Böhmer (1674–1749) in his *Ius ecclesiasticum protestantium* considered the rule to have derived from Canon law but in the nineteenth century this view was rejected. It was a purely German institution.[82] The Dutch extrajudicial recantation was not discussed by the scholarly jurists dealt with already, but it can be traced to one of the *Hollandse Consultatiën*, a collection of expert replies intended as a manual for practitioners. The reply, dated 16 April 1622, is ascribed to a councillor of the Court of Holland, Willem van Muylwijk (1585–1644). It stated that verbal injuries, which were provoked or uttered in a fit of temper, could be excused. Before litiscontestation had taken place, they could be revoked.[83] Since this would have been the more common opinion amongst the scholars, Muylwijk referred to the commentary of the Italian jurist Girolamo Cagnoli (1492–1551) on the text of D 50.17.48: words uttered in a fit of temper are only effective if they appear to have been well-considered.[84] A sentence of the Supreme Court (*Hoge Raad*) of 1727 indeed elucidates that verbal injuries could sometimes be nullified by an extrajudicial declaration. In the case under dispute, retraction and declaration of honour in writing were offered through a notary.[85] However, the injurer's declaration, given in advance, that he did not mean to injure (the so-called *protestatio*) would not exonerate him from verbal insults, e.g. when he had spoken: 'not to offend you (*absit dicto contumelia*) or with all due respect (*salvo honore*) but you are a liar'. Vinnius, as many other Roman-Dutch jurists after him, adhered to the maxim 'a declaration in contravention of one's acting has no effect' (*protestatio facto contraria nihil operetur*).[86]

[81] Johannes Voet (n 64) 1021–1022 (D 47.10, n 17).
[82] Wallenrodt (n 56) 243–255.
[83] *Consultatien, advysen en advertissementen, gegeven en geschreven bij verscheiden treffelijcke rechts-geleerden in Hollandt en elders* I (Gerrit de Groot en Zoon, Gysbert Tieme van Paddenburg, de weduwe Mattheus Visch, 1768) 522–523 (324).
[84] Hieronymus Cagnolus, *Comentarii in titulum ff. de regulis iuris* (Gymnich, 1585) 323–324 (ad D 50.17.48 n 11).
[85] Bijnkershoek (n 57) III (Tjeenk Willink, 1946) 242–243 (n 2351).
[86] Vinnius (n 8) 743 (Commentarius ad Inst 4.4.1, n 4). The maxim goes back to the gloss *protestetur* ad VI 1.6.25: ergo nil operator protestatio per contrarium (…).

3. *The law of Utrecht*

Unlike the law of Holland, Roman-Utrecht law was familiar with statutory provisions dealing with injury. The Ordinance of the city of Utrecht of 5 July 1550, promulgated by Emperor Charles V, contained a title on injury (rubric 46) consisting of two short paragraphs. The first spoke about correction of verbal injuries through '*eerlyke en profytelyke amenden*'. The second ruled that the remedy for retraction could not be brought by ill-reputed persons:

> Van Injurien Ru. 46
>
> Alle injurien verbael daer yemants eere ofte fame aencleeft niet verjaert synde, sullen met eerlicke ende proufitelicke amenden nae gelegentheyt vander saken tot discretie van den gerechte gecorrigeert worden.
>
> Welverstaende, dat men lichte persoonen van quader name ende fame geen eerlicke of honnorable amende off reparatie doen en sal.[87]

This deviated from Roman-Dutch law, which allowed anyone to claim retraction.[88] Provisions with a similar purport were adopted in an edict against murderers and other wrongdoers for the Province of 5 January 1592, promulgated by prince Maurits of Orange (1567–1618) together with the States of Utrecht. Moreover, it was stated explicitly that ill-reputed persons have a remedy for monetary assessment:

> XV. Item, alle injurien verbal, daer yemands eere, of fame aankleeft, niet verjaart zynde, sullen met eerlyke en profytelyke amenden na gelegentheyt van der saken, ende tot discretie van den voorz. Hove gecorrigeert worden.
>
> XVI. Welverstaande, dat men lichte persoonen van quader name ende fame, geen eerlicke of honorable amende, ofte reparatie doen en sal, maar wel profitabele amende.[89]

Since the statutory provisions only mentioned verbal injuries, it was questionable whether in case of real injuries, it was also possible to claim apologies and

[87]Johan van de Water, *Groot Utrechts placaatboek* III (Jacob van Poolsum, 1729) 363. Translation: Injuries, Title 46. § 1. All injuries, damaging someone's honour and reputation, which are not barred by limitation, will be corrected by *amende honorable* (*eerlicke amende*) and *amende profitable* (*proufitelicke amende*) according to the judgement of the court, taking the circumstances into consideration. § 2. In such a way, that *amende honorable* (*eerlicke amende*) or reparation will not be granted to trivial persons with a bad name and reputation.

[88]Johannes Voet (n 64) 1021–1022 (D 47.10, n 17).

[89]Van de Water (n 87) I (Jacob van Poolsum, 1729) 727. Translation: § 15. All injuries, damaging someone's honour and reputation, which are not barred by limitation, will be corrected by *amende honorable* (*eerlicke amende*) and *amende profitable* (*proufitelicke amende*) according to the judgement of the (provincial) court, taking the circumstances into consideration. § 16. In such a way, that *eerlicke* or *honourable amende* or reparation will not be granted to trivial persons with a bad name and reputation, but *amende profitable* will.

monetary assessment. From the collection of decisions of the Court of Utrecht, compiled by Willem van Radelant (1538–1612) and dating from 1580 until 1611, it seems as if the Court did not allow the remedy for injury, where the wrong was qualified as real injury (*iniuria realis*). From the case as recorded, it appears, however, that this term 'real injury' did not refer to injuries in the broad sense of any infringement on personal integrity caused by an object or an act, but to wounds or permanent physical damage. Such injuries were also not recognized as a ground for claiming *amende honorable* or *amende profitable* in Roman-Dutch law. Radelant referred to a case concerning a corporeal injury. A boy was beaten with clubs. As a result his condition was critical. For nine weeks he could not do anything and he was to remain deaf for the rest of his life. Together with his father he claimed revocation of the injury and monetary assessment of the injury. The Court declined the first claim without considering the possibility that apologies could take the place of retraction. On the other hand, it held that the *actio iniuriarum* for a sum of money could concur with an *actio legis Aquiliae*. The Court argued that, although corporeal defects cannot be assessed, the boy did have an *actio legis Aquiliae utilis* ex D 9.2.13 (*Liber homo*). After mitigating the amount claimed by the plaintiffs, the Court awarded 250 guilders.[90]

Other jurists pointed out, however, that *amende honorable* and *amende profitable* could nevertheless be awarded in cases of defamation caused by acts. In his *Practyk judicieel*, the Utrecht practitioner Gerard van Wassenaer (1589–1664) discussed all kinds of real injuries, such as manual injuries, injuries by force, attempts to seduce a maiden etc. In such cases there was no room for retraction, just a monetary penalty.[91] Real injuries were also dealt with in the extensive commentary of Willem van der Muelen (1659–1739), councillor of the Court of Utrecht, on the Ordinance of the City of Utrecht of 1550. It was published in 1709 under the title *Costumen, usantien, policien*. In the case of verbal injuries (orally or in writing) as mentioned in the Statute, one could claim revocation (*palinodia*); in the case of a real injury one could claim apologies (*deprecatio*). The reason for disallowing revocation in the latter case had to do with the *actus contrarius*-principle. Both remedies, that for revocation and that for apologies, could be brought in one and the same *libellus*, combined with a claim for the *amende profitable*.[92]

[90]Willemus Radelantius, *Decisiones posthumae curiae provincialis Traiectinae* (Ioannes à Doorn, 1637) 242–243 (decisio 121).

[91]Gerard van Wassenaer, *Practyk judicieel ofte instructie op de forme en manier van procederen voor hoven en recht-banken* I (Jacob van Poolsum, 1729) 252–257 (Caput XIX, articles 1–13, at n 7).

[92]Willem van der Muelen, *Costumen, usantien, policien ende styl van procederen der stad, steden en landen van Utrecht* (Willem Broedelet, 1709) 451–452 (Rubric 46, n 31, 32 and 34). See on the *actus contrarius*-principle also Matthaeus (n 6) 136 (ad D 47.4, caput 4, n 1).

In a handbook for the procedural law of the Court of Utrecht, first published in 1636, the practitioner Bernhard van Zutphen († 1685) maintained that the remedy for revocation and retraction (*tot revocatie ende reclamatie van de injurien*) had a civil (reipersecutory) and no penal character, thereby referring to four scholars. These four were writing on the law applicable in the German territories. The Leiden Professor Everard Bronckhorst (1554–1627) spoke about the customs of Germany. Joachim Mynsinger and Andreas Gaill dealt with the practice of the Imperial Chamber Court (*Reichskammergericht*) and Matthaeus Wesenbeck (1531–1586) referred to the law of the Electorate of Saxony. Van Zutphen was apparently of the opinion that the law of the provinces of the Dutch Republic was in some respects quite similar to that of the German territories. Bronckhorst had maintained that for various reasons the remedy, aimed at revocation of the injury, had no penal nature. Revocation is no punishment. Had the remedy been penal, according to German customs, appeal from the sentence would not be open, but it was. Moreover, were it a penal remedy, intervention of a representative (*procurator*), either to bring the charge or to take up the defence, would not be allowed (D 48.1.13–14) but it was. A penal nature would also exclude accumulation with the claim of a private monetary penalty, since the wrongdoer may not be punished twice, it was argued. Sometimes the remedy for retraction was termed penal because of its defamatory effect, but this effect also resulted from a number of contractual remedies, which were not penal. All this indicated that the remedy for retraction could not be penal. These arguments can also be found in older writings, such as those of Mynsinger and to a lesser degree those of Gaill. Bronckhorst put forward some more, less convincing and possibly redundant arguments. Penal remedies were characterized by corporeal punishment of the offender or the payment of a penalty to the fisc. In case of claiming revocation, none of these applied. Moreover, from D 26.10.1.8, a counterargument was derived: to claim punishment of a tutor suspected of fraud, a criminal remedy had to be brought before the court of the urban prefect and not before the praetor. This argument was also refuted by Bronckhorst.[93] The teachings of the four authors, mentioned by van Zutphen, can be seen as a response to the view of Maranta, who had maintained that the remedy for revocation is penal.[94]

Antonius Matthaeus II, in his commentary on books 47 and 48 of the Digest, entirely disagreed with the opinion that actions for retraction could be merely

[93]Everardus Bronchorst, *Centuriae duae miscellanearum iuris* (Iohannes Patius, 1602) 287–289 (Centuria secunda, assertio 58); Mynsingerus (n 43) 93–94 (Centuria II, observatio 98); Andreas Gaill, *Practicae observationes ad processum iudiciarium imperialis camerae* (Arnoldus Hierat, 1634) 120 (Liber I, observatio 65, n 5); Matthaeus Wesenbecius, *Paratitla in Pandectarum iuris civilis libros quinquaginta* (Ioannes Oporinus, 1563) 342 (ad D 47.10, n 18).

[94]Bernhard van Zutphen, *Nederlandtsche practycque van verscheyden daghelijcksche soo civile als criminele questien* (Ian van Doorn, 1636) 303 (Iniurien, n 11).

aimed at undoing the injury. In his opinion these remedies were penal because of the self-humiliating elements which retraction brought with it, such as the fact that it had to take place publicly and was often accompanied by a kind of dishonour (*ignomia*), such as knocking on one's mouth with the hand (*verberare palma os*) and asking God and the plaintiff for forgiveness (*deprecari Deum et actorem*). Since the action was penal, it should extinguish the claim for a monetary assessment. At the same time, Matthaeus conceded that his private opinion was not in conformity with rubric 46 of the Statute of the city.[95]

Matthaeus must have been one of the few jurists with a deviating opinion. According to the Utrecht Professor Paul Voet, the father of Johannes Voet, *amende honorable* had no penal character. For support, he referred to a *consilium* of Martin Prenninger, to Mynsinger, Gaill and to the German jurist Philipp Heinrich von Hoen (1576–1649).[96] As the latter explained, since in German customary law, unlike in the *ius commune*, there was no appeal in criminal cases, retraction could not have a penal character because in the *actio iniuriarum ad palinodiam* appeal was indeed allowed.[97] For the opinion that the remedy for retraction had a penal character, Willem van der Muelen also referred to Daniel Moller (1544–1600), commenting on the Constitutions of Electoral Saxony (*Kursächsische Konstitutionen*) of 1572, which in serious cases could add public punishments to a sentence to retract, including those of incarceration or relegation.[98] According to van der Muelen, however, the action for retraction is not a penal, but a civil (reipersecutory) remedy.[99]

Despite the humiliating elements mentioned by Matthaeus, Gerard van Wassenaer, describing the procedural law of Utrecht, stated only that the confession of guilt had to be pronounced bareheaded.[100]

The Utrecht jurists did not explicitly pronounce on the nature of the *amende profitable*. Paul Voet discussed for Roman law the choice which in case of *iniuria* had to be made between the civil *actio iniuriarum* for the fine and criminal prosecution. Since both would be directed at punishment and vengeance and both would render the injurer infamous, these proceedings would exclude each other.[101] This passage was copied by van der Muelen in his commentary on the Ordinance

[95]Matthaeus (n 6) 136 (ad D 47.4, caput 4, n 1).
[96]Paulus Voet (n 11) 386 (ad Inst 4.4.10, n 3). In the *consilium* (of 1493) Prenninger had stated that the remedy was not penal, because 'the claim was not aimed at public revenge, but at the private interest of the plaintiff.' See Uranius (n 9) 65 (Tomus I, consilium 7, n 27): 'per eam agitur non ad vindictam publicam sed ad privatum commodum partis', with references to a number of medieval commentators and canonists.
[97]Philippus Henricus Hoenonius, *Disputationum iuridicarum libri tres* (Georgius Corvinus and Johannes Georgius Muderspachius, 1627) 321–322 (Liber I, disputatio 18, n 25).
[98]Daniel Mollerus, *Semestrium libri quinque* (H Grosius, 1594) 74 (Liber I, caput 23, principium).
[99]Van der Muelen (n 92) 451–452 (Rubric 46, n 33).
[100]Wassenaer (n 91) 252–257 (Caput XIX, articles 1–13, at n 4).
[101]Paulus Voet (n 11) 386 (ad Inst 4.4.10, n 3).

of 1550. However, it is not clear whether this should imply that he considered the *actio in aestimationem* and thus the *amende profitable* to be penal.[102]

Unlike the Roman-Dutch jurists, the legal experts of Utrecht paid considerable attention to the possibility of extrajudicial retractions and apologies in order to avoid a condemning sentence. Matthaeus stated that before litiscontestation the injurer could offer a statement, declaring he acted on the spur of the moment and that he regretted his words. Such a declaration could take the place of retraction and prevent the injured party from bringing further remedies.[103] For this rule of customary law, Matthaeus referred to various authors and sources, all dealing with other jurisdictions, such as Andreas Gaill, writing on the Imperial Chamber Court[104] and the law of Malines.[105] Gerard van Wassenaer stated, referring to D 47.10.17.6, that extrajudicial reparation could be achieved by declaring to have acted in haste and that the injury was unjust. The injurer had to be asked by a court clerk or notary whether he was willing to accept the consequences of his insulting words or acts. If not, he could declare under oath that he had lacked the intention to injure and issue a declaration of honour. This was supported by D 47.10.5.8 and D 12.2.34. If the injurer was not willing to do so, the one injured could claim that the injurer would publicly confess his guilt and petition for forgiveness and also pay a monetary fine.[106] Paul Voet considered the extrajudicial declaration that the defendant had acted in a fit of temper and regretted the words spoken, as a kind of retraction. It would come close to the provision of D 50.17.48. Some required, according to Voet, that it was offered the next day, others allowed it even until litiscontestation.[107] Furthermore, as van Wassenaer explained, neither in Utrecht could a *protestatio* avoid liability. The announcement to write or speak without injurious intent, could not exonerate the injurer's behaviour.[108] However, an individual who had uttered insults or dealt a blow as a prank (*korswyl*) or lark, was allowed to demonstrate that his act lacked such intent.[109]

4. *Other regions*

In the eighteenth century, Voorda presented a useful survey of the various rulings in his lectures on contemporary law (*ius hodiernum*). An action for retraction was used amongst others in the provinces of Holland, Utrecht and Gelderland, but not

[102]Van der Muelen (n 92) 451 (Rubric 46, n 30).
[103]Matthaeus (n 6) 139 (ad D 47.4, caput 4, n 8).
[104]Gaill (n 93) 503 (Liber II, observatio 106, n 8).
[105]P Christinaeus, *In leges municipales civium Mechliensium* (Antwerp, 1625) 214–215 and 217 (Titulus II, articulus 4, n 5–7 and 17–18).
[106]Wassenaer (n 91) 252–257 (Caput XIX, articles 1–13, at n 1 and 2).
[107]Paulus Voet (n 11) 389 (ad Inst 4.4.12, n 2). Cf Van der Muelen (n 92) 453 (Rubric 46, n 37).
[108]Wassenaer (n 91) 252–257 (Caput XIX, articles 1–13, at n 13, referring to D 19.2.60.6 and X 1.29.20).
[109]Wassenaer (n 91) 252–257 (Caput XIX, articles 1–13, at n 13, referring to D 47.10.3.3).

in Friesland, he wrote.[110] Indeed, from the writings of Ulrich Huber (1636–1694), professor in Franeker and occasional councillor of the Court of Friesland, it appears that, on the one hand, the Law of Friesland was familiar with the action for retraction – it was always adopted in the *libellus* of the claim next to the remedy for a monetary assessment – but, on the other hand, its application had fallen into disuse. The courts in the province of Friesland seldom, if ever, upheld remedies for retraction.[111] Nevertheless, a fine example of a sentence from the Court of Friesland was preserved, dating from 1627, where the defendant, who had revoked before litiscontestation the words he had spoken in a fit of temper, was absolved from retraction, but sentenced to pay an amount of money.[112] Forms of extrajudicial retractions were also known in the uniform law of the territory of Overijssel, which was promulgated in 1630,[113] and the municipal statutes of Deventer of 1642. The injurer was to be questioned by two (or some) 'virtuous and peaceful' or 'good' men, commissioned to that end. He had to declare whether he wanted to persist in the insulting words. If not, he had to testify his regret before these men and deliver them a declaration of honour. He also had to pay a fine to the authorities and bear the costs, but he was no longer liable towards the injured party. If he persisted, he had to face liability towards the injured.[114]

IV. *Amende honorable* during the process of codification

1. *The codes of civil law*

What was the fate of *amende honorable* during the process of codification? In the period between 1795 and 1815, the Dutch Republic underwent significant changes. In 1795 it became the Batavian Republic, in 1806 the Kingdom of Holland under King Louis Napoléon Bonaparte (1778–1846), in 1810 part of the First French Empire under Napoléon Bonaparte (1769–1821) and in 1815 the United Kingdom of the Netherlands. In 1798, the first constitution (*Staatsregeling*) of the Netherlands came into being. It ruled that the law, including civil law, had to be codified. The following codification process was lengthy and complex. Four attempts to establish a Dutch civil code would fail in the period between 1798 (the *Staatsregeling*) and 1838, when the Dutch Civil Code (*Burgerlijk Wetboek*) eventually gained force of law. In the meantime, two more or less

[110] Voorda (n 64) I, 1370 (ad D 47.10).
[111] Ulricus Huber, *Heedendaegse rechts-geleertheyt* (Gerard onder de Linden, 1726) 910 (Book VI, Chapter 10, n 5–10) and Ulricus Huberus, *Praelectionum juris civilis tomi III* (Joh Frid Gleditsch, 1749) 1506 (Part II, ad D 47.10 n 6).
[112] Ioannes a Sande, *Theatrum practicantium hoc est decisiones aureae* (Andreas Bingius, 1663) 139 (Liber V, titulus 8, definitio 7).
[113] *Landregt van Over-Isel* (Jan van Wyk, 1724) 130 (Part 2, title 18, n 1–2).
[114] *Rechten ende gewoonten der stadt Deventer* (Nathanael Cost, 1644) 127–128 (Part 4, title 1, n 3).

'foreign' codes of civil law had been introduced: in 1809 the *Wetboek Napoleon ingerigt voor het Koningrijk Holland* and in 1811 the French *Code civil*. The latter would remain in force until 1838. The introduction of these codes constituted a major turning point in Dutch legal history, since they put an end to the existence of regional variations in civil law and created a national jurisdiction.

2. *The early drafts of Farjon and van der Linden*

In 1798, a committee of 12 individuals, the 'Committee of Twelve', was appointed in order to draft national codes of law. The Amsterdam practitioner Johannes Lodewijk Farjon (1766–1824) was charged with the task of preparing the general part concerning the law of obligations.[115] Farjon's draft (1800) was never promulgated and not even discussed by the other committee members. The Committee of Twelve never succeeded in completing a full draft of a Civil Code. In 1804, a draft text of an 'Introduction to the law in general' (*Inleiding van het recht in het algemeen*) was published. Subsequently, the Commission's work came to an end. It was criticized by the Supreme Court (*Hoog Nationaal Gerechtshof*) for containing philosophical principles and being too doctrinal.[116] Grotius' *Inleidinge tot de Hollandse Rechtsgeleerdheid* is supposed to have constituted the basis for the Committee's work, but neither Farjon, nor the other members of the Committee had produced any provisions on *amende honorable*.[117] The influence of Grotius is clear when it comes to defamation, but this is dealt with in the Committee's draft *Criminal* Code, not the *Civil* Code.[118]

When Louis Napoléon became King of Holland in 1806, his brother, the emperor, expected him to introduce in the new kingdom the French *Code Civil*. Louis, however, tried to maintain a certain distance towards the French empire and decided to commission the Amsterdam practitioner Joannes van der Linden (1756–1835) to draft a proper Civil Code for the Kingdom of Holland. Van der Linden delivered his draft texts in parts between April 1807 and January 1808, but due to the emperor's strong political pressure, they could not acquire force

[115]Ernst Holthöfer, 'Niederlande', in Helmut Coing (ed), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, III/1 *Gesetzgebung zum allgemeinen Privatrecht* (CH Beck, 1982) 1191, at 1223–1228. YMI Greuter-Vreeburg (in cooperation with MJEG van Gessel-De Roo), *Verbintenissenrecht 1798-1814* [Bronnen van de Nederlandse Codificatie sinds 1798, 9] (Stichting tot uitgaaf der bronnen van het oud-vaderlandse recht, 2002) XI–XIII.

[116]JTh de Smidt and AH Huussen (eds), H Aa, *Bronnen van Nederlandse Codificatie sinds 1798* I (Kemink en zoon, 1968) 557–558.

[117]JTh de Smidt, *Codificatie-perikelen. Rede uitgesproken bij de aanvaarding van het ambt van gewoon hoogleraar in het oudvaderlands recht aan de Rijksuniversiteit te Leiden op ... 17 juni 1966* (Kluwer, 1966) 9.

[118]Ranchod (n 56) 92–93 (n 6).

of law.[119] Van der Linden's drafts relied mainly on the earlier drafts of the Committee of Twelve, the works of Robert-Joseph Pothier (1699–1772), the French *Code Civil* and on his own earlier work. The titles on civil obligations arising from delicts and quasi-delicts described the obligation to undo an injury and the methods of reparation. Here also the *amende honorable* was mentioned. The articles are reminiscent of Grotius' *Inleidinge*:

> Draft van der Linden, Book III, Title XIII, Article 7
>
> Die door woorden, geschriften, of dadelijkheden iemands eer beledigt, is gehouden de injurie of aangedane hoon te beteren.[120]
>
> Draft van der Linden, Book III, Title XIII, Article 17
>
> De betering van aangedane injurie is tweeledig; honorabel, door den Injuriant voor den Regter te doen verzoeken om vergiffenis, met verklaring, dat hem het gebeurde van harte leed is, en dat hij den Geïnjurieerden houdt voor een man van eer, op wiens gedrag hij niets te zeggen weet: en profitabel, door het betalen eener zekere geldsomme aan de armen.[121]

3. The *Wetboek Napoleon ingerigt voor het Koningrijk Holland* and the *Code Civil*

As just stated, van der Linden's draft never gained force of law due to Napoléon's political pressure in favour of introducing the French *Code Civil*. Still, Louis Napoléon did not give in to his brother's wishes and appointed a committee, which he now charged with the task of adapting the French *Code Civil* to the circumstances of Holland. This draft did acquire force of law and was promulgated in 1809 as the *Wetboek Napoleon ingerigt voor het Koningrijk Holland*.[122] It is self-evident that the new code was primarily based on the *Code Civil*. To a certain extent, however, it had relied also on the draft of van der Linden. This certainly holds good for the delict of injury, which was included now in the articles

[119]Holthöfer (n 115) 1228–1231. Greuter-Vreeburg (n 115) XIII–XV. Tammo Wallinga, 'Joannes van der Linden and His Draft Code for Holland' (2010) 16(1) *Fundamina* 567.

[120]JTh de Smidt (ed), Joannes van der Linden, *Ontwerp Burgerlijk Wetboek 1807/1808. Heruitgave met enige nog onuitgegeven stukken* [Fontes iuris Batavi rariores, 1] (Graphic N.V., 1967) 278. Translation: The one who defames another through words, writings or acts, is obliged to repair the injury or the inflicted defamation.

[121]Edition De Smidt (n 120) 279. Translation: The reparation of the inflicted injury is twofold: honourable by making the injurer in court ask for forgiveness, declaring that he is profoundly sorry for what happened and that he considers the plaintiff to be a man of honour, whose conduct is beyond reproach: and profitable, by paying a certain amount of money to the poor.

[122]Holthöfer (n 115) 1231–1238. Greuter-Vreeburg (n 115) XV–XXI. Frits Brandsma, 'Een basterd Code Napoleon? Het Wetboek Napoleon ingerigt voor het Koningrijk Holland', in Jan Hallebeek and Boudewijn Sirks (eds), *Nederland in Franse schaduw. Recht en bestuur in het Koninkrijk Holland (1806–1810)* (Verloren, 2006) 221.

1322–1328. However, there was one significant difference. The profitable mending by paying to the poor had now disappeared. In addition to the *amende honorable* of article 1322 (based on book III, title XIII, article 7, draft of van der Linden) the new code now mentioned 'damages' (*schade*), to be paid to the plaintiff. Article 1326 described in which way the *amende honorable* had to be performed. It was almost identical to article 17 of the draft van der Linden, quoted earlier:

> Wetboek Napoleon ingerigt voor het Koningrijk Holland, art. 1322
>
> Die door woorden, geschriften of dadelijkheden iemands eer beleedigt, is, behalve tot het vergoeden van schade, ook gehouden, de injurie of aangedanen hoon honorabel te beteren.[123]
>
> Wetboek Napoleon ingerigt voor het Koningrijk Holland, art. 1326
>
> Betering van injurie bestaat daarin, dat de injurant aan den beleedigden in het openbaar voor den regter verzoekt om vergiffenis, met verklaring, dat hij berouw heeft van het gebeurde, en belooft en aanneemt, zich voortaan daarvan te zullen wachten, en eindelijk verklaart, dat hij den geïnjurieerden houdt voor een' man van eer, op wiens gedrag hij niets te zeggen weet (…).[124]

The second part of article 1326 gave the presiding judge a new discretion, viz. to pronounce upon the exact form the *amende honorable* should take, which implied that he was competent to order an apology that would satisfy the specific needs of the injured individual:

> Wetboek Napoleon ingerigt voor het Koningrijk Holland, art. 1326
>
> (…) kunnende nogtans de regter, naar den aard en meerdere of mindere kwaadaardigheid der aangedane beleediging, de uitdrukkingen en de wijze, op welke de betering geschieden moet, zoodanige andere rigting geven, als hij oordeelt te behooren.[125]

Napoléon, whose patience with his brother became exhausted, decided in 1810 upon the annexation of Holland. As a consequence, in 1811 all the French national Codes, including the *Code Civil*, gained force of law in the former Kingdom of

[123] *Wetboek Napoleon ingerigt voor het Koningrijk Holland* (Koninklijke Staatsdrukkerij, 1809) (209). Translation: The one who defames another through words, writings or acts, is, apart from reimbursing for the damages, also obliged to repair in an honourable way the injury or the inflicted defamation.

[124] *Wetboek Napoleon ingerigt voor het Koningrijk Holland* (n 123) (210). Translation: Reparation of the inflicted injury entails that the injurer publicly in court asks the one injured for forgiveness, declaring that he is sorry for what happened, that he promises and determines to henceforth abstain from such behaviour, and eventually declares, that he considers the one injured to be a man of honour, whose conduct is beyond reproach (…).

[125] *Wetboek Napoleon ingerigt voor het Koningrijk Holland* (n 123) (210). Translation: (…) while the judge is competent to modify at his own discretion the way reparation has to take place, in accordance with the nature and the major or minor perniciousness of the insult.

Holland.[126] From that moment onwards, there was no longer a statutory basis for claiming *amende honorable*.

4. *The two drafts Kemper*

After the French occupation was driven away it was decided that until further notice the French *Code Civil* would retain force of law, as was the case in some other European territories outside France where this code had been introduced. In 1814, the North and South of the Netherlands were united. In 1815 these territories constituted the Kingdom of the Netherlands and William I (1772–1843) became the first king. Already in 1814 a new committee had been created, charged with drafting a new code of civil law. Its chairman was Joan Melchior Kemper (1776–1824), professor at the University of Leiden. The committee finished a first draft in 1816 and a second, revised draft in 1820.[127] Both drafts were primarily based on Roman-Dutch law. Hence, the honourable mending reappeared. Reparation of honour was again attainable by retraction and/or apologies (*amende honorable*). However, compared to the *Wetboek Napoleon ingerigt voor het Koningrijk Holland* of 1809, there were some minor differences. First, in article 3550 (draft 1816), an equivalent of article 1322 of the Code of 1809, the words '*of goeden naam*' were added. This meant that under this provision, not only wrongs against honour were actionable, but also attacks on another man's reputation. Second, the *animus injuriandi*, i.e. the intention to injure someone's honour or reputation, was now explicitly mentioned as a requirement. The article went on to describe all kinds of situations where such an intent could be absent:

> Draft Kemper (1816), article 3550:
> Die door woorden, geschriften, of daden, iemands eer of goeden naam beleedigt, is, behalve tot vergoeding van schade, ook gehouden de injurie of den aangedanen hoon honorabel te beteren; mits het uit den aard der zaak zelve, of uit de omstandigheden bewijsbaar zij, dat de injurie met oogmerk om te beleedigen is aangedaan (…).[128]

The way *amende honorable* should be performed was laid down in article 3552 (draft 1816), which was an equivalent of article 1326 of the Code of 1809. The main difference was that now the presiding judge was no longer competent to pronounce on any other specific form of *amende honorable*:

[126] Holthöfer (n 115) 1238–1241. JHA Lokin, 'De receptie van de Code civil in de Noordelijke Nederlanden' (2004) 21 *Groninger opmerkingen en mededelingen* 1.
[127] Holthöfer (n 115) 1241–1258.
[128] *Burgerlijk Wetboek voor het Koningrijk der Nederlanden* (1816). Translation: The one who defames another or injures his reputation through words, writings or acts, is, apart from reimbursing for the damages, also obliged to repair in an honourable way the injury or the inflicted defamation, provided the nature of the case or the circumstances allow proof the injury was inflicted with the intent to injure.

Draft Kemper (1816), article 3552:

> Betering van injurie bestaat daarin, dat de injuriant, het zij in het openbaar ten volle, het zij in eene vertrekkamer, doch altijd in tegenwoordigheid van den beleedigden, indien deze daarbij tegenwoordig mogt willen zijn, verklaart, zich onbehoorlijk te hebben gedragen, en alzoo het gezegde of geschrevene te herroepen, met belofte van zich voortaan daarvan te zullen onthouden.[129]

The first draft of Kemper was not well received by the jurists from the Southern part of the kingdom. They considered it too laborious and doctrinal. Moreover, they criticized the structure and that it contained issues which to their mind should not belong in a civil code. More generally, they regarded the language as being too long-winded and unclear. Kemper was asked to make a second draft, which his committee completed in 1820 – which also failed to be accepted. The Belgian jurists were critical again. They desired a code modelled after the French one, as had been in force since 1811. After the introductory part of the draft was rejected in Parliament, King William decided to withdraw the proposal. The provisions from the first draft Kemper, just mentioned, had reappeared in the second draft. Articles 3550 and 3552 from the first draft were identical to articles 3031 and 3033 in the second draft.

5. The *Burgerlijk Wetboek* 1838

Between 1821 and 1826 the titles for a new code were drafted, this time on the basis of the French *Code Civil*, and discussed in Parliament. In 1830 the new civil code, the *Burgerlijk Wetboek* 1830, was completed.[130] Just as with the *Code Civil*, it did not contain any provisions dealing specifically with 'wrongs against honour' or *amende honorable*. Due to the Belgian Revolt, however, it could not be promulgated, which gave the opportunity for some revisions in the years to come. The underlying idea was to adapt the *Burgerlijk Wetboek* 1830 and make it more 'suitable' for the Northern Netherlands.[131] Thus, certain rules of Roman-Dutch law, which had been abandoned earlier, were incorporated. In this way the new *Burgerlijk Wetboek* came into being, promulgated in 1838.[132]

One of the important alterations, introduced between 1831 and 1834, was the insertion of nine articles on defamation, which became the articles 1408 to 1416 in the *Burgerlijk Wetboek* 1838. Amongst other things, these provisions allowed the

[129] *Burgerlijk Wetboek voor het Koningrijk der Nederlanden* (1816). Translation: Reparation of the inflicted injury entails that the injurer either publicly or in a room, but always in the presence of the one injured, if the latter wishes to be present, declares to have acted improperly, and by so doing retracts what he has said or written, promising to henceforth abstain from such behaviour.

[130] Holthöfer (n 115) 1258–1264.

[131] Holthöfer (n 115) 1265–1268. Gerrit Meijer and Sjoerd Meijer, 'Influence of the Code Civil in the Netherlands' (2002) 14(3) *European Journal of Law and Economics* 227.

[132] Holthöfer (n 115) 1268–1284.

victims of defamation a more specific remedy in addition to the general action on delict of articles 1401–1402 of the Civil Code. According to the Explanatory Memorandum, the main reason for inserting these provisions was to clarify some questions regarding liability for defamation, which had remained unanswered by the general provisions on liability for delict. These questions, which were intended to be answered by the Civil Code and not arbitrarily by the courts, as was the situation under the French *Code Civil*, were the following:

> Amendment Book III Civil Code, Explanatory Memorandum
>
> (…) op welke wijze laster, hoon of beleediging moet worden gebeterd, of de gelasterde, gehoonde of beleedigde partij, behalve eene geldelijke vergoeding voor geledene verliezen, niet ook betering van eer kan vorderen; waarin die betering kan bestaan; hoedanig de beleediger alle openbaarmaking, door het betoonen van zijn leedwezen, kan voorkomen, of echtgenooten, ouders, grootouders, kinderen, enz. herstel van eer kunnen vorderen, indien hunne echtgenooten en dierbaarste bloedverwanten, na hunnen dood, schendig in hunnen goeden naam zijn aangerand; of de regtsvordering niet behoort te vervallen, indien uit een vonnis of eene authentieke akte van de waarheid van de gedane aantijging blijkt; of, desalniettegenstaande, een bij vonnis gestraft persoon, niet behoort te worden gewaardborgd, tegen vervolgingen, die geen ander kennelijk doel hebben dan het voornemen om hem te beleedigen; op welke wijze die rechtsvordering verloren gaat (…).[133]

According to the Explanatory Memorandum, this could all be laid down in the Code. In addition, the Memorandum stated the following:

> Amendment Book III Civil Code, Explanatory Memorandum
>
> (…) a. dat de aanplakking van het vonnis (art. d), thans in de praktijk gebruikelijk, de voorkeur schijnt te verdienen boven de openlijke recantatie, waartoe de beleediger, volgens de oude wetgeving dezer landen, zelfs bij gijzeling, kon worden genoodzaakt. b. dat (art. e) de beleediger de aanplakking echter kan voorkomen door eene vrijwillige recantatie of berouwtooning (…).[134]

[133]Kamerstuk Tweede Kamer 1832–1833 kamerstuknummer XVI, ondernummer 18 (Wijziging van boek III Burgerlijk Wetboek, Memorie van toelichting), *Handelingen der Staten-Generaal*, zitting 1832–1833, 535. Translation: (…) in which way slander, defamation and insult should be repaired, whether the one injured should not have the competence to claim repair, apart from monetary compensation for damages, what such a repair should include, in which way the one insulting can avoid publication by showing his regret, whether spouses, parents, grandparents, children etc. can claim repair of defamation, when their spouses and most beloved close relatives are desecratingly offended in their reputation after their death; whether a claim should not expire, when from a sentence or a notarial instrument the allegation appears to be true; whether nevertheless someone, judicially punished, should not be safeguarded from prosecutions, which serve no other purpose than insulting him; in which way such a claim is lost (…).

[134]Kamerstuk Tweede Kamer 1832–1833 kamerstuknummer XVI, ondernummer 18 (Wijziging van boek III Burgerlijk Wetboek, Memorie van toelichting), *Handelingen der Staten-Generaal*, zitting 1832–1833, 535. Translation: (…) a. that posting up the sentence (art d), as nowadays usual in practice, seems to be preferable instead of public recantation,

Indeed, the Civil Code of 1838 acknowledged a remedy aimed at both damages (*vergoeding der schade*) and reparation of reputational injury (*betering van het nadeel, in eer en goeden naam geleden*) resembling the old *amende profitable* and *amende honorable*:

> Burgerlijk Wetboek 1838, article 1408
> De burgerlijke regtsvordering ter zake van laster, hoon of beleediging strekt tot vergoeding der schade, en tot betering van het nadeel, in eer en goeden naam geleden. De regter zal bij de waardeering daarvan, letten op het min of meer grove van den laster, den hoon of de beleediging, benevens op de hoedanigheid, den stand en de fortuin der wederzijdsche partijen, en op de omstandigheden.[135]

The damages of article 1408, resembling the *poena* of the old *actio aestimatoria*, were definitely regarded to have a mere reipersecutory nature.[136] They were meant as compensation for losses. The legislator had also realized that under the old law, the usual way to enforce *amende honorable*, if the defendant was reluctant, consisted in monetary penalties or incarceration, something the courts resented on occasion. This prompted the legislator to opt for an alternative, i.e. the public display of the sentence, declaring that the defendant had acted in a defamatory manner:

> Burgerlijk Wetboek 1838, article 1409
> De beleedigde kan bovendien eischen, dat bij hetzelfde vonnis worde verklaard, dat de gepleegde daad is lasterlijk, honend of beleedigend. Het vonnis al, indien de beleedigde zulks vordert, ten koste des veroordeelden, openbaar worden aangeplakt, bij zoo vele exemplaren als, en daar waar de regter zulks zal bevelen.[137]

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to which the injurer, according to the former legislation of these lands, could be compelled, even through imprisonment, b. that (art e) the injurer, however, can avoid the posting up by a voluntary recantation or expression of regret (…). See also JC Voorduin, *Geschiedenis en beginselen der Nederlandsche wetboeken, volgens de beraadslagingen deswege gehouden bij de Tweede Kamer der Staten-Generaal* V (Robert Natan, 1838) 86ff and Carel Asser, *Het Nederlandsch Burgerlijk Wetboek, vergeleken met het Wetboek Napoleon* (De gebroeders van Cleef, 1838) 489–492.

[135]Translation: The civil claim for slander, defamation and insult is aimed at compensation of damages and at repair of the damage suffered in honour and reputation. When assessing the damage, the judge will take into consideration the rudeness of the slander, defamation or insult, as well as the quality and fortune of both parties and the circumstances.

[136]The government explained the remedy of art 1408 as a mere civil action for damages, which could also *ex injuria* or *e furto* be granted to the heir. See Kamerstuk Tweede Kamer 1832–1833 kamerstuknummer XVI, ondernummer 20 (Wijziging van boek III Burgerlijk Wetboek, beantwoording van de bedenkingen der afdeelingen), *Handelingen der Staten-Generaal*, zitting 1832–1833, 552. Voorduin (n 134) 99 and CJJC van Nispen, *Het rechterlijk verbod en bevel* (Kluwer, 1978) 93–94.

[137]Translation: The one injured can moreover claim, that the sentence will declare that the act performed is slanderous, defaming or insulting. The sentence will, if claimed so by the one injured, be publicly displayed, while the judge shall order the number of copies and the locations.

Moreover, a defendant who admitted to have acted in a defamatory manner could avoid public posting of the declaratory judgement by voluntary recantation – reminiscent of the extrajudicial retraction under the old law. He had to make a statement in the presence of the judge and the offended person, declaring to be sorry for what had happened, ask forgiveness and consider the plaintiff to be a man of honour:

> Burgerlijk Wetboek 1838, article 1410
> Onverminderd hare gehoudenheid tot schadevergoeding, kan de verwerende partij de toewijzing van de vordering, bij het voorgaand artikel vermeld, voorkomen, door het aanbod en de werkelijke aflegging van eene openbare verklaring voor den regter, houdende dat haar de gepleegde daad leed doet; dat zij deswege verschooning vraagt, en den beledigde houdt voor een persoon van eer.[138]

Thus, the Civil Code of 1838 seemed to have reinstated the old *amende profitable* and *amende honorable* in article 1408 and an alternative for the *amende honorable* in article 1409.

6. *Case law and doctrine under the Burgerlijk Wetboek 1838*

The legislator's intention may have been to embody in article 1408 the old *amende honorable*, where it spoke about 'reparation of reputational injuries' (*betering van het nadeel, in eer en goeden naam geleden*).[139] The problem was, though, that despite what was announced in the Explanatory Memorandum, the Code did not seem to explain in which way such *amende honorable* had to take place. From the outset, there were jurists who considered the reparation of article 1408 not to be the old *amende honorable*. They argued as follows. The first paragraph of article 1408 mentioned two remedies, one for damages and one for reparation. The former was further elaborated in the second paragraph of article 1408, dealing with judicial assessment of damages. The latter was further elaborated in article 1409. Thus the reparation of reputational injuries, mentioned in article 1408, was nothing else but the declaratory judgement, mentioned in article 1409.[140] These authors based their view on the articles' parliamentary history. The words chosen to formulate article 1409 had changed at some point during the codification process. Originally, the article read 'The one insulted can also (*tevens*) claim … '

[138]Translation: Without prejudice to his obligation to pay damages, the defendant can avoid that the claim, mentioned in the article, is awarded by the offer and actual performance of a public statement before the judge, that he regrets the act he committed, accordingly asks to be excused and holds the one insulted for a man of honour.

[139]EJMFC Broers, 'Van Tafel 8 tot Boek 6. De belediging in rechtshistorisch perspectief' (1992) 18(3) *Volkskundig Bulletin* 295, at 306.

[140]See for an overview of authors who have taken this position: AS Hartkamp, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk recht.* 4-III (WEJ Tjeenk Willink, 1990) nr 236c.

That would imply that article 1408 was connected to article 1409. On request of the fourth department of the Parliament, the Government chose to replace the word *tevens* (also) with the word *bovendien* (moreover).[141] Now, it seemed as if something new, i.e. the declaratory judgement of article 1409, was added to the reparation of reputational injuries, already mentioned in article 1408. However, this had never been the intention of the legislator. Thus, from this point of view the articles 1408 and 1409 only distinguished two claims, i.e. one for damages and one for a declaratory judgement, while the old *amende honorable* had disappeared.

In case law, the reparation of reputational injury of article 1408 was, however, interpreted in an entirely different way, i.e. neither as the old *amende honorable* nor as the declaratory judgement of article 1409, but as compensation for immaterial losses. This was for some time a controversial matter. Some authors, such as the Leeuwarden practitioner JW Tromp and the magistrate Gerard Diephuis (1817–1892), later Professor in Groningen, had argued that reputational injuries can never be compensated financially.[142] It took some time before the Supreme Court had the opportunity to pronounce upon the question. In 1842 and 1851 it ruled that awarding damages for insult and defamation on the basis of article 1408 did not depend on the existence of any concrete material losses, stated and proved by the one injured, but that the assessment of damages could be left to the insight of the judge.[143] These verdicts granted the courts considerable discretion. However, they did not elucidate what would be meant by 'reparation' (*betering*) of article 1408. Only in 1881 could the Supreme Court provide clarity on the meaning of such reparation, by stating that this can be achieved through payment of an amount of money, compensating moral damages. By so doing, the Supreme Court acknowledged the possibility of claiming immaterial damages in cases of slander, defamation and insult, alongside compensation for material losses and publication of a declaratory sentence. In any case, it gave a logical significance to the word *bovendien* (moreover) in article 1409:

> (…) O. daaromtrent, dat de woorden van art. 1408 niet beperkt zijn tot stoffelijke schade, maar integendeel onder het nadeel, in eer en goeden naam geleden, niet anders dan moreel nadeel kan worden verstaan; dat zulks volgt uit de omstandigheid, dat naast die woorden sprake is van vergoeding der 'schade', welk woord het geheele begrip van stoffelijke schade omvat; dat voorts bij het 2e lid den regter wordt opgedragen bij de waardering te letten op allerlei omstandigheden, welke woorden niet doen denken aan stoffelijke schade, die door gewone middelen te bewijzen zou

[141] Voorduin (n 134) 94.
[142] JW Tromp, 'Kent de wet aan hem, die gelasterd, gehoond, of beleedigd is, het regt toe, om tot betering van het nadeel, in eer en goeden naam (1) geleden, betaling in geld te eisen' (1843) 3 *Themis* 273. Gerard Diephuis, *Het Nederlandsch burgerlijk regt naar de volgorde van het Burgerlijk Wetboek* VI (JB Wolters, 1849) 407–409 (n 719).
[143] Supreme Court 18 October 1842, *Weekblad van het Regt* 386 and Supreme Court 29 April 1851, *Weekblad van het Regt* 1258.

> zijn, maar aan zedelijk nadeel, dat eigenlijk niet in geld waardeerbaar is, maar waarvoor door den regter met het oog op die omstandigheden eene zekere geldsom behoort te worden aangewezen; (…).[144]

This was to remain the opinion of the Supreme Court until far into the twentieth century.[145] Many authors followed the Supreme Court's jurisprudence in their interpretation and taught that accordingly articles 1408–1409 of the Civil Code distinguish three remedies, i.e. (i) for compensation of material losses; (ii) for compensation for non-pecuniary losses; and (iii) for a declaratory sentence, which, if desired, could be publicly displayed.[146] All of this implied that the *amende honorable* disappeared from legal practice. The declaratory judgement was only somewhat reminiscent of the old *amende honorable*.

In the course of the nineteenth century, payment of material and immaterial damages, combined with a judicial confirmation that the defendant had acted in a defamatory way, were often experienced as satisfactory, although the possibility of displaying the sentence and the voluntary retraction, to avoid sentencing, continued to exist for some time in legal practice. It was now questioned in which way 'publicly posting' of a declaratory judgement, as mentioned in article 1409, should properly be interpreted. Case law shows that from around 1875, victims of defamation started to make requests for the publication of declaratory judgements in a newspaper instead of the public posting. In 1881, the Supreme Court awarded a claim for public display of the declaratory judgement, but a second claim to publish it in a newspaper.[147] In the following decades, lower courts were divided amongst themselves as regards the question of whether a judgement could also be published in a newspaper at the expense of the defendant. There was recognition of the fact that in 1838 the public posting of a judgement may have been the most common and effective way of giving notice to the sentence

[144]Supreme Court 13 May 1881, *Weekblad van het Regt* 4638. Translation: The words of article 1408 are not restricted to material losses, but, by contrast, the prejudice, suffered in honour and reputation, cannot be adopted otherwise than in the sense of moral disadvantage. This results from the circumstance, that apart from these words compensation of 'damage' is mentioned, which term includes the entire notion of material losses. In the second paragraph, moreover, the judge is commissioned to take into consideration all kinds of circumstances. These words do not remind of material damages, which can be proven by ordinary means, but moral disadvantage, which actually cannot be assessed in money, but for which the judge in view of those circumstances has to determine a certain amount of money; (…).

[145]Supreme Court 14 November 1958, *NJ* 1959/15 and Supreme Court 10 April 1959, *NJ* 1960/114, both with annotations by LEH Rutten. See also MFHJ Bolweg, *Pitlo, Het Nederlands Burgerlijk Wetboek* III *Algemeen deel van het verbintenissenrecht* (Gouda Quint BV, 1979) 363–367.

[146]NKF Land and WH de Savornin Lohman, *Verklaring van het Burgerlijk Wetboek* IV (Bohn, 2nd edn 1907) 332 and CP Aubel, *Persoon en Pers. Over onrechtmatige aantasting van persoonsbelangen door perspublikaties* (Kluwer, 1968) 332.

[147]Supreme Court, 13 May 1881 (*Weekblad van het regt*, nr 4638).

but in the second half of the nineteenth century that seemed increasingly less obvious and there were good reasons to interpret article 1409 extensively.[148] From the 1960s, courts, dealing with defamation cases, started ordering the publication of rectifications in newspapers, whereas the public display of declaratory judgements gradually came to an end. It seemed self-evident that defamations, commonly expressed through the mass media, had to be rectified in the same mass media, in keeping with the old *actus contrarius*-principle.[149]

Article 1410 also passed gradually into oblivion. The voluntary retraction could still take place but was probably not practised very frequently. The courts required that the defendant acknowledged in his declaration to have acted in a defamatory way and asked for forgiveness.[150] In 1955 the local judge in Heerlen still ordered an appearance of parties in order to give the defendant, who had publicly called the plaintiff 'a sly pretender' (*een sluwe commediant*), the opportunity to provide the statement referred to in article 1410. For the time being, this was probably the last convulsion of *amende honorable* in Dutch legal practice:

> Cantonal Judge Heerlen, 13 May 1955
>
> (…) dat ged. een vaag beroep op verzoening heeft gedaan en Wij daarom termen aanwezig achten, nu verzoening of vergiffenis de vorderingen doen vervallen, een comparitie van pp. bevelen, kunnende bovendien ged. ex art. 1410 B.W. door het aanbod en de werkelijke aflegging van een openbare verklaring, dat hem de gepleegde daad leed doet en hij deswege verschoning vraagt, de verklaring en veroordeling bedoeld in art. 1409 W.W. voorkomen (…).[151]

V. *Amende honorable*: its rise and fall, its nature

1. *No clear 'legal transplant'*

We have seen previously the various references of early modern authors to the possible roots of *amende honorable* in the Middle Ages and we have described the major features of these roots, i.e. the obligation to make restitution of

[148] AR Bloembergen, 'Onrechtmatige daad: publicatie van het vonnis; recht op rectificatie' (1964) 39 *Nederlands Juristenblad* 337, at 340. Aubel (n 146) 146.

[149] Marjolijn Bulk, *Rectificatie en uitingsvrijheid. Een onderzoek naar de civielrechtelijke aansprakelijkheid voor onrechtmatige uitingen* (Kluwer, 1998) 121.

[150] District Court Amsterdam, 20 December 1876 (*Weekblad van het regt*, nr 4103), District Court Breda, 13 January 1914 (*NJ* 1914, p 1072), District Court Utrecht, 15 May 1941 (*NJ* 1941/841) and District Court Dordrecht, 8 June 1960 (*NJ* 1960/540).

[151] Cantonal Judge Heerlen, 13 May 1955 (*NJ* 1956/360). Translation: (…) that the defendant in vague terms referred to reconciliation and we therefore see grounds, since reconciliation and forgiveness cancel the claims, to order a personal appearance of the parties, enabling also the defendant on the basis of article 1410 of the Civil Code to avoid the statement and sentence, referred to in article 1409 of the Civil Code, by offering and actually giving a public statement, saying that he regrets the act committed and accordingly asks for forgiveness (…).

Canon law (and the *forum internum*), the *amende honorable* of French indigenous law, its late medieval equivalent in the Netherlands and the provisions of Castilian law. Moreover, we have discussed the reception and transformation of the Roman law of delicts. In view of the many aspects of *amende honorable* and the divergent opinions in the older literature, it is not easy to accurately depict its genesis or disappearance. Obviously, *amende honorable* was no clear 'legal transplant'. Hence, the traditional opinions that retraction would derive from Canon law, as defended by Justus Henning Böhmer in the eighteenth century, or that it would derive from the indigenous law of the German territories, as many German scholars from the nineteenth century maintained, are just too simple.

2. The genesis of *amende honorable*

Our own hypothesis would be the following. The roots of *amende honorable* lay in late medieval society, which was unfamiliar with strict separations between the private and public spheres, between the mere reipersecutory function of private law and the penal function of public criminal law, or between the domain of the Church and that of secular authorities. Moreover, in this society, the concept of honour was claimed by social entities, such as chivalry, rather than individuals. There was honour of ranks, classes and professions, including the judiciary and administrative officials, i.e. persons appointed to perform certain jurisdictional duties. Insulting and injuring these individuals was serious. Vulgar abuse was believed to infringe the social status of the opponent and could thus undermine what was essential for a well-functioning society. Calling a bailiff or court clerk a thief or liar was disqualifying him as an officer and as a citizen. By doing so the political and moral position of the authorities was at stake. Accordingly, harming such individuals was seen as disrupting social order.[152]

First, there are concepts in medieval law which must have lain at the root of the early modern *amende honorable*, such as the secular reconciliation rituals of the French *amende honorable* and the *deprecatio* of the *forum internum* and Canon law. The French *amende honorable* was, as we have seen, characterized by humiliating elements, such as putting on a white sheet and prostration, supplemented with monetary penalties. It was meant both to punish the wrongdoer and to reconcile him with the injured person and with society. A second starting point can be seen in the private sacrament of penance or in ecclesiastical proceedings *ratione peccati*, where the wrongdoer could be ordered to humbly beg for forgiveness. Such an act was aimed at reconciliation with the one injured and remission of sins.

In the formative period of early modern law, these medieval concepts were transformed into new remedies and this process must have been influenced by various fundamental changes in legal thinking and legal practice, such as the

[152]Jacob Burckhardt, *Die Kultur der Renaissance in Italien* (Salzwasser, 2016) 246–247; Haemers (n 5) 247.

introduction of a strict separation between, on the one hand, private law remedies aimed at damages and, on the other, criminal prosecution aimed at revenge and punishment, which was henceforth exclusively in the hands of the secular authorities. Revenge and fines no longer fitted with the new private law, neither did an *amende honorable* with a penal nature. Accordingly, we see that the new *amende honorable* was deprived of its self-humiliating elements and reduced to a simple bareheaded spoken apology. It was aimed at undoing the offence, not at punishing the offender. This development may have been enhanced by legal thinking, based on the moral theology of Early Modern Scholasticism with its doctrine of restitution, transforming the Roman law of delicts, as far as it managed to penetrate into legal practice, into a general concept of civil liability for damages in case of wrongs.[153] At the same time, within this broad notion of liability for delict, values such as honour and reputation were increasingly distinguished as distinct interests which deserved protection. Thomas Aquinas had already acknowledged reputation (*fama*) as one of these.[154] Subsequently, the moral theologians of the sixteenth century applied the protection of such interests to an extensive case-based analysis, reflecting the day-to-day reality of their own days, but they did not list these interests and therefore failed to establish a 'catalogue' of protectable interests. However, Aquinas himself had already made the first move towards such an enumeration, by stating that one can injure another by beating him, calling him names or treating him disrespectfully.[155] Early modern jurists resumed the thread. The French humanist Hugues Doneau (Hugo Donellus, 1527–1591), when discussing the question of what should be understood by the Roman law precept '*alterum non laedere*', mentioned four intangible matters that should be respected: life (*vita*), physical integrity (*incolumitas corporis*), freedom (*libertas*) and honour (*existimatio*).[156] In the wake of Doneau, Grotius distinguished in his *Inleidinge*, but now based on the concept of restitution, four inalienable subjective rights, viz. life, body, freedom and honour.[157] Similarly, in *De iure belli ac pacis* Grotius maintained that according to nature there are several things a man is entitled to: his life (not to lose it but to preserve it), his body, his limbs, his reputation, his honour and his liberty of action.[158] In this way a kind of 'catalogue' of

[153]Cf James Gordley, 'Tort Law in the Aristotelian Tradition', in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 131.
[154]Thomas Aquinas (n 17) 43 (Summa Theologiae, Secunda secundae, quaestio 62, articulus 2).
[155]Thomas Aquinas (n 17) 36 (Summa Theologiae, Secunda secundae, quaestio 61, articulus 3): '(…) injuriam facit, puta percutiendo vel conviciando, aut etiam cum reverentiam exhibit (…).' The Leonine edition followed the reading *reverentiam* and not *irreverentiam*.
[156]Hugo Donellus, *Donellus enucleatus sive commentarii de iure civili* (Petrus Bellerus, 1642) 19 (Liber II, caput 8).
[157]*Inleidinge* II.1.42; see De Groot (n 61) 45.
[158]*De jure belli ac pacis* II.17.2.1; see Grotius (n 66) 428: 'Natura homini suum est vita, non quidem ad perdendum sed ad custodiendum, corpus, membra, fama, honor, actiones propriae (…).' See Robert Feenstra, 'Das Deliktsrecht bei Grotius, insbesonderers der

protectable interests was established, comparable to the later '*Rechtsgütern*' of § 823 BGB.[159] This implied that honour and reputation were more or less adopted as personality rights which could be harmed and should be protected.

The fact that the protection against injuries took shape through two separate remedies, i.e. one for *amende honorable* and one for *amende profitable*, may have had its roots in more specific provisions, dating from the Middle Ages, such as the one from Castilian law where the two are mentioned next to each other. After all, the first source in the Netherlands where the two go hand in hand was the Ordinance of Utrecht (1550), introduced by Charles V. These remedies could subsequently have been fleshed out by more detailed provisions. Some of these may also have derived from Castilian law, such as the Utrecht provision that an ill-reputed person (*vilis*) cannot demand retraction.[160] However, most of these more detailed provisions had their origin in Roman law and were originally related to the Roman delict of *iniuria*. This could create the impression that some kind of reception of this delict had taken place, but this view is too simple and Roman terminology can be misleading. A main feature of the Roman *iniuria* was by no means received in the Netherlands, viz. that its *actio* was *famosa*. Neither the *actio aestimatoria* nor the *actio ad palinodiam* would render the defendant 'infamous' through a condemning sentence.[161] Features, seemingly deriving from Roman law, are the fact that liability requires the plaintiff to have taken the insult badly right away (Inst 4.4.11 and D 47.10.10.2) and that the insult was not a kind of joke (D 47.10.3.3), the assessment of the injury by the plaintiff under oath, which amount could be mitigated by the judge (Inst 4.4.7), and the limitation period of one year (C 9.35.5). The extrajudicial retraction had no clear origin in Roman law, but could be supported by some Roman texts (D 12.2.34, D 47.10.5.8 and D 50.17.48).

Schadenersatz bei Tötung und Körperverletzung' in Robert Feenstra and Reinhard Zimmermann (eds), *Das römisch-holländische Recht. Fortschritte des Zivilsrechts im 17. und 18. Jahrhundert* [Schriften zur europäischen Rechts- und Verfassungsgeschichte, 7] (Duncker & Humblot, 1992) 429. See for the possible influence by Donellus: Alejandro Guzmán Brito, 'La sistemática del derecho privado en el "De iure belli ac pacis" de Hugo Grotius' (2004) 26 *Revista de Estudios Histórico-Jurídicos* 157.

[159]These '*Rechtsgütern*' in the German BGB also include property. See on Grotius' catalogue of protectable interests: Hermann (n 56) 33–37 and Feenstra (n 158) 431–434.

[160]Such a rule was dealt with by Castilian jurists, such as Alfonso de Azevedo (1518–1598) from Plasencia (Extremadura). They also explained the rationale behind the rule: the defendant would lose more honour than the plaintiff had been deprived of. See Alphonsus de Azevedo, *Commentariorum iuris civilis in Hispaniae regias constitutiones* V (Pedro Lasso, 1596) 175 (n 197).

[161]Johannes Voet (n 64) 1021–1022 (D 47.10, n 17). Voorda (n 64) I, 178 (ad D 3.2).

3. The nature and purpose of *amende honorable* and *amende profitable*

It is characteristic of the early modern time, that honour and reputation became values no longer connected to chivalry, or to classes or professions. Now they were pursued individually and regarded as merits of great importance. A distinction between honour and reputation had not yet been drawn. Both were determined by individual virtuousness, which concept fitted well in the ideals of Enlightenment, and/or were connected to social status. Infringement of reputation was considered serious. This can also be seen in the Dutch Republic. Legal proceedings in cases of *injurie*, where the plaintiff claimed recantation/retraction, were so numerous that some cities had established a separate court for such litigation.

As we saw previously, the early modern period brought a strict separation between civil law proceedings for damages and public criminal law proceedings for punishment. In the law of the Provinces of the Dutch Republic, there were two civil claims, one for retraction and/or apologies (*amende honorable*) and one for a monetary assessment of the injury (*amende profitable*). The ritual of retraction was reduced to the bareheaded pronouncement of apologies and declaration of honour, without such humiliating elements as putting on a white sheet and prostration, whereas in France this medieval ritual continued to be observed until the eighteenth century.[162] Antonius Matthaeus maintained the *amende honorable* was penal by nature. His view was, however, exceptional in the Dutch Republic. Other authors, defending such a view, were all writing about foreign jurisdictions. Roberto Maranta dealt with the law of the Kingdom of Naples, Daniel Moller was commenting on the Constitutions of the Electorate of Saxony of 1572 and Benedikt Carpzov on the law of Saxony in general. The vast majority of jurists in Holland and Utrecht were of the opinion that *amende honorable* was not penal, because neither did it consist in a corporeal punishment, nor was anything payable to the fisc.

The amount of money, claimed by the *actio aestimatoria*, was initially termed *poena* or *mulcta*. Does this mean, though, that the *amende profitable* was penal? On the one hand, that seems to be the case, where accumulation with the *amende honorable* is explained by referring to the Roman rule that a mere penal remedy can cumulate with a reipersecutory one. As a consequence, payment of the *poena* would exclude criminal prosecution and vice versa, for the injurer should not be punished twice. This existence of a civil remedy for a fine did not fit, however, in the new legal order, where only the authorities were competent to bring criminal proceedings (*omnia crimina publica sunt*). In the eighteenth century, this was also emphasized by Johannes Voet, who no longer spoke about 'claiming a penalty', but about 'claiming a monetary assessment of the injury' (*aestimatio inuriae*). In his opinion, moreover, payment of the *amende profitable* did not exclude the possibility of criminal prosecution. If the assessment

[162]James R Farr, 'Honor, Law, and Custom in Renaissance Europe' in Guido Ruggiro, *A Companion to the Worlds of the Renaissance* (Blackwell, 2002) 124.

were a punishment, this would hardly be compatible with the principle that the wrongdoer should be punished only once for the injury he committed. We may not exclude the possibility that the pecuniary claim had gradually lost its penal character and was increasingly seen as an additional means to restore the disturbed balance between parties; as a confirmation of the retraction, apologies, or as a kind of immaterial damages, rather than a means of punishing the defendant. It may be that the defendant's declaration by itself was not always sufficiently convincing, which is more or less comparable to the problem we face today, that sincerity cannot be imposed.

That the *actio aestimatoria* had no penal nature, but was aimed at immaterial damages and thus did not exclude criminal prosecution, was defended by many German jurists, writing on the *usus modernus pandectarum*. This view was substantiated thoroughly, for example, in the dissertation *De aestimatoria injuriarum actione rei persecutoria* of Heinrich Samuel Eckhold (1653–1713) and Samuel Friedrich Rappold (end seventeenth century), published in 1682.[163] It was the Tübingen legal historian Jan Schröder (1943) who in 1995 maintained, on the basis of the investigated sources, that only by the end of the eighteenth century was the strict separation between the private law of delicts (damages) and criminal law (punishment) carried through in the *usus modernus*. Henceforth the *actio aestimatioria* would have functioned as a remedy for a form of immaterial damages and no longer for a private penalty.[164] Since we know that Roman-Dutch jurists were familiar with German legal scholarship, we may not exclude the possibility that Voet, and possibly others as well, followed such an opinion also for Roman-Dutch law. This would explain why the payment of money for insult and defamation in the nineteenth-century Dutch drafts and codes, which took Roman-Dutch law of the eighteenth century as their basis, always took the form of damages.

The qualification of the *actio aestimatoria*, penal or not, has important consequences for criminal law liability, since if the civil remedy is penal it excludes criminal prosecution. It is also relevant for legal dogmatics because if the action is penal a private fine is claimed and if the action is not penal some kind of damages will be awarded. Seen from the perspective of the plaintiff, however, this distinction could not have been of major importance. Money is money. As long as the person injured could claim a certain amount from the wrongdoer, we can imagine that it would not have made all that much difference how this amount was labelled by the jurists. It is striking that claims for immaterial

[163]See Thomas Moosheimer, *Die actio injuriarum aestimatoria im 18. und 19. Jahrhundert* [Tübinger Rechtswissenschaftlicher Abhandlungen, 86] (Mohr Siebeck, 1997) 8–11.

[164]Jan Schröder, 'Die zivilrechtliche Haftung für schuldhafte schadenszufügung im deutschen usus modernus' in Letizia Vacca (ed), *La responsabilità civile da atto illecito nella prospettiva storio-comparistica* (Giappichelli, 1995) 144, at 162. See also Ina Ebert, *Pönale Elemente im deutschen Privatrecht von der Renaissance der Privatstrafe im deutschen Recht* (Mohr Siebeck, 2004) 72–73.

damages were acknowledged at the same time when claims for private fines fell into disuse, as if these two categories constitute communicating vessels.[165]

4. Farewell to the *amende honorable*

During the process of codifying civil law in the Netherlands, it seems as if initially it was beyond dispute that *amende honorable* should be enshrined in the Dutch Civil Code. We traced it in the draft van der Linden, in the *Wetboek Napoleon ingerigt voor het Koningrijk Holland* and in the two drafts Kemper. The French *Code Civil*, introduced in 1811, on the other hand, only knew a more general foundation for delictual liability. Parliamentary history showed that under the French *Code Civil* the courts took the discretion, despite lack of a statutory basis, to order reparation of reputational injuries in the way they considered appropriate. At the same time, the old *amende honorable* appeared to be past its prime and there was resentment against the use of coercive means such as imprisonment to enforce *amende honorable*. In the Civil Code of 1838, the reparation of reputational damages was adopted again, alongside liability for damages. However, as soon as 1881**,** the Supreme Court, followed by legal doctrine, considered this obligation to repair to be a liability for immaterial damages. What remained of the old concept of *amende honorable* was the voluntary statement that the legislator had adopted in article 1410, which was reminiscent of the old extrajudicial retraction. The purpose was the same, viz. avoiding a condemning sentence (in earlier times to retract, but now just declaratory), but it was no longer extrajudicial and had to be given in court. Moreover, it was not restricted to cases where the defendant had acted on the spur of the moment, but was allowed in all cases. Eventually, also this last echo of the old *amende honorable* disappeared from legal practice. The injured party was henceforth satisfied with material and immaterial damages, the judicial confirmation that the act committed was indeed defamation, and a possible rectification.

Compared to the early modern era, when litigation for defamation expanded enormously, a certain cultural shift must have taken place, which the legal sources hardly display. Nevertheless, we should realize that the nineteenth century brought a stricter separation between law and morality. Reputation was increasingly seen as something individual, belonging to the realm of morality and unsuitable for being protected through legal, coercive measures. Honour was something depending on the state, either the general honour, derived from being a citizen, or the civil honour, derived from being a citizen holding an office. These kinds of honour did not depend on personal virtuousness. Their

[165]Jan Hallebeek, 'Buitencontractuele aansprakelijkheid aan de vooravond van de moderne samenleving' in Bruno Debaenst and Bram Delbecke (eds), *Vangnet of springplank? Het buitencontractuele aansprakelijkheidsrecht in een moderne samenleving (1804-heden)* (Die Keure, 2014) 15.

infringement was an offence towards the state, rather than towards the individual. This explains why coercive measures of a public law nature were considered appropriate, but there was no longer much room for civil law liability, except for damages.[166]

VI. A revival of *amende honorable*?

In 1992, the Dutch Civil Code (*Burgerlijk Wetboek*) of 1838 changed significantly. One of these changes constituted the removal of the provisions concerning the declaratory judgement and the voluntary recantation (art 1409–1410). The 'new' *Burgerlijk Wetboek* did not contain references to (compelled or voluntary) apologies or anything else comparable to the old *amende honorable*. There was only one provision, ruling that in case of defamation, the court can order the defendant to publish a rectification of his incorrect, incomplete or misleading statements:

> Burgerlijk Wetboek, article 6:167
> Wanneer iemand (…) jegens een ander aansprakelijk is ter zake van een onjuiste of door onvolledigheid misleidende publicatie van gegevens van feitelijke aard, kan de rechter hem op vordering van die ander veroordelen tot openbaarmaking van een rectificatie op een door de rechter aan te geven wijze.[167]

On the basis of this provision, claimants may seek rectifications, containing apologies. However, the courts are usually reluctant to meet such a request and phrase the ordered rectification in a mere factual manner. The courts substantiate such decisions with various arguments: no one should be compelled to express an opinion that is not his own,[168] compelled apologies imply an infringement of the right to freedom of expression,[169] and people should only offer apologies with the conviction that they did something wrong.[170]

A serious barrier for claiming apologies is not only the lack of a statutory basis, but also the general requirement of article 3:303 of the Civil Code that every plaintiff should have 'sufficient interest' for suing the defendant. The parents of a three-year-old child, drowned after swimming therapy in a university hospital, requested a declaratory judgement that liability existed without having substantiated the existence of any monetary damage. In 1998, the Supreme Court dismissed the claim. The requested declaratory judgement was considered to serve a purely

[166]See for the German territories and German doctrine: Moosheimer (n 163) 142–145.
[167]Translation: if (…) a person is liable towards another person in view of an incorrect or, by its incompleteness, misleading publication of information of a factual nature, the court may, upon the demand of such other person, order him to publish a rectification in such manner as the court will determine.
[168]Court of Appeal Amsterdam, 23 May 1996 (*Mediaforum* 1996-7/8, B99).
[169]Court of Appeal Amsterdam, 19 June 2008 (ECLI:NL:GHAMS:2008:BE9682).
[170]District Court East Brabant, 11 July 2013 (ECLI:NL:RBOBR:2013:2856).

emotional interest, and, as a consequence, it failed to fulfil the statutory requirement of 'sufficient interest'.[171] This sentence was taken to imply that apologies or other statements, expressing an emotion or opinion, could not be ordered under article 6:167 of the Civil Code. However, a number of district courts have recently awarded claims for rectifications, containing an apology, albeit by way of exception.[172]

In present-day scholarly literature it has been argued on various grounds for legal acknowledgment of claims for apologies. These pleadings can be seen as resulting from an increasing awareness that non-pecuniary interests, such as emotional recovery, the acknowledgment of responsibility, preventing the same thing from happening to others, and indeed, apologies, can be of great or even overriding importance to those who have suffered serious injuries. Empirical-psychological research has shown that apologies have a healing power to a greater extent than mere damages.[173] On the one hand, such apologies can be seen as a revival of the old *amende honorable*. After all, they imply a return to the eighteenth-century approach, in the sense that they put aside the strict separation between law and morality. Accordingly, non-pecuniary interests, also those of a personal and individual nature, can be legally acknowledged. Moreover, apologies are intended, just as the *amende honorable* was, at a reconciliation of parties, which reminds us of present-day South African case law, basing imposed apologies explicitly on the principle of *ubuntu*. Reintroduction of enforceable apologies can also be seen as part of what is called the 'reprivatization' (in German: *Reprivitarisierung*) of criminal law. Apologies, offered by the injurer to the one injured, leading to reconciliation, contribute to what is called restorative justice. Even when there is no objective of punishing the wrongdoer, apologies can make criminal law prosecution superfluous. On the other hand, the main focus of the early modern *amende honorable* was retraction of insults, thereby satisfying the hurt feelings of the one injured and restoring loss of face, whereas the main focus of apologies nowadays would be the emotional recovery of those who have suffered some kind of serious wrong, such as an adverse medical event or a considerable mistake by public authorities. Accordingly, claims for compelled apologies will not be available so easily for those whose feelings are hurt by slander, defamation

[171] Supreme Court, 9 October 1998 (*NJ* 1998/853). Zwart-Hink, Akkermans and Van Wees (n 1) passim.

[172] District Court Haarlem, 1 November 2006 (ECLI:NL:RBHAA:2006:AZ1366), District Court The Hague, 17 October 2007 (ECLI:NL:RBSGR:2007:BB5893), District Court The Hague, 20 August 2007 (ECLI:NL:RBSGR:2007:BB2188) and District Court Central Netherlands, 18 June 2014 (ECLI:NL:RBMNE:2014:2472).

[173] AJ Akkermans, EM Uijttenbroek, KAPC Van Wees and JE Hulst, 'Excuses in het Privaatrecht' (2008) 6772 *Weekblad voor privaatrecht, notariaat en registratie* 778, at 782. Zwart-Hink, Akkermans and Van Wees (n 1) *passim*.

or insult, but rather for those who met a considerable injustice, feel helpless and deserve recognition.

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