

# INFAMIA IN THE SIGHT OF ROMAN LAW

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**Abstract:** The research identifies “Infamia” as a pervasive legal construct, intricately linked with notions of reputation, honor, and societal standing. The concept significantly influenced various aspects of Roman jurisprudence, spanning from contractual relations (such as fiducia, societas, depositum, tutela, and mandatam) to inheritance laws, and even marital unions. This study underscores the intricate interplay between legal regulations and moral considerations, illustrating how Roman society intertwined religious beliefs, trust, and conscientiousness in shaping legal conduct. Examining the inheritance laws, the research delineates the pivotal role of “Infamia” in determining the transfer of rights and responsibilities following an individual's demise. The inheritance process becomes a crucial juncture where societal values are intertwined with legal mandates, influencing the distribution of familial assets. Notably, the Roman institution of “pater familias” vested nearly absolute authority over familial members, restricting their ownership rights. Furthermore, the study traces the evolution of inheritance practices through distinct historical periods, including the legislative reforms introduced by Justinian. These amendments aimed to rectify perceived injustices, providing mechanisms for disinherited heirs to contest their exclusion through the querella inofficiosi testamenti. The research also scrutinizes “Infamia” within the realm of marital law, discerning its presence in the dissolution of marriages through practices like “divoriturum” and “repudium.” These terminations, whether consensual or unilateral, bore financial and reputational consequences, with the latter potentially resulting in societal disgrace. In conclusion, this comprehensive review illuminates the intricate and dynamic role of “Infamia” in Roman legal and societal frameworks. It underscores how this concept permeated various facets of Roman life, serving as a potent tool for regulating conduct, shaping social relations, and upholding moral values. By synthesizing a diverse range of scholarly works, this study offers a holistic understanding of “Infamia” and its far-reaching implications in ancient Rome.

Keywords: Infamia, Roman law, societal stigma, inheritance laws, marital law.

Field: Social sciences

## THE CONCEPT OF EXISTIMATIO

Little reliable evidence is available for early Roman history, and no detailed written account survives from before the third century B.C (Anderson, 2022: 2). Where does Roman law come from? It is possible that Roman law is an outgrowth of an oral tradition of law shared with other Indo-European languages. (Bell, du Plessis, 2022: 9). This tradition had a strong influence on the historiography of early Rome (Candy, Ferrandiz, 2022: 11). Honor (existimatio) is defined as “a code of behavior that defines the duties of a person within a specific social group. Honor is what he or she is in the eyes of others” (Jim, 2003: 2). The view of honor has not changed much, and the Romans viewed honor in almost the same way. It is stated that the Romans considered honor as the dignity that a collective, based on customs and even laws, recognizes in an individual. Based on the law, it can be restricted or completely erased by a wrongful act (D. 50. 13. 5. 1). Honor is certainly a concept beyond the realm of law; it is a concept of socio-moral understanding. Existimatio represents a special degree of respect that a person carries, which is evaluated based on his correct actions and vice versa. Therefore, this attribute, which has a socio-psychological dimension in the form of existimatio, is actually an indicator of one's status in society. The higher the “positive morality,” the greater his degree (Greenidge, 1984: 2). At another point, we find that existimatio also represents to the Romans the “civil honor” that should be preserved at all costs because the loss of a good name or civil honor represents a great burden and shame to the Romans (Greenidge, 1984: 2-3). In the speeches of Roman jurists and emperors, we find nothing but vague expressions, never fully defined in terms of the expression existimatio, which was present in the Latin language and literature, but in any case, it was about a moral category (Greenidge, 1984: 2-3). The autonomy of morality, and therefore honor, is reflected in a separate internal category, which could be called a sanction - a guilty conscience. “This sanction is autonomous, it is pronounced by oneself, and the moral subject who has violated the moral norm applies it to himself” (Lukić, 1976: 117).

“Conscience is a complex psychological phenomenon, composed of multiple different elements. It primarily consists of a range of feelings, such as feelings of shame for the committed transgression, a sense of vague fear regarding uncertain consequences that will occur, feelings of disgust for the transgression,

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a sense of self-contempt and self-condemnation, feelings of pain, despondency, hopelessness, general discomfort, a desire for self-punishment that can lead to suicide, feelings of restlessness, anger, sometimes rage, apprehension, worry, and more.” (Lukić, 1976: 119 - 120). Although honor, as we have seen, is a hybrid category, a conglomerate encompassing social, moral, and psychological aspects, in no case can we negate certain legal aspects within Roman law, especially since the loss of honor sometimes led to civil death, referred to as *capitis deminutio maxima*, which pertains to the loss of status and thus subjective rights (Stanojević, 1989: 117). One of the ways to lose honor that could lead to civil death is deliberately avoiding military service and registration in the censor's list - *elapsus militum officium mortalitati fere comparamus* (Melanica, Deretić, 2011: 186). The Romans never completely abandoned revenge as a means of sanctioning wrongdoers, including those who were dishonored. Revenge was an integral part of life, and we know it as personal execution. Personal execution is a phenomenon that characterizes all primitive laws, and it involves executing a debtor, either by reducing them to the status of a slave or in cases of the debtor's death (Stanojević, 1989: 152). This mode of executing a judgment is not exclusive to Roman law; we find an identical legal phenomenon in Mesopotamia, in ancient Greece before Solon's reforms, among the ancient Celts, and in medieval Serbian law (Stanojević, 1989: 152). Roman historians speak of a time of extreme scarcity when personal execution was at its zenith, mentioning a “hungry era” when people threw themselves into the Tiber River because they could not bear the suffering caused by hunger. At that time, personal execution was commonplace because many people would incur debts but were unable to repay them due to insolvency (Stanojević, 1989: 152). Personal execution as a legal institution of Roman law is not an end in itself, and we see this in the procedure of *manus iniectio*, which was conducted to reach a settlement of the claim. Therefore, the debtor was held in chains, led to the forum three times, and only then would the sale of the debtor be resorted to. This was done so that a member of the family would pity them and pay the debt on their behalf, effectively redeeming them (Zimmermann, 1996: 3).

## INFAMIA AS A SANCTION

in Roman culture, *infamia* represented the loss of legal and social status, and as a technical term, it denotes the official withdrawal of legal protection enjoyed by Roman citizens (McGinn, 1998: 65). Exceptionally characteristic of the Republican and Principate eras, an *infamis* is a person who has violated personal integrity and reputation (McGinn, 1998: 65). *Infamia* entails ‘inescapable consequences for certain professions, including prostitution and brothel-keeping, entertainers, actors, dancers, and even gladiators were not exempt from the consequences of *infamia* (Catharine, 1997: 67). Even entertainers who were *infames* were not excluded from the circles of Roman elite. For example, elite entertainers who were mistresses of high-ranking Romans, like Mark Antony. *Infamia* also represents a legal term that pertains to the incapacity to act on behalf of another party in court, and subsequently, the loss of reputation (*fama*) and ‘good name,’ or rather, honor (*existimatio*) (Kaser, 1956: 220). Therefore, *infamia* signifies the loss of civil honor, respect, reputation among Romans, which has repercussions for one's movement in the legal world. *Infamia*, in the strict sense, as a punishment of disgrace, is regulated by the legislation of Emperor Justinian, which is enumerated in the praetorian edicts. Additionally, there exist regulatory forms of *infamia* in the law *Lex Iulia Municipalis*, known as the Heracleian Tables (45 BCE). *Infamia* could lead to the shameful expulsion from the army (*Lex Iulia Municipalis*, 1. 121), stigmatization of women engaged in prostitution, and individuals who arbitrarily terminated a marriage. Roman law regulates *infamia* in a way that it falls under judicial jurisdiction, meaning that through legal proceedings, a person could acquire the stigma of *infamia* in specific cases. Ancient Roman scholars, such as Gaius in his legal writings, discussed *infamia* in the context of legal consequences for specific actions. Gaius, for instance, highlighted that those convicted of certain offenses, including theft, robbery, assault, or breaches of trust, would be considered “*infames*.” This status affected their ability to engage in legal proceedings and could lead to social stigmatization. For instance: ‘Those who are convicted in certain lawsuits become dishonored, such as in cases of theft, robbery, or assault, as well as in cases of partnership, trust, guardianship, mandate, or inheritance. However, in cases of theft, robbery, or assault, not only those who are convicted lose their honor, but also those who settle out of court, as correctly stated in the praetorian edict. There is a very significant distinction, namely, between one who is obligated due to a delict and one due to a contract. However, in no part of the edict is it explicitly written that someone is dishonored, but it is considered dishonorable for one who is prohibited from bringing a lawsuit on behalf of another, to appoint a *cognitor*, or to take a *procurator*, and then to participate in a lawsuit as a *procurator* or *cognitor*’ (Gaius, 4:182).”

It is very important to check the history of law in order to get a true picture of the development of a legal institution (Kulauzov, 2021: 8).

## INFAMIA IN FIDUCIA, SOCIETAS, DEPOSITUM, TUTELA AND MANDATUM

The Romans largely based their legal transactions on religion, trust, conscience, and good faith. All breaches of trust were followed by a series of sanctions that would begin with property consequences and end with a sanction of disgrace. It is important to note that these sanctions did not necessarily follow one another as a rule, but rather depended on the specific case, and both could be imposed or just one. One example of a breach of trust and good faith is mentioned in fiduciary legal transactions, with *fiducia* as a central institution in Roman law. The reason for the emergence of such a legal solution lies in the rudimentary and undeveloped nature of old civil law (*ius civile*), as it did not differentiate between ownership and possession, thus not allowing the holding of another's property. This is why Romans transferred ownership regardless of who it was given to and the reason for it. Ownership was always transferred (Melanica, Deretić, 2011: 375). *Fiducia* (*fiducia*) as the first means of securing was named after *fides* (faith, trust, honor), indicating that it was based on trust rather than fear of the penal system of the Roman state (Stanojević, 1989: 199). This was particularly evident in *fiducia*, where if the pledged creditor sold or gifted the pledged item to a third party, they would be obligated to return the pledged item or pay its monetary value, avoiding *infamia*. Therefore, the debtor would give the item to the creditor, expecting it to be returned once the obligation towards them was fulfilled (Stanojević, 1989: 199). Initially, this institution was widely used, relying on trust and moral sanction. However, over time, the direct action *actio fiduciae* was introduced, starting from the 2nd century AD, by the urban praetor through his *ius edictum*. This transformed the agreement into a protected contractual relationship (Melanica, Deretić, 2011: 375). Through this action, the pledged debtor could sue the pledged creditor and demand the return of the pledged item if they had fulfilled their debt. In the situation where the pledged creditor alienated the pledged item, the same action was used, but the debtor did not request the item from the new owner, but from the person to whom they had given it as a pledge. If successful in the lawsuit, the creditor was punished with a monetary penalty for condemnation, as well as *infamia* (Stanojevic, 1989: 200). The penalty of disgrace is also present in the contract of partnership (*societas*). A partnership contract represents a "consensual contract in which two or more parties (partners, *socii*) commit to contribute their shares and efforts for the purpose of achieving a common benefit" (Melanica, Deretić, 2011: 394). It is assumed that partnership was practiced since ancient times due to various reasons. Its essence lies in *bona fides*, as it was not regulated by the Twelve Tables. Abuse of *bona fides* has various sanctions, including pecuniary penalty and *infamia* (Melanica, Deretić, 2011: 394-397). A partnership could be formed for any reason, economic or otherwise, as long as it did not involve criminal activities (Dig. 17 .2. 3. 3.). The abuse of good faith in partnership involves feigning a special kind of trust, without which partnership cannot exist. The action taken in cases of feigned trust is *actio pro socio*. If convicted, the person faced a monetary sanction, as well as disgrace (Stanojevic, 1989: 279). Furthermore, we can talk about the abuse of trust which results in disgrace in the case of the legal act of deposit (*depositum*). It states that a deposit is a "real contract in which one party, the depositor (*deponent*), hands over a movable item for free safekeeping to another party, the depositary (*depositarius*), who undertakes to return it upon request" (Melanica, Deretić, 2011: 377). The main goal of this contract is to safeguard the item, and for this reason, the depositary is not allowed to use the item. If they do so, it constitutes theft of the item (*furtum usus*) (Melanica, Deretić, 2011: 377). Violating the moral principles on which the deposit is based results in a pecuniary penalty as compensation for damages and disgrace in the form of *infamia*. All of this applies if the depositary refuses to return the deposited item, damages it, or uses it without authorization. The monetary penalty the depositary must pay is double (*in duplum*) the value of the deposited item. When it comes to the penalty of disgrace, it is particularly pronounced in the case of a deposit in distress (*depositum miserabile*), which involves concluding a legal act under exceptional circumstances such as shipwrecks, floods, fires, and political persecution. In such a situation, the depositor does not have the right to choose the depositary, but the depositary must take greater care of the deposited items than usual (Stanojevic, 1989: 271; Melanica, Deretić, 2011: 377). Therefore, if the guilt of the depositary is established, they will be held accountable and disgrace is one of the consequences (Dig. 16. 3.) The general trust in safeguarding items for various reasons, especially due to travel, is reflected throughout the history of Rome. The first codification in the form of the Twelve Tables contains provisions concerning deposits. A depositary who does not return the deposited item is considered a thief, which further supports

why they were punished with infamia (Melanica, Deretić, 2011: 378).

## INFAMIA IN INHERITANCE AND MARTIAL LAW

Inheritance law provides answers to questions about how rights and obligations are transferred to others after a person's death. Our rights begin with birth and end with death. The essence is that after a person's death, all their rights and obligations are transferred to their heirs. (Milosevic, 2020, 250) Most people inherited a significant portion of their property from their ancestors and passed it on to their descendants. Inheritance laws are of great importance because they do not affect just one legal relationship, but the fate of family property depends on them (Kaser, 1984: 211). Taking into account Roman law, we can say that the pater familias (head of the household) had almost unlimited authority over members of his family. Family members did not have the ability to own property (Rufner, 2015: 45). From a chronological perspective in Roman law, we have several lines of inheritance, including: a) inheritance by the law of the Twelve Tables; b) inheritance in families with strong patria potestas; c) inheritance through the praetor; d) inheritance in classical law; e) inheritance according to Justinian's novellas (Stanojevic, 1989: 213-218). The field of inheritance law is largely intertwined with moral rules, which are particularly evident in testamentary inheritance. In this sense, it is stated that two positions have crystallized over time among Romanists, namely, formally necessary inheritance law and materially necessary inheritance law (Stanojevic, 1989: 222). Formally necessary inheritance law is the obligation to mention a fixed number of persons in the will, while materially it consists of obtaining a specific part of the estate within a precisely defined circle of heirs (Stanojevic, 1989: 222). If the testator excludes one of the necessary heirs from the inheritance, they could sue through an action called querella inofficiosa testamenti, which would be successful only if the excluded necessary heir proves that they were excluded without justified reason (sine iusta causa) (Xochitl, 2012: 1-2). Therefore, it was considered here that the testator was avoiding certain heirs, and this act was in contradiction to morality. In the situation of proving a justified reason for exclusion from the inheritance, it further meant punishment by infamia, and the person would be declared unworthy of receiving anything from the inheritance for any reason. Unworthiness is not only a concept in inheritance law, but it is also said that "those considered unworthy are women, foreigners, slaves, the mentally impaired, the deaf, the mentally ill, and those declared unworthy based on a *lex specialis*" (Gaius, 2. 10. 6). Marriage is an institution of family law, and the Roman jurist Modestinus defines marriage as: "the bond between a man and a woman, a lifelong union, an establishment of divine and human law" (Dig. 23. 2. 1). Romans allowed the formation of a full-fledged marriage exclusively for Roman citizens (*cives*), and this was one of the characteristics of ancient law (Riggsby, 2010: 104). In Roman law, there are three ways in which a marriage can be terminated: a) mutual divorce (*divortium*); b) unilateral or unilateral repudiation of marriage (*repudium*); c) termination of marriage due to the death of one of the spouses (*domini mortem coniugi*). In Roman law, death did not only encompass the departure of the soul from the body, but Roman law also recognizes another type of death called civil death (*capitis deminutio maxima, media, minima*) (Kaser, 1984: 78). The penalty of disgrace is largely present in the case of unilateral repudiation of marriage, which is defined as: "Termination of the contract between spouses or marriage contract with the intention of solemnity" (Dig. 50. 16. 191). The solemnity mentioned involves the obligation of testimony from seven competent and of age individuals.

Repudiation in Roman law has two forms: *repudium ex iusta causa* and *repudium sine iusta causa*. The first form resulted in pecuniary losses in the form of dowries (*dos*) and premarital gifts, depending on whose improper behavior led to the repudiation (Berger, 1980: 676). Therefore, in this case, it is about justified repudiation of a spouse because certain behavior cannot be tolerated, and such behavior is a reason for unilateral marriage termination. The second form of repudiation indicated a situation in which one party terminates the marriage without valid and justified reason. This type of repudiation had various consequences, all of which related to the individual's property, but the main penalty imposed on the person for their unjustified termination of the marital union was infamia (Mousourakis, 2015: 110).

## CONCLUSION

"Infamia," as a Roman institution of sanctioning, can be dissected into the following points, providing us with a comprehensive understanding of it: Loss of Legal and Social Status: Infamia entailed a significant reduction in an individual's legal and social standing. This included the forfeiture of

certain rights and privileges enjoyed by Roman citizens. Violation of Personal Integrity and Reputation: Those labeled as infames were individuals who had committed acts or engaged in behaviors that were considered to be a breach of personal integrity and reputation within Roman society. Consequences for Certain Professions: Infamia had specific implications for individuals in certain professions. This included occupations such as prostitution, brothel-keeping, entertainment, acting, dancing, and even gladiatorial combat. Engaging in these professions could lead to a person being labeled as infamis. Restrictions on Legal Actions: Infames faced restrictions on their ability to act in legal matters on behalf of themselves or others. They may have been barred from initiating lawsuits, appointing legal representatives (cognitors), or participating as representatives (procurators) in legal proceedings. Loss of Reputation (Fama) and Honor (Existimatio): Infamia resulted in the degradation of an individual's reputation and honor among the Roman populace. This loss of esteem could have far-reaching social and personal consequences. Prohibition from Military Service: Being labeled as infamis could lead to expulsion from the Roman army, further diminishing an individual's standing and opportunities within Roman society. Stigmatization of Certain Actions and Behaviors: Infamia was associated with specific actions or behaviors that were deemed socially unacceptable or dishonorable. These could include offenses like theft, robbery, assault, and certain breaches of trust or fiduciary duties. Regulation through Legislation: Infamia was addressed and regulated through legal measures, including the legislation of Emperor Justinian, as well as in specific laws like the Lex Iulia Municipalis (Heracleian Tables).

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