



Doctrinal History of the Protection of Personality Rights in Europe in the *Ius Commune*: General Actions or Specific Actions?

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I. The Historiography of the Law Protecting Personality Rights in Europe

The development of legal doctrine in Europe from the sixteenth century through to the codifications in European jurisdictions has been enormously illuminated by authors publishing in English in the last twenty years. This work has drawn on, in particular, the development of legal analysis in the writing of leading jurists in the mainstream of the history of European private law, including the late Spanish scholastics, and also that of humanist jurists such as Donellus and northern European natural lawyers such as Grotius, and, indeed, reflects consideration of an impressive range of study of others, who led the way in systematising private law in this area. This has then been carried forward to clarify the development of the law in the nineteenth century, especially the law in Germany and in France. Two variants of the history are expounded in this important body of modern scholarship. They complement each other. They may be summarised as follows, though it is not possible in the confines of this article to convey the richness of the study of sources and analysis involved in them.

Reinhard Zimmermann in his *Law of Obligations – Roman Foundations of the Civilian Tradition* published in 1990 succinctly explains the law as commencing in the medieval period: “[The Roman] *actio injuriarum* afforded a strong and efficient protection against injuries to immaterial interests ... [it] was adopted from the Romans in order to provide protection against interference with man’s (non-material interest) in his dignity and honour”. The distinction between it and aquilian liability is then emphasised. The *actio injuriarum* is characterised by the availability of the remedy of the palinode (apology – *amende honorable* in French) and by the yardstick for financial compensation being what was “*bonum et aequum*”. The action was “penal” and the jurists disagreed, accordingly, whether civil proceedings could be cumulated with criminal.¹ The elaboration of the action is then firstly through the identification by jurists of the interests protected, and the requirement of the mental element as *dolus malus*. This is summed up in the clear formulation of the major late seventeenth century Dutch jurist, Johannes Voet, “*delictum in contemptum hominis liberi admissum, quo ejus corpus vel dignitas, fama laeditur dolo malo*”.² Secondly the elaboration of the action is in the sub-division relating to the mechanism used to bring about *injuria*, the distinction between real and verbal, between a physical act (*injuria realis*) and a verbal representation (*injuria verbalis*). (In connection with the latter sub-division there was for written/printed representation a sub-category based on the Roman texts dealing with *libelli famosi*.) The later history in nineteenth century Germany was a shift from civil law to criminal and then in the twentieth a renaissance of the principles of the developed *actio injuriarum* through the recognition of the protection of the general personality right (*allgemeines Persönlichkeitsrecht*). In Reinhard Zimmermann’s memorable phrase, what was by the German Civil Code “thrown out by the front door ... has managed to sneak in through the back window”.³ Detailed work in German⁴ confirms this picture of the development of *injuria*. This history has also born fruit in modern South African law,⁵ and one recent Scottish

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¹ At p 1071.

² At p1064; Voet, *Commentarii ad Pandectas* 47.10.1 (A wrongdoing committed in contempt of a free human being, and by which his person or dignity or reputation is injured with evil intent. (Gane trans.))

³ At p 1092.

⁴ M Herrmann, *Der Schutz der Persönlichkeit in der Rechtslehre des 16 – 18 Jahrhunderts* (1968); H Weber, *Der Schutz der Persönlichkeit im südafrikanischen Privatrecht* (1996).

⁵ For South African law generally see, J Neethling, J M Potgieter and P J Visser, *Neethling’s Law of Personality* (2d edn; 2005); J M Burchell, *Personality rights and freedom of expression: the modern actio injuriarum* (1998).

case about the retention of dead babies' organs by hospitals contains the first mention in recent times in a Scottish judgment of an *actio injuriarum*.⁶

The other variant in the central modern scholarship in English is the important contribution of James Gordley. This elaborates the former model, crucially analysing and emphasising the significance of the philosophical and theological background to the work of jurists in articulating the doctrine of the law. Aquinas building on Aristotle established that allocation of honour was a matter of distributive justice. *Dignitas* and *fama* can be impaired by "detraction" (in secret) which affects reputation and "insult" (in public) which impairs honour. The sixteenth century scholastics either focussed on the interest, or on the in secret/in public distinction. The Spaniard, De Lugo, however, focussed on both. As Professor Gordley sums the position up: "The late scholastic analysis of why dignity and reputation should be protected was largely ignored by... northern natural law [and] 17th and 18th century commentators on Roman law".⁷ The history then in nineteenth and twentieth century French doctrine is a more complex one than in Germany.

In this present article I elaborate a third variant of the history of the doctrinal history personality rights in the period of the *ius commune*. Again it is not inconsistent with the important modern scholarship just outlined. But it does add levels of complexity in working from the bottom up, as revealed in the law as applied in courts and a body of specialised literature used there. The material that reveals this complexity is the case law of European courts in the sixteenth and seventeenth centuries, and the literature, principally that of specialised writers on crime/delict and (particularly with respect to the details of the protection of personality rights in family life and moral sexual relations) that of specialised writing on particular topics by canonists of the same period. This body of literature was, it appears, valued by practitioners and judges, because it addressed details of the law. This was especially so because it combined theory with detail, above all in the most comprehensive work on crime/delict of the late sixteenth and early seventeenth century, that of Prospero Farinacci (Prosper Farinacius, 1554-1613).⁸

It has been a consideration of what sources were relied on in Scottish courts in this period that has provided a springboard into the exploration here of the complexity of the law as revealed through this body of material for the elaboration of the law in Europe in the same period.⁹ Identifying the centrality of this for the doctrinal history of this area of law in the *ius commune* has only been possible because in Scotland there is a relatively easily accessed material in court records, including pleadings, as they have been published by scholars and antiquarians of the nineteenth and twentieth centuries. This material shows reliance on this body of material of continental European material, and not, as far as it appears,¹⁰ on the mainstream systematic jurists. Further research and analysis will be necessary to flesh out the outline of the position in Europe generally and in particular in the various European jurisdictions. The present article, accordingly, is a preliminary outline.

⁶ *Stevens v Yorkhill NHS Hospitals Trust* [2006] CSOH 143; 2006 SLT 889.

⁷ J Gordley, *Foundations of Private Law* (2006) p 221.

⁸ H Schlosser, "Prospero Farinacci (1548-1618), ein bedeutender Kanonist?" in M Ascheri et al (eds), "*Ins Wasser geworfen und Ozeane durchquert*" 893 at p 897.

⁹ J Blackie, "The History of Personality Rights in Scots Law" in N Whitty and R Zimmermann (eds) *Rights of Personality in Scots Law: A comparative Perspective* (in press, 2009); J Blackie, 'Defamation' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* vol 2 (2000) (hereafter Blackie, 'Defamation').

¹⁰ Work on the original records may, however, show at least some of that material to have been used as well.

What emerges is, particularly, four features adding complexity. Firstly, though there was no overt use of a concept “personality rights”, there is detailed law, evidenced by this body of material, which deals with the protection of specific personality rights. This law worked with detail going to a further level of micro-analysis beyond the higher level categories, *corpus*, *fama*, and *dignitas* that are central in the general analysis of the more systematic jurists. All of these specific personality rights are logically examples of these three categories. But they are distinctly identified because there were sub-categories for focussing the legal rules applicable to their protection. The personality rights that can be distinguished at this level are the right to bodily integrity, the right to physical liberty (i.e. functionally two features of *corpus*), rights in family life and moral sexual relations, at least one aspect of informational privacy,¹¹ and specific aspects of dignity and reputation. The focus on these specific rights came from the use of sub-categories which were the source of detail in the substantive law. The second feature of this complexity lies in that detail. The third is that all of these sub-categories have a connection to the highest level category, *injuria*, which also functioned as a residual category for deciding cases where there was no applicable sub-category. In contrast, however, the existence of the sub-categories, as they covered almost all situations where the invasion of a personality right was by a physical act, but not where the mechanism was a representation, there was no point, or very, very rarely¹² was there any point, in expressly referring to the sub-division *injuria realis* in terms. (Only two instances have come to light in Scottish published court records, both in debates as to whether the general courts had any jurisdiction in cases of *injuria verbalis*, where making the contrast using this sub-division was natural.) The detailed sub-categories were what mattered on the ground. In contrast the sub-division *injuria verbalis* did matter on the ground. It was routinely expressly referred to, both to describe a body of work in the church courts, or in protestant areas in courts of particular jurisdiction that had taken over their jurisdiction as it applied to disputes between lay people, but also because there were no relevant sub-categories for it, with the exception of the sub-category, *libellus famosus*, used, or potentially available, for written/printed representations. A fourth feature is explicable as a consequence of the existence of sub-categories, namely that even in cases of bodily physical injury or deprivation of physical liberty, where the invasion of the right had patrimonial consequences, for instance medical expenses in a bodily physical injury case, aquilian liability would not typically be considered separately. (The modern Anglo-American term “personal injury” to describe cases where the harm is to a person’s body can be found in Latin in *ius commune* material.)¹³ The final feature is that there was considerable dispute on many points of detail in the law.

¹¹ “Secrets”. See further below at Section III.(4).

¹² Two examples have come to light in the published records of Scottish courts in the period, *Carnegie* (1672) W G Scott-Moncrieff, *The Records of the Proceedings of the Justiciary Court Edinburgh 1661-1678* vol 2 (1669-1678) (Scottish History Society) (1906-1908) (Scottish History Society) (1905) (hereafter Scott-Moncrieff, *Justiciary Records*)116; *Straitton (otherwise Straitton) v Doig* (1672) Scott-Moncrieff, *Justiciary Records* vol 2, 132.

¹³ See Prosper Farinacius *Praxis et theorica criminalium rerum – Variarum Quaestionum ac Communium Criminalium* (complete first publication 1614) (hereafter “Farinacius”), lib 3 tit 12 quaest 185 nu 181. explaining which “*personalis injuria*” in this sense is always *atrox*. He extends it (at nu 183) also to cover clothing worn.

No attempt is made here to study the extent to which this complex picture was developed or modified in the eighteenth century. Study of Scots material¹⁴ shows that many of the sub-categories faded from the law in the second half of that century. In Scotland to an extent that was a product of taking over aspects of English law. But if there was modification and simplification of sub-categories at that time in other parts of Europe, too, that phenomenon may have played a role as an aspect of the background to the provisions under which personality rights protection was covered in different ways in various different codifications. However, in considering the background to particular codifications in European jurisdictions it is above all the literature favoured by the particular authors of the code in question which (with their own views) was formative.¹⁵

In another way the complex picture of the detailed law as it was applied in European jurisdictions in the sixteenth and seventeenth century may throw light on the law today. It shows that then, as now, there was an interaction between conceptualising the law as governed by unitary principle (of varying levels of generality), and adopting particular categories, for example, in some jurisdictions today, to deal with distinct personality rights, for instance image rights. Furthermore, it shows that at least a few particular categories, notably that of professional and other “secrets” have a long history in the *ius commune*. Finally, the unity of criminal law and civil law in the use of sub-categories for the protection of bodily physical injury and the protection of physical liberty¹⁶ in sixteenth and seventeenth century Europe may illuminate the farther background to more modern theory that distinguishes civil and criminal law, and the role that criminal courts may appropriately have as a forum for remedies for private parties.

II. The Development of Detail in Courts and Specialised Literature in the Sixteenth and Seventeenth Centuries

The specialised material that developed from the sixteenth century on which reveals the complexity is that on “crimes”, works dealing with consistorial law, and encyclopaedic works in the form of law dictionaries.¹⁷ To this can be added collections of case law and *consilia* from a range of jurisdictions.¹⁸ All this material reflects firstly a variety in early modern Europe in the allocation of jurisdiction between courts. Everywhere the church courts (or in protestant areas courts created to take over their pre-reformation jurisdiction in the respects that it covered disputes between private parties) were the typical forum for cases concerning the protection of dignity and reputation, where it was not accompanied by physical bodily injury. They also dealt with the protection of family life and moral sexual relations. By definition courts of criminal jurisdiction were the courts with jurisdiction to impose punishment in protecting bodily physical integrity and physical liberty. However, it must be

¹⁴ J Blackie, “The History of Personality Rights in Scots Law” in N Whitty and R Zimmermann (eds) *Rights of Personality in Scots Law: A comparative Perspective* (in press, 2009).

¹⁵ J Gordley, *Foundations of Private Law* (2006) pp 225-230. R Zimmermann, *Law of Obligations – Roman Foundations of the Civilian Tradition* (1990) pp 1088-1092.

¹⁶ Other *injuria* including, *injuriae verbales* also could give rise to punishment of the perpetrator.

¹⁷ E.g. Besoldus, *Thesaurus Practicae* (first published 1629).

¹⁸ E.g. A *consilium* published in 1554 on the classification of forms of *injuria* by Joost de Damhouder, *Praxis Rerum Criminalium* – nu 135 the extensive analysis of the law on the question of whether truth of the representation was ever relevant, in by the Ferraran jurist, Aymo Cravetta, *Consiliorum vel responsorum consilium* nu 145 prompted by a case in an Italian Court, *Mattaeus de Homine, Domino de Valis Clausae ex loco Buxt v Johannes Testafort ex loco Buxt*.

stressed, it is also the case that in some parts of Europe it was within a criminal process that a private party would obtain monetary compensation for the invasion of these rights.¹⁹

The relevance of this material is not solely for disputes within the courts for which it was particularly written. In particular the literature on “crimes” was written with an awareness of its relevance also in those places where it was civil, and not criminal courts, in which monetary compensation for bodily injury or deprivation of liberty would be sought. Consistent with this it is referred to by major systematic jurists, for instance Johannes Voet, when considering issues that would in their jurisdictions be considered by civil courts. The same is true of the literature written particularly for consistorial courts, a literature which continued to develop doctrine established and elaborated by canonists in the medieval period.

The number of works that constitutes this corpus of material is very large. The following, however, appear as particularly frequently used. There is, firstly, the body of mainstream “criminalist” literature, starting, though building on earlier authors, with the work of the Italian, who also worked in Spain, Giulio Claro (Julius Clarus, 1525-1575).²⁰ Influential, too, was his contemporary Andreas Gaill (1526-1587),²¹ who wrote from the context of the jurisdiction of Imperial Germany. Above all it was, as already noted above, the much more extensive work of the Italian jurist of the Papal States of the next generation, Prospero Farinacci (Prosper Farinacius, 1554-1613) that elaborated the law at a high level of detail. These works were as influential in protestant Europe as in catholic Europe. In the seventeenth century protestant Europe produced its own specialist literature in the field, which at the same time took account of specific features of the jurisdiction in which they were based. A significant contemporary of Farinacci was the Württemberg jurist, Johannes Harpprecht I (Joannes Harprechtius, 1550-1639).²² Of particular prominence then were to be the Dutch, Antonius Matthaeus II (1601-1654)²³ and Paul Voet (1619-1677),²⁴ and the Saxons, Matthias Berlich²⁵ (Matthias Berlichius. 1586-1638), and Benedikt Carpzov (Benedictus Carpzovius II, 1595-1666).²⁶ This body of juristic writing is central to understanding the sub-categories relevant to the protection of bodily integrity and personal liberty. It is also where the detailed law on the protection of dignity and reputation in other contexts is to be found. It also dealt with the sub-categories relevant to the protection of family life and moral sexual relations. In that respect it built on the work of canonists, whose specialised literature was also utilised. Again the range of literature used in courts was enormous.²⁷ As with the criminalist writers

¹⁹ And possibly an expression of repentance.

²⁰ Julius Clarus, *Liber Quintus Sententiarum Receptarum* (first published 1568) (Hereafter, “Clarus”).

²¹ Andreas Gaill, *Practicarum Observationum, tam ad Processum Judicarium, Praesertim Imperialis Camerae, Quam Causarum Decisiones Pertinentium* (first published 1587).

²² Johannes Harpprecht (Joannes Harprechtus) *Practica Criminalis* (first published 1603).

²³ Antonius Matthaeus, *De Criminibus ad lib XLVII et XLVIII digesti commentarius* (Amsterdam 1644; 1665) (the 1761 edn edited with English trans. by M L Hewett and B C Stoop 4 vols 1987-1996) (Hereafter “Matthaeus”).

²⁴ Paulus Voetius, *Institutionum imperialium commentarius* (1668).

²⁵ Matthias Berlichius, *Conclusiones practicabiles secundum ordinum constitutionum Augusti Electoris Saxoniae* (Arnhem 1644).

²⁶ Benedictus Carpzovius, *Practica Nova Imperialis Saxonica Rerum Criminalium* (first published 1635), and *Jurisprudentia ecclesiastica seu consistorialis rerum et quaestionum in principis Electoris Saxoniae Senatu Ecclesiastico et Consistorio Supremo*.

²⁷ A published set of records of the Scottish court within whose jurisdiction came invasions of rights in family life and moral sexual relations, F P Walton (ed), *Lord Hermand's Consistorial Decisions 1684-1777* (Stair Society, vol 6) (1940) Introduction (by the editor) pp xv-xxi, evidences the use in that court of a very large number of works, including amongst them are not only canonists, but criminalists: Alteserra, Augustinus,

some were particularly used, most notably the work of the Spanish canonist and theologian, Tomas Sanchez (1550 -1610).²⁸ Additionally there was available case law from courts in several jurisdictions²⁹ focussed on particular topics. A notable example is the detailed consideration category of informational privacy in the form of protected “secrets”, professional and otherwise.³⁰

The “criminalist” and canonist jurists dealt with private parties’ remedies as well as with criminal punishment, and the similar punishment element in church courts and their successors in protestant jurisdictions.

III. Sub-categories and Their Significance

The sub-categories that existed in early modern European law can conveniently be listed as they relate to distinct personality rights. The sub-categories were variously developed from distinct sources. In some more than one of these sources influenced their nature. The sources are: specific Roman texts, canon law and moral theology. In some jurisdictions certain of the sub-categories were also influenced by local customary law. Their elaboration and fine-tuning came through case law and debates in juristic literature.

(1) For Invasions of Bodily Integrity

The sub-categories for focussing cases of bodily physical injury reflect the language of the *Corpus Iuris*.³¹ Roman texts established that *injuria* could be *atrox* because of the part of the body injured.³² The sub-categories then developed and applied in the *ius commune* related to that. There are Latin terms for all of them, originating in fact in the vocabulary of the relevant Roman texts. However, there was another reason why they were developed and used in the *ius commune*. Christian theology on the nature of man gave reason for distinguishing as separate cases where a distinct part of the body of a victim was disabled by the invasion, the category *mutillatio* (where the distinct part of the body was actually removed, such as a hand being cut off – sometimes referred to as *dismembratio* or *demembratio*).³³ Why the Christian concept of the nature of man underpinned the separate identification of this sub-category was that an invasion of a distinct part of the human body disrupts the whole.³⁴ The very nature of man conceived corporally is injured.³⁵ A clear exposition is to be found in Aquinas.³⁶ Lesser

Berlichius, Beza, Brouwer, Brunemannus, Caranza, Carpzovius, Christinaeus, Clarus, Covarruvias, Cujacius, Fachineus, Farinacius, Gentilis, Gothofredus, Grönnewegen, Gualtier, Huber, Lancelotus, Mascardus, Matthaeus, Menochius, Mynsingerus, Papon, Sanchez, Zachius and Zoesius.

²⁸ Tomas Sanchez, *Disputationes de Sancti Matrimonii Sacramento* (first published 1592).

²⁹ E.g. the collection of Savoyard court decisions by Antoine Fabre (Antonius Faber), *Codex Fabrianus definitionum forensium et rerum in Sabaudiae Senatu tractarum, ex ordine titulorum codicis Justiniani* (first published 1609).

³⁰ See Section III.(4) below.

³¹ E.g. D.9,2,15ff (“*vulneratus*”: Aquilian liability); (“*vulneravit ... percusserit*”); D.49,16,6 (“*vulneravit*”).

³² Justinian, *Institutes* IV,3,4,9; D.47, 10, 9 (Paulus).

³³ In one Scots case, *Ross v Forbes* (1667) Scott-Moncrieff, *Justiciary Records*, Baldus, Covaruvius (sic) *ad tit Digest de iudicii pub.* and Bartolus were relied on.

³⁴ Thomas Aquinas, *Summa Theologica* 2.2.q 65.3 – explaining why consent to mutilation does not excuse, “*quia per hoc fit iniuria communitati, cuius est ipse homo et omnes partes eius*”; “because this would involve an injury to the community, to whom the man and all his parts belong” (trans Fathers of the English Dominican Province, 2d rev. edn; 1912-36).

³⁵ *Summa Theologica* 2.2. q 65.a 1.obj 1: “*Sed secundum naturam a Deo institutam est quod corpus hominis sit integrum membris; contra naturam autem est quod sit membro diminutam.*” (For according to nature it is

invasions of the body are of another order as they do not do this. In Aquinas' scheme the damage they cause is to the senses, as with pain.³⁷ The other sub-categories used for cases of invasions of bodily integrity were likewise directed at providing a useable set of distinctions for determining the relative seriousness of the invasion of a victim's bodily integrity, distinguishing *vulneratio* (wounding) from *percutio* (beating), and, perhaps influenced by customary law, *effusio sanguinis* (drawing of blood).³⁸ In this way courts, rather than having to assess every case of *injuria* on a case by case basis where bodily physical injury occurred, had a framework to indicate the level of seriousness, and so within that framework to consider the appropriate form of considering the question of intent,³⁹ for determining the level of criminal punishment, and also at least some of the amount of monetary compensation to the victim.⁴⁰ The framework also had spin-off uses. Cases in Scottish records, which relied on continental European material, show this scheme also would be used, for instance in determining whether intention to kill could be inferred from the use of a particular type of weapon or blow,⁴¹ and whether factual causation of death could be established from the form of a wound.⁴²

(2) For Invasions of Physical Liberty

A generalised concept of liberty was highlighted and discussed in sixteenth century late scholastic philosophy⁴³ and theology.⁴⁴ Liberty was seen as an essential element of the nature of man.⁴⁵ This influenced the development of the relevant sub-categories. But unlike those for bodily physical injury, where the sub-categories reflected the seriousness of impact, in this context they came into existence primarily because they were to be found in Roman texts. They were, as a consequence, to an extent artificial. The relevant Roman texts were those covering *raptus*, *plagium* and what had become known in the *ius commune* as the *crimen privati carceris*. The former two sub-categories covered abduction (*capere*; *abducere*; *detinere*). They could be linked together.

appointed by God that a man's body should be entire in its members, and it is contrary to nature that it should be deprived of a member.)

³⁶ *Summa Theologica* 2.2.q 65 (Of Other Injuries Committed on the Person).

³⁷ *Summa Theologica* 2.2.q 65.a2 obj 3 resp – (in the context of considering the right to chastise) comparing mutilation with beating the body: “*mutilatio corporis integritatem, verberatio, vero tantummodo afficit sensum dolore. Unde multo minus nocumentum est quam membri mutilatio*” (mutilation destroys the body's integrity, while a blow merely affects the sense with pain, wherefore it causes much less harm than cutting off a member).

³⁸ Cases can be found highlighting this sub-category from widely disparate parts of Europe, from Scotland to Croatia (See T Buklijaš and S Fatović-Ferenčević, *Medico-legal Practices in Fifteenth Century Dubrovnik*, (2004) 45 *Croat Med J* 220 (available at <http://www.cmj.hr/2004/45/2/15103763.pdf>).

³⁹ See further section IV.(3) below.

⁴⁰ See further section IV.(2) below.

⁴¹ See the argument in the Scots case *Heart* (1637) Irvine Smith, *Justiciary Cases* vol 2, 332 at pp 334-335.

⁴² *Clarus* § *Homicidium* Nu 11. 41 and 42; Farinacius *Quaest.* iii. 11, 48 and 49; Paulus Zacchias, *Questiones Medico-Legales* [a major work on medico-legal topics, first published in Rome between 1621 and 1635].

⁴³ A discussion of this philosophical material is R Schüßler, “Moral Self-Ownership and *Ius Possessionis* in Scholastics” in V Mäkinen and P Korkman (eds), *Transformations in Medieval and Early-Modern Rights Discourse* (2006) 149.

⁴⁴ See I R Vázquez, “*Cárceles públicas y privadas en el Derecho medieval y castellano. El delito de cárceles particulares*” (2006) 28 *Revista de Estudios Histórico-Jurídicos* 339 at n150 considering its treatment by the late scholastic theologian Domingo de Soto, *De Iustitia et Iure* (first published 1553) lib 5 *quest* 2 art 3. My awareness of the *ius commune* literature on the *crimen privati carceris* is derived from this article.

⁴⁵ R Schüßler, “Moral Self-Ownership and *Ius Possessionis* in Scholastics” in V Mäkinen and P Korkman (eds), *Transformations in Medieval and Early-Modern Rights Discourse* (2006) 149.

The *crimen privati carceris* was relevant to the holding of a person against his or her will. Today *raptus* is translated in English in the law as “rape” (of a woman). By contrast the dominant view of sixteenth and seventeenth century European juristic writing was that it was abduction. The *Digest* title on the Fabian Law on kidnappers was at issue.⁴⁶ There was a dispute as to whether the category was applicable where the victim was male. There was a debate as to whether it was necessary even to show that it was *libidinis causa*, i.e. with a view to having sex (rebuttably presumed if the victim was a young woman).⁴⁷ *Plagium* was universally interpreted as relevant to the abduction of both males and females. (Its survival in Scotland restricted to the abduction of children is a phenomenon of the eighteenth century.)

As just noted, the sub-category *crimen privati carceris* was a response to Roman texts.⁴⁸ Its elaboration in European juristic writing is already to be found in the later medieval period.⁴⁹ This elaboration, however, has been convincingly shown to be connected to the aims of centralising government into the sixteenth century in constraining the rights of local competing power bases.⁵⁰ In fact this is clear still at the start of the period of codifications. There is a specific provision in the Prussian code of 1794.⁵¹ But additionally its use had one practical advantage for both victims and prosecutors in that there was a presumption of illegality if the party had been held for twenty hours or more without it being reported to the competent authorities.⁵² A further advantage for the prosecutors was that on one view it was capital crime.⁵³ It also had a spin-off use as a sub-category. Contracts induced by holding a contracting party against his or her will were *ipso facto* challengeable.⁵⁴

(3) For Invasions of Family Life and Moral Sexual Relations

(a) Generally

In modern systems generally the availability of civil remedies in respect of sexual invasions of a person are limited only to cases of rape in the modern sense and sexual assaults. In effect these are today concerned with particular serious forms of an invasion of bodily integrity. In early modern Europe the focus was different. It was on the personality rights in moral sexual relations and associated rights of certain family members. Also today the reach of the criminal law in controlling sexual behaviour between adults has diminished. It is necessary, however, to obtain a full picture of the detailed sub-categories used to focus the protection of

⁴⁶ D.48,15,6,2 (*Lex Fabia de plagiariis*) “*Lex Fabia cavetur, ut liber, qui hominem ingenuum vel libertinum invitum celaverit invinctum habuerit emerit sciens dolo malo quive in earum qua re socius erit, ... eius poena tenetur.*” (“It is laid down by the *Lex Fabia* that a freeman who hides another, freeborn or freed, against his will, or keeps him in fetters or buys him, knowingly with malicious intent, or who is an accomplice in any of those things, ... is liable to the penalty [of the statute].” (Mommsen-Krüger-Watson trans.))

⁴⁷ The debate can be found in Clarus, §6 *Raptus: Raptum viri etiam puniri pena Raptus ac si Virgo rapta esset.*

⁴⁸ C.4,12,4 (*De episcopali audientia* etc); C. 9,5,1 (*De privatis carceribus inhihendis*); C 10,31,54,1-3 (*De decurionibus et filiis eorum et qui decuriones habentur quibus modis a fortuna curiae liberentur*), (and also D 48.2.1).

⁴⁹ Baldus de Ubaldis, *In Quartum et Quintum Codicis libros Commentaria*; Bartolus de Sassoferrato *In Secundem Codicis Partem* and *Tractatus de carceribus in Concilia, Questiones, et Tractatus*. See Vázquez, (2006) 28 *Revista de Estudios Histórico-Jurídicos* 339.

⁵⁰ Emphasised with respect to Spain in the mediaeval period and the 16th century in Vázquez (2006) 28 *Revista de Estudios Histórico-Jurídicos* 339.

⁵¹ *Allgemeines Landrecht für die preußischen Staaten* 1794 II 20 §§1079-1082, §1079: *Niemand soll, ohne vorwissen des Staats, privatgefängnisse, Zucht- oder Irrenhause anlegen.* (“No one shall, without permission of the state, set up a prison or lunatic asylum.”)

⁵² I R Vázquez *op cit* n 158; Farinacius lib 1 tit 4 quaest 27 nu 21.

⁵³ Clarus, lib 5 §. *Fin – Practica Criminalis*, quaest 28-30, and 68, nu 33.

⁵⁴ See Farinacius, lib 1 tit 34 quaest 27 nu 20.

personality rights in early modern Europe to appreciate that protection was given in respect of a wider range of invasions in this period. This of course reflects the different approach to sexual morality in that society, while at the same time recognising the relative powerlessness of women.

Rights in family life and moral sexual relations can be seen as falling into two categories at this period. First, there are rights of certain women in the protection of their chastity. This involved the consideration of a sub-category, *stuprum* (and its relation to *raptus*). Secondly, there were rights of certain family members arising from such invasions of chastity, and also of the bond of matrimony. Except in so far as “adultery” forms the background to claims by wronged spouses it was not of distinct direct relevance.⁵⁵

(b) Infringement of Chastity

Roman texts provided the basic notion, namely *stuprum*.⁵⁶ The man was a *stuprator*, the wronged woman a *stuprata*. What is distinctive of the category, however, is that it was taken as a hook on which to hang a basis of liability developed by canonists.⁵⁷ It was as much utilised in protestant northern Europe as in the catholic areas. Extensive treatment is, for example, included in the work of the Saxon, Benedikt Carpzov, whose work covered both consistorial law and crime/delict.⁵⁸ The work of the canonists on the sub-category, likewise, was built on by the specialised writers on crime/delict elsewhere.⁵⁹ It was applied as much in secular courts as in others.⁶⁰ This approach taken to determining the rules of the law applicable aimed to achieve the policy goal of protecting women from libidinous men, while not encouraging unchastity in women.

The first requirement was that the woman was chaste and either a virgin or a widow. The dominant opinion of jurists considering the topic was further⁶¹ that chastity was rebuttably presumed. The second requirement related to the effect on the will of the victim. It covered not only the forcible overbearing of the will by violence (though Roman texts seemed to include it as a form of *stuprum*).⁶² It covered also situations where the consent was affected

⁵⁵ There was major dispute between jurists as to whether adultery was or was not just a form of *stuprum*.

⁵⁶ *Stuprum* in Roman law was the criminal offence of sexual intercourse between a man and a chaste woman, such as a virgin or widow, which brought dishonour on the woman. It was punishable by the *lex Iulia de adulteriis coercendis*: see Justinian’s Inst. 4,18,4; D.48,5,6,1 (Julian) stating that *stuprum* is committed against a virgin or a widow; cf D.50,16,101 (Modestinus) pointing out that the *lex Iulia de adulteriis* uses *stuprum* and adultery indifferently.

⁵⁷ Tomas Sanchez, *Disputationes de Sancti Matrimonii Sacramento* (first published 1592) vol I. lib 10. disp. 14. nu. 18. (Sanchez used “*condonatio*” as meaning *remissio*.) Benedictus Carpzovius, *Jurisprudentia ecclesiastica seu consistorialis rerum et quaestionum in principis Electoris Saxoniae Senatu Ecclesiastico et Consistorio Supremo*, lib. 2 tit 1., def. 197. nu. 10.1.

⁵⁸ Benediktus Carpzovius, *ibid*.

⁵⁹ E.g. Clarus lib 5, § *Stuprum*; Farinacius lib 5, tit 16, quaest 147.

⁶⁰ J Witte and R McCune, *Sex, Marriage, and Family in John Calvin’s Geneva* (2005) p 391; Johannes Voet, *Commentarii ad Pandectas* 48,5,3 and 5.

⁶¹ Voet, *Commentarii ad Pandectas* 48,5,4.

⁶² In particular C. 9,12,3 (*ad legem Iuliam de vi publica seu privata*; specifically referred to by Mackenzie for that view). “*Si confidis sponsam filii tui raptam esse vel filium tuum inclusum, instituire sollemni more legis Iuliae de vi accusationem apud praesidem provinciae non prohiberis*”. (“If, as you allege, your son’s betrothed has been taken away from him, or your son has been shut up, you will not be prevented from bringing an accusation of violence before the governor of the province under the provisions of the *Lex Iulia*.”)

by the wiles of the *stuprator*, as discussed further below in relation to the requirement of the mental element for liability generally.⁶³

(4) For an Aspect of Informational Privacy

(a) The Sub-category “Secrets”

A number of legal systems today are familiar with the category of “secrets”. French law for instance has a very developed law of *secrets professionnels*. In fact it is only under the sub-category, *secreta*, rather than the general law of *iniuria* that a sustained, highly elaborated, discussion of an aspect of privacy is to be found in the *ius commune*. A consequence was that there was not one all embracing sub-category for the protection of informational privacy. It functioned to give rules for the protection of “secrets” that one individual has revealed to another, as *secret professionnel* still functions, though this latter is applicable to one such context. The sub-category, *secreta*, thus did not fit situations where private information was not passed by the victim to another. Its very existence and the extensive consideration of it may, indeed, have taken the mind of lawyers off a consideration of that type of situation. That is suggested for instance by the fact that the obligation of a judge to keep secret information obtained in the course of his office was treated as an instance of the sub-category, though in the nature of things it is obvious that some of that sort of information would not have been obtained through its being given to the judge by the party to whom it related. That there is such extensive discussion in the *ius commune* and elaboration of “secrets” must also partly be because it was frequently necessary to consider the limits on the obligation to keep it secret, in particular whether a party to whom the information had been given could be forced to reveal it by a court. The sub-category was elaborated both to determine the answer to that and to identify what types of situation did give rise to the sub-category anyhow. Once again it was the existence of specific Roman texts apart from any other consideration which necessitated the sub-category. The word, *secreta*, was to be found in the *Digest*.⁶⁴ It was, however, canonists who first developed the idea.⁶⁵ It could be underpinned by Christian doctrine⁶⁶ and also by neo-stoic ethics.⁶⁷ It was extensively discussed in civilian literature and by continental courts.⁶⁸

⁶³ See section IV.(3) below.

⁶⁴ D.9,2,41: *et si quis tabulas testamenti apud se depositas deleverit vel pluribus praesentibus legerit, utilius est in factum et iniuriarum agi, si iniuriae faciendae causa secreta iudiciorum publicavit* (And if someone who is looking after someone’s will makes an erasure or reads it out with other people present, it is better to bring an [Aquilian] action *in factum* or sue for *iniuria* if he published the secrets of one’s legal affairs with an insulting intent.) D.16,3,1,38 (Ulpian): *Si quis tabulas testamenti apud se depositas pluribus praesentibus legit, ait Labeo depositi actione recte de tabulis agi posse. Ego arbitror et iniuriarum agi posse, si hoc animo recitatum testamentum est quibusdam praesentibus, ut iudicia secreta eius qui testatus est divulgarentur.* (If someone reads out to a number of people testamentary tablets deposited with him, Labeo says that suit can rightly be brought with the action on deposit on account of the tablets. I personally am of the opinion that the action for insult [*actio iniuriarum*] can also be brought if the will has been read out to those present with the intention that the secret dispositions of him who made the will be divulged. (both Mommsen-Krüger-Watson translations))

⁶⁵ Bernardus Papiensis (before 1150-1213) *in form. jur.test. num. 15*.

⁶⁶ E.g. Aquinas, *Summa contra Gentiles* 4.21.4 connecting the idea to friendship: “*Est autem hoc amicitiae proprium quod amico aliquis sua secreta relevat*” (But is a mark of friendship, since a person reveals his secrets to a friend.)

⁶⁷ See Cicero, *De Officiis* 1,5 and 3,17 and 3.23.

⁶⁸ My awareness of the three cases from continental Europe, cited below comes from the treatment of the topic by the Scottish writer Mackenzie, *Observations upon the 28 (sic – i.e. 18) Act, 23. Parl. K. James VI. Against disposition made in defraud of creditors etc.* (1699 edn) at §§ 195-196 and 201.

The basis for protection was that there was a situation where the information was entrusted to another by the party now seeking a remedy. Certain types of situations as specific contexts where by definition the information was a “secret” came to be recognised. In the recognition of some of these, canon law was influential. These situations extended not only to the context of professionals, such as lawyers and doctors, but also to information imparted to mediators,⁶⁹ and negotiators as well as to secrets of the confessional.⁷⁰ The context of marriage was also recognised (*secretum conjugale*). Scottish material suggests it covered also information about a master’s profession imparted to an apprentice.⁷¹ A Scottish instance of its application to the deliberations of local government is also unlikely not to reflect the position in Europe more generally.⁷² As noted above, it was extended to information acquired by a judge, and it seems not to have attracted comment that some of that information would not have come from the party concerned.

The law was concerned with the basis on which a revealed secret attracts protection and the limits on the obligation to keep it secret. The former was expressed in the Roman text itself, in that a secret is “deposited”.⁷³ As the canonists and theologians underlined, a person relies on the “faithfulness” of a party to whom the secrets are entrusted. The focus thus is really not on the nature of what is a “secret”, nor on the necessary relationship between the parties, but emphasises the faith which the person has in the trust not being broken by the person to whom the “secret” has been entrusted.

Why the category of the entrusted “secret” gave rise to the majority of analysis directed to privacy in *ius commune* sources in the early modern period is because the limits of the obligation not to reveal the information was of practical importance in the procedural question, whether a party to whom such a secret had been entrusted was ever permitted, or could ever be forced by a court to reveal it as a witness in a case where it was relevant evidence. Characteristically, this specific issue turned on the approach taken to law developed on a specific Roman text, which was to be found in the *Digest* title *de testibus*.⁷⁴ There were disputes of a policy nature relating to the conduct of litigation. Case law, for instance at least from Savoy⁷⁵ and the *Parlement* of Paris,⁷⁶ was available variously to support and reject Bartolus’ interpretation of the text. Essentially, however, the whole question was one of policy familiar still in discussions of this sort of issue today, i.e. whether without a complete restriction members of the public would feel free to reveal information to their advisers, and

⁶⁹ 23 November 1596 Savoy, reported in Antoine Fabre (Antonius Faber), *Codex Fabrianus definitionum forensium et rerum in Sabaudiae Senatu tractarum, ex ordine titulorum codicis Justiniani* (first published 1609) lib. 4, tit. 15, def 56.

⁷⁰ Decretum Gratiani, Causa 2, quaestio 2, canon 38 'Statuendum'. I am grateful to Professor Gero Dolezalek for identifying this text for me.

⁷¹ See e.g. P Martin, *Cupar – The history of a small Scottish town* (2006) p 68 not to “reveal or divulge any of his said master’s or patients’ secrets entrusted to him”.

⁷² Burgh Law of Dundee 25th February 1567 in A. J. Warden, *Burgh Laws of Dundee* (1872) p 34.

⁷³ D.16,3,1,38.

⁷⁴ D.22,5,25: (Arcadius Charisius) *Mandatis cavetur, ut praesides attendant, ne patroni in causa cui patrocinium praestiterunt testimonium dicant*. (Imperial mandates provide that a governor must see that those who represent clients in law suits do not give evidence in cases in which they appear. (Mommsen-Krüger-Watson trans.))

⁷⁵ 23 November 1596 reported in Antoine Fabre (Antonius Faber), *Codex Fabrianus definitionum forensium et rerum in Sabaudiae Senatu tractarum, ex ordine titulorum codicis Justiniani* (first published 1609) lib 4, tit 15, def 56.

⁷⁶ *Barbine* of 18 June 1580 and another from December 1619 (probably found in Desiderius Heraldus (1579-1649) *De Rerum Judicatarum Auctoritate*, lib 2 cap 4 (1640).

in the case of lawyer client relationships what effect any other rule would have on obtaining fair trial, or fair hearing, and issues also with conjugal secrets.

(b) Intruding into a House

There is one other sub-category, this time relevant to a form of invasion of privacy by intruding as opposed to by revealing what had been entrusted. This concerned the invasion of the victim's home. Where that was followed by bodily physical injury there was an applicable sub-category, though the invasion of the house would in some places perhaps have been seen as a separate *injuria*.⁷⁷ A Roman text specifically mentioned it.⁷⁸ Characteristically this assisted its recognition as a sub-category more serious than intentionally caused bodily injury generally since the *injuria* was by definition more serious. It is elaborated in several *ius commune* sources,⁷⁹ following consideration by Bartolus. (Perhaps uniquely, the sub-category survives in Scots criminal law as nominate crime, "hamesucken", and as such an assault more serious than intentionally caused bodily injury generally.)

(5) For Protection of Certain Other Specific Personality Rights

As has been well recognised, there was a sub-category, *libellus famosus*, which was relevant, or at least potentially available, for at least certain types of written/printed attacks on dignity or reputation. Again the sub-category was founded on Roman texts.⁸⁰ There was also some material that was capable of being used to create a sub-category for cases of wrongful criminal prosecution.⁸¹ Another, but for a specific personality right (an aspect of *dignitas*), was "violation of sepulchres", still alive in the French and Spanish criminal codes.⁸² A debate existed in the *ius commune* as to whether it had any role. Some jurists did not consider it had in contemporary law, since bodies were not now, as they had been in Roman times, buried in private burial grounds, and the relevant sub-category, if any now, was the "public crime", sacrilege. However, Mattheus argued that just because an action has not often been raised it has not been abolished.⁸³ An even more peculiar debate in the *ius commune* was about whether where a dead body was mutilated by the cutting off of a part, by extension *mutilatio* (in the form of *dismembratio*) was applicable.⁸⁴ What this kind of kind of sub-categorising demonstrates is again the extent to which legal analysis was in thrall to Roman texts where they existed. But it also again demonstrates the way in which it was entirely natural to jurists to explore detail in the law of *injuria* through sub-categories, wherever there was a basis on which they could be created. This was so even in these last two where it is not at all clear that they provided guidance in considering the extent of the *injuria*, and in that contrast *libellus famosus* as a sub-category, which could highlight that writing or printing is a particularly deliberate act, and one which may impact more on a person than an oral representation.

⁷⁷ E.g. Farinacius lib 3, tit 12, quaest 105, nu 218 – *injuria ad domum*, explained in lib 3, quaest 107, nu 142 (breach of *cautio non offendendo*).

⁷⁸ D.47,2,21,7 referred to in J Gordley, *Foundations of Private Law* (2006) at p 258.

⁷⁹ E.g. Clarus quaest 82 considering a statutory form. The seventeenth century Scottish writer Mackenzie, *Criminals* (2d edn 1699) p 110 relies also on *Albericus* and a French court decision, "Vincen. De fran decision 402". (I have not yet been able to identify this work.)

⁸⁰ D,47,10,5;C.9,36.

⁸¹ R W Lee, "Malicious Prosecution in Roman-Dutch Law" (1912) 29 SALJ 22.

⁸² Code Pénal Art 235-17; Código Penal Art 526.

⁸³ Mattheus Lib 47, tit 6, cap 2, nu 8.

⁸⁴ The divergent views can be found in the work of Prosper Farinacci and Diego de Covarruvias (1512-1577) on the one side, and Suarez on the other. (These are discussed in the Scottish work Sir Alexander Seton, Lord Pitmedden, *Treatise of Mutilation and Demembration and their Punishments* (1699) pp 21-22 (§64).)

IV. The Various Roles of *Injuria*

(1) The Sub-categories as Reflecting *Injuria*

As considered above, when working with a sub-category nothing was to be gained by also specifically referring to *injuria*, or the sub-division, *realis*. However, it is clear, particularly from the works of the specialist jurists on the sub-categories, that if asked an informed lawyer would have agreed that they did give effect to the concept. It is possible, thus, to see the law in this area as a tree with *injuria* as the trunk, with the two main branches as *realis* and *verbalis* respectively, with the former then branching out in numerous smaller branches, sub-categories. At the same time most concentration was not in practice focussed on the trunk but on the branches.

It is very apparent from the relevant specialised literature that authors and courts generally referred to an *actio injuriarum* expressly only where none of the recognised sub-categories was applicable. Even then this was rarely for highlighting that a situation fell into the sub-division *realis*. That was a consequence of the fact that most invasions of a personality right by a physical act were as a matter of fact invasions of bodily integrity, where there were routine sub-categories. This was true also in respect of invasions of physical liberty and of interests in family life and moral sexual relations, which by definition involved a physical act. While the revealing of “secrets” could, depending on how that was done, be by way of a physical act, such a passing on a letter to a third party, or by way of words, by telling a third party, both were comprehended by the one sub-category.

By contrast to the sub-division, *injuria realis*, the other sub-division, *injuria verbalis*, was constantly expressly referred to for the law in applying and elaborating the law for invasions of dignity and/or reputation done by oral representations. Fundamental to this is that where the mechanism used was an oral representation there were no inherited sub-categories for focussing such cases. In the early modern period, when writing was not widespread in the population most cases where the mechanism was a representation were of this type. There are two further factors. First, the practical importance of the distinction between *verbalis* and *realis* was with respect to jurisdiction. Jurisdiction in *injuria verbalis* lay (probably in some parts of Europe even exclusively) in church courts, or in protestant areas in courts of particular jurisdiction that had taken over their jurisdiction as it applied to disputes between lay people. These courts had no jurisdiction with respect to *injuria* where the mechanism used to cause it was a physical act.⁸⁵ Second the question of whether “truth” was ever a defence, and if so, under what conditions was by its nature not at issue other than in cases where the invasion of the right was through making a representation to or about another.⁸⁶

⁸⁵ The position where there were at one and the same time an oral representation and a physical attack requires further research. Secular courts at the most localised level of jurisdiction did exercise a jurisdiction in those cases at least in Scotland. Church courts and their protestant successor equivalents; church courts and their protestant successors did consider cases where there the representation of a rude physical gesture, either along with words, or on its own.

⁸⁶ The law relating to “secrets” of course illustrates that invasions of personality rights by revealing true information could be actionable. But the connection between that example and where the invasion was through a representation does not seem to have been expressed as such.

As already noted, at least some written/printed representation could be analysed under a sub-category, as *libellus famosus*. The classic *libellus famosus*, was, however, very narrowly confined, i.e. to a representation in the form of a placard posted in a public place.⁸⁷ The second modification to the general picture of *injuria verbalis* as a sub-division without sub-categories is that there was some tendency for a functional sub-category of “defamation” to emerge as applicable to situations where the interest invaded was reputation through the representation being made to others than the victim himself or herself. This is not based on Roman texts, nor on any philosophical or theological distinction. Though it connects with *fama* the term itself in *ius commune* sources could be used also where it was *dignitas* that was injured.⁸⁸ As such the fact that some European systems have defamation law has early modern historical antecedents for its being a distinct sub-category with a life of its own.

In addition to its particular role in *verbalis* cases *injuria* was significant in various different ways on the map dominated by sub-categories. This is not just that it was used as a fundamental concept in the writing of systematic jurists. But in practice its cardinal significance was that it provided in itself the residual category for cases where the mechanism was physical that did not come within any sub-category. As an organizing category it affected the approach in detail of the law of defences and of remedies, though as discussed below, even at the level of remedies there were relevant sub-rules, especially in the context of cases of bodily physical injury. There is a single exception to this, the scheme of remedies in cases of *stuprum*, a special scheme that reflected the specific policy goals of that sub-category in the protection of rights in moral sexual relations.⁸⁹

(2) *Injuria* as a Residual Category

In the following contexts where the mechanism was a physical act *injuria* was relied on directly as no sub-category was applicable: (a) disturbing another’s private seat in church,⁹⁰ and invasion of another’s house,⁹¹ though material illustrating this latter example seems rare. Moreover, there was a sub-category available, where the invasion also involved physical injury to the occupier⁹² (b) reading a private letters⁹³ (c) interfering with or withholding a dead body, and violating a grave or monument⁹⁴ (in the latter situation if neither “violation of sepulchres” nor “sacrilege” was recognised as a sub-category) (d) physical attacks not in the event resulting in bodily physical injury⁹⁵ (e) making rude gestures at someone (f) if, as on one view the sub-category, *crimen privati carceris* was not applicable to it, wrongful imprisonment by a judge with power to imprison generally, but lacking competency in the particular instance.⁹⁶

⁸⁷ See e.g. Johannes Harrpprecht (Joannes Harprechtus) *Practica Criminalis* (first published 1603) § *Injuria*; Farinacius, tit 12 quest 105.

⁸⁸ Blackie, ‘Defamation’ p 637.

⁸⁹ See section V(4)(b) at text accompanying note 116 below.

⁹⁰ See R Zimmermann, *Law of Obligations – Roman Foundations of the Civilian Tradition* (1990) p 1066.

⁹¹ I.e. in respect of the affront to its occupier.

⁹² See Section III.(4) above.

⁹³ Molina, *De iustitia et iure* IV, disp 36 no 2 referred to in J Gordley, *Foundations of Private Law* (2006) at p 258.

⁹⁴ See the comprehensive study exploring the *ius commune* material: N R Whitty, “Rights of personality, property rights and the human body in Scots law” (2005) 9 Edin LR 194.

⁹⁵ Specifically discussed in Farinacius lib 3 tit 12 quaest 10 nu 7.

⁹⁶ See Farinacius lib 1, tit 4, quaest 27, nus 126-137 considering a claim against a judge for imprisoning “indebite” as grounded on *injuria* and rejecting the view that it required proof of *maleficia* as based on a misreading of the Roman texts.

It may be that those situations under (a) and (b) in this list, taken together, provided the germ of what in more modern times has become a sub-category, privacy, a sub-category built on distinguishing the specific personality right protected. However, in early modern Europe this had not yet really emerged. As detailed above, most situations arising in respect of private information were analysed under the sub-category “secrets”, which still in jurisdictions that work with at least a sub-category “secret professional” has to be recognised as a specific part of the law of privacy protection. Thus, the example of taking a private diary, and reading it was not the mainstream of the protection of informational privacy. Moreover, the example of the church seat, as opposed to the house, reveals that defining the private space and a public space was different from today. That division and how important it is or is not has altered with culture and society. A church seat in the seventeenth century could be entirely in the public area, but to disturb or occupy another’s without right challenged the status that would be shown by the precise location of that seat with the particular church building. Where it was a specific gallery, for a high ranking family, it had features of being both in the public sphere and an extension of the family’s home. But the importance the public status of individuals in the society and culture of that time entailed that invasion of that status in a public place was every bit as much an invasion of dignity. In fact it might have been seen as the more so. A seventeenth century person of high status, would have seen the place for tasting sermons, not as retreat, as today’s celebrity sees the open air place for tasting food, but as a place for display.

This list was by definition not closed. The example for reading a private diary, which comes from a jurist, shows that this was so. The fact that the list is so relatively short must in part be because of the nature of society and culture in the early modern period, when by contrast to today public physical violence was endemic in the upper ranks of society. However, it also reflects how wide the field was that was focussed through sub-categories.

(3) The Sub-categories, *Injuria* and Differing Approaches to the Mental Element

It was trite law that there must be *animus injuriandi*. Systematic jurists did address many of the difficult issues that modern systems have had to consider.⁹⁷ However, at the level of court decisions and the specialised literature considered in this article this is barely reflected. Courts and jurists in the nineteenth century would have found little in this material to build a theoretical analysis. A reason arises from the use of the sub-categories. They could be categorised as *delicta nominata* or *specialia*,⁹⁸ with the effect that it followed that, where they applied, the invasion itself was taken as demonstrating the necessary intent, whatever that was conceived as meaning. Even where no sub-category was applicable, and it was not a case of a representation, the courts and the specialist literature for them seems to offer little precision on the theory and nature of intention and analysis seems not, for example, to have been pursued as to exactly what was meant by such words as *maleficia*.⁹⁹

⁹⁷ For analysis of this see J Gordley, “Reconceptualizing the Protection of Dignity in Early Modern Europe: Greek Philosophy Meets Roman Law” in M Ascheri et al (eds), “*Ins Wasser geworfen und Ozeane durchquert*” (2003) 281 at pp 294-298.

⁹⁸ Farinacius lib 3 tit 12 quaest 105 preamble.

⁹⁹ See Farinacius lib 1, tit 4, quaest 27, nus 126-137 considering a claim against a judge for imprisoning “indebite” as grounded on *injuria* and rejecting the view that it required proof of *maleficia* as based on a misreading of the Roman texts.

In the context of two sub-categories, abduction classified as *raptus* or *plagium* and invasions of chastity as *stuprum*, there were distinct specific requirements. For the latter all what was required was some sort of inducement by wiles leading the woman on.¹⁰⁰ The dominant view was that that also applied to deprivation of liberty as *raptus* or *plagium*.¹⁰¹ In cases of *injuriae verbales* (and *libelli famosi*) it was generally not necessary to prove intent or anything more than that the representation was made. Allegations of criminal behaviour, dishonesty, and sexual immorality were rebuttably presumed to be uttered with intent to harm.¹⁰² It was thus only where neither was there a sub-category applicable, nor was the case one where the mechanism was a representation that direct proof of *animus* would be required. The contribution of the *ius commune* to the development of the law of intent in the field of the protection of personality rights is for this reason relatively limited. Modern laws have had to create their own theories for what is required as a mental element.

(4) *Injuria* as the Basis of Defences

Sub-categories did not have separate defences. The general concept of *injuria* as affront and questions of policy relating to the control of public order were both relevant in this connection. The division between *realis* and *verbalis* was of significance in two respects, both of which relate to variously the idea of affront, and these questions of policy. The defence of “self-defence” was applicable only to *realis* cases, and was fundamentally concerned with issues of public order, though based on Roman texts. The defence of provocation and also the question of truth (to *verbalis* and *libellus famosus*) were affected by an inevitable tension between the concept of *injuria* as affront and the policy of promoting public order. The defence of provocation, a *ius commune* term itself, sometimes characterised as *compensatio injuriarum*, was in the context of invasions of bodily integrity by most seen as not applicable where the act was a response to words alone.¹⁰³

That an action could be barred by express or implied forgiveness, *remissio*, was a direct result concept of *injuria*. It was applicable in such diverse contexts as, for example, oral insults, and an action by a wronged spouse against an adulterer.¹⁰⁴ Analytically it seems not to have been quite clear whether it should be classified as a free standing defence or whether where present there is no actionable wrong, as the individual in question thereby shows himself or herself not to be injured. On either analysis, however, it flows from the fundamental concept itself.

¹⁰⁰ Formulations of this are colourful: e.g., Farinacius, lib 5, tit 16, quaest 147, nu 34: “*cum blanditiis, persuasionibus, promissionibus, dationibus pecuniarum & munerum, aut similibus fraudis & fallaciis*” (with allurements, persuasions, gift of money and things, and such frauds and deceits), and nu 56: “*blanditiis et deceptionibus*” (allurements and deceptions).

¹⁰¹ In the words of the late medieval jurist, Bartholomaeus à Saliceto, *quod persuasio dolosa, in talibus, plus est quam violenta tractio*. (Because deceitful persuasion in such thing amounts to more than a violent abduction).

¹⁰² R Zimmermann, *Law of Obligations – Roman Foundations of the Civilian Tradition* (1990) pp 1067-1068 provides many examples.

¹⁰³ Cf Matthaëus lib 47.3.5.

¹⁰⁴ E.g. Tomas Sanchez, *Disputationes de Sancti Matrimonii Sacramento* (first published 1592) lib 10 disp 11 (who uses the word *condonatio*) Carpzovius, *Jurisprudentia ecclesiastica seu consistorialis rerum et quaestionum in principis Electoris Saxoniae Senatu Ecclesiastico et Consistorio Supremo* lib2 tit 11 def 197. n. 10.1.

V. Remedies – Sub-rules and Complexity

(1) Apologies, etc.

The doctrinal history of remedies in the protection of personality rights in early modern Europe is multi-layered. This is another element in the European inheritance being complex. In several respects the approaches taken reflect the concept of *injuria* as affront, as has been well emphasised by modern scholars. The availability of a remedy of apology or expression of repentance clearly gives effect to the fundamental concept. Further work could reveal how far such was available across the whole field. It was routine in cases where *injuria* was caused by a representation, whether oral or written/printed. It has recently been emphasised that in cases of *injuria* brought about by representations, the formulation of the palinode included in its standard form an expression that the person lied, but it may have been adapted for cases where what was represented was truly actionable.¹⁰⁵ A Scottish case shows its use in an action by a woman for a declaration that she was not married to the defender who had asserted she was,¹⁰⁶ and there are a few instances in cases of bodily physical injury.¹⁰⁷ The difficult theoretical issue as to whether there was a right to a sum of monetary compensation if an apology or expression of repentance was ordered varied between jurisdictions.¹⁰⁸

(2) Monetary Compensation

It is the case, as has been well-recognised, that the general concept was that monetary compensation was to be assessed as *bonum et aequum*. Courts in early modern Europe would award a single sum of money. The assessment (*taxatio* or *modificatio*) was at the discretion of the judge. In court records the precise basis of this, even whether it represented in the case in question also something for any patrimonial consequences quite apart from the non-patrimonial, is not typically specified. However, it should not be overlooked that the specialist literature dealing with invasions of bodily integrity, and also to an extent that concerned with dignity and reputation more widely, developed at least from the sixteenth century on certain sub-rules. There are sources¹⁰⁹ that indicate that judges did apply these, even though this is not normally expressed in the court record. As these sub-principles and sub-rules were identified, it is at that level that discussion of quantum was carried on (a similar phenomenon to the impact of sub-categories where they were available for determining the merits). These sub-principles and sub-rules are (1) the law identified factors that were relevant to take into account in the assessment of non-patrimonial consequences; (2) there was a debate as to whether the non-patrimonial consequences were to be assessed in the light of the subjective impact on the victim, in cases of bodily physical injury at least; (3) there were rules to assist in determining classes of patrimonial loss that were compensable; (4) there were various analyses for contrasting patrimonial and non-patrimonial consequences.

¹⁰⁵ J Gordley, “Reconceptualizing the Protection of Dignity in Early Modern Europe: Greek Philosophy Meets Roman Law” in M Ascheri et al (eds), “*Ins Wasser geworfen und Ozeane durchquert*” (2003) 281; J Gordley, *Foundations of Private Law* (2006) p 223.

¹⁰⁶ *Rob v Buchanan* (19 March 1760), Hermand 97, sv “Palinode”.

¹⁰⁷ E.g. *Gyb* (1590) Pitcairn 188.

¹⁰⁸ See section I text accompanying note 1 above.

¹⁰⁹ See e.g. Besoldus, *Thesaurus Practicae* (first published 1629) sv “Abtrag”.

(a) Factors Relevant to the Assessment of Non-Patrimonial Consequences

The factors identified as specifically relevant are the status of the victim, the geographical setting in which the invasion occurred and the status of the party liable.¹¹⁰ All three apply across the whole field, except in cases of *stuprum*, which reflected the specific policy of the law in protecting moral sexual relations and had a distinct scheme of remedies.

(b) Non-Patrimonial Consequences – Subjective or Objective Approach?

The factors and the general concept of *injuria* would be consistent with non-patrimonial consequences being assessed objectively, i.e. as to mark the invasion of the right as such.¹¹¹ However, they would be equally consistent with non-patrimonial consequences being assessed subjectively, i.e. considering the actual pain or other effects as experienced by the individual victim. A difficult question is whether in the early modern period which of these approaches were taken, or, indeed, whether both were combined, and whether the position was different in different places. Where the invasion was of bodily integrity, customary law in at least many northern European jurisdictions¹¹² entailed that non-patrimonial consequences were assessed subjectively at least in part. The right stemming from customary law in Holland in such cases to *smert* money and the German *Schmerzensgeld* were incorporated into the analysis of Dutch jurists from the sixteenth century on, permitting recovery for pain and suffering (*dolor*), scars (*cicatrices*) and disfigurement (*deformitas*).¹¹³ There is an intellectual irony in this in that in order for this to be so, they had to depart from the principle clearly established in Roman texts, and at least consistent with one aspect of the Christian concept of the human, that the body of a free person was of inestimable value.¹¹⁴ This is where the concept of *solatium doloris* comes into existence. It sounds Roman, but that was just a polite name, that could have been borrowed from Roman literature.¹¹⁵ In cases of *injuriae verbales* the approach may by contrast everywhere have been solely objective in this period. At least in northern Europe this constitutes another reason why the protection of the right to bodily integrity has tended to become separated from the law of the protection of personality rights. As a category of its own, then, both intentional and negligent infringements of bodily physical injury have in most places come to be comprehended in the same box, by contrast to the position in respect of other personality rights.

¹¹⁰ Both the specialised literature and the more systematic literature deal with these. For discussion of the latter see J Gordley, “Reconceptualizing the Protection of Dignity in Early Modern Europe: Greek Philosophy Meets Roman Law” in M Ascheri et al (eds), “*Ins Wasser geworfen und Ozeane durchquert*” (2003) 281 at pp 284-286.

¹¹¹ C von Bar, *The Common European Law of Torts* (1998) vol 1 para 20.

¹¹² Matthaeus 47.4.3 refers in addition to France, the Austrian Netherlands, and Saxony.

¹¹³ See e.g. Grotius, *Inleiding* 3,34,2; Vinnius *ad Inst.* 4,3,13; Groenewegen, *De Legibus Abrogatis* ad D.9,3,7; Voet, *Commentarii ad Pandectas* 9,2,11; De Wet, “Criminal Liability and Civil Liability for Wrongful Conduct” (“Edinburgh Lectures”) in *Opuscula Miscellanea* 149 at p183.

¹¹⁴ D.9,3,7: “*cicatricum aut deformitatis nulla fit aestimatio quia liberum corpus nullam recipit aestimationem*”; see also D.9,1,3; D.9,3,1,5; Zimmermann, *Law of Obligations* p 1015. Among the vast literature see R Feenstra, “*Réparation du dommage et prix de la douleur chez les auteurs du droit savant, du droit naturel et du droit romano-hollandais*” in B Durand, J Poirier, and J-P Royer (eds), *La douleur et le droit* (1997) 411; De Wet, “Criminal Liability and Civil Liability for Wrongful Conduct” (“Edinburgh Lectures”) in De Wet (Gauntlett ed), *Opuscula Miscellanea* 149; Michel Morin, ‘Une analyse historique et comparative de l’indemnisation du *solatium doloris* au Québec’ in P-C Lafond (ed) *Mélanges Claude Masse: en quête de justice et d’équité* (2003) 107 at 353-35 considering the pre-Napoleonic French law. (I am grateful to the author for providing me with a copy of this essay.)

¹¹⁵ Pliny, *Letters* II vii uses it to describes a statue erected on the order of the senate of a general’s son, who died when his father was away fighting as being a *solatium doloris* to the father.

As the protection of chastity is not a goal of any aspect of law protecting personality rights today, that there was a distinct scheme of remedies for the relevant sub-category does not as such throw light on remedies for the protection of personality rights today. However, that there was a distinct scheme of remedies again illustrates the historical fact that in so much of the field it was sub-categories and sub-rules that were at the forefront of the law, rather than the underlying general law of *injuria*. The standard scheme of remedies for *stuprum* was that the¹¹⁶ *stuprator* would be ordered at his option to marry the victim (*ducere*), or to pay her a sum of money assessed as the amount that someone of her status would need as a dowry to attract another husband (*dotare*).

(c) Classes of Patrimonial Loss

In assessing monetary compensation to cover patrimonial consequences of the invasion of personality rights there were two well recognised instances that were certainly compensable: medical expenses and financial loss arising from being unable to work. It was not just that de facto these were routinely features of cases of bodily injury. A theory was developed to distinguish the two as *damna extrinseca* and *damna intrinseca*, respectively.¹¹⁷ That these types of patrimonial consequence were the subject of this specific theory does not mean that other heads of patrimonial loss were not compensable. Nonetheless, that it was physical injury that gave rise to these two well-recognised instances and supported the theory further fostered the tendency of the protection of bodily physical injury to become detached from the protection of personality rights more generally.

(d) Analyses Contrasting Non-Patrimonial and Patrimonial Consequences

Two features of the process of awarding monetary compensation for the invasion of personality rights raise a question as to what extent courts and the specialised literature for them really in this connexion considered patrimonial loss assessment to be a question of aquilian liability rather than *injuria*. The fact that the merits were so often considered by the application of sub-categories entailed that the general concept of *injuria* was not at the forefront anyhow could have an effect that that sort of high level distinction may not have been perceived to be necessary to explore. It is possible, too, that often the judge in his fixing the single sum awarded, though he would take account of patrimonial consequences, did not always separately assess them, but awarded a figure that was definitely large enough to cover them and provide also more to cover non-patrimonial consequences – an assessment that was *bonum et aequum*. On the other hand some material indicates that the *Lex Aquilia* was at least in some places expressly relied on,¹¹⁸ and could be useful if there was some particular advantage, for instance with regard to which year should be used as the multiplicand to assess loss as a consequence of being unable to work.¹¹⁹

¹¹⁶ Whether the option to marry was given in all protestant areas requires further research. It appears that in Scotland after the Reformation it was probably not. In the first half of the eighteenth century it was held that it certainly was not available.

¹¹⁷ As extensively relied on in the extended analysis of the question of monetary compensation by the Scottish writer Sir Alexander Seton of Pitmedden, *A Treatise of Mutilation and Demembration* (1699) at p 64.

¹¹⁸ See e.g. the contemporary German case law referred to in Besoldus, *Thesaurus Practicae* (first published 1629) sv “Abtrag”.

¹¹⁹ A rare example in Scottish published records is in *Dewar v Baxter* (1662) W G Scott-Moncrieff, *Justiciary Records* vol I (1661-1669) (Scottish History Society) (1905) 50 at p 53.

VI. The Interaction of the Law of Delict and Crime

A crucial feature in understanding the use of sub-categories in elaborating the historical development of the law protecting personality rights is that there was a unity of penal law. That private parties had remedies that today we characterise as “civil” and that punishment could be imposed, which today we characterise as “criminal” did not alter this. The substantive law was one and the same. The law of evidence was also the same. The law of transmissibility of claims in this context also reflects it.¹²⁰ This unity was as much the case even though the competency of particular courts differed from one jurisdiction to another. It existed not only in those jurisdictions where private parties sued for their remedies in respect of bodily physical injury and deprivation of physical liberty within the criminal process, and sought remedies for *injuria verbalis* in church courts (or specialist courts in protestant areas taking over their jurisdiction in this respect). That in some places courts of criminal jurisdiction and such specialist courts¹²¹ dealt with both the “civil aspects” and the penal merely confirms the position. The unity of the law of delict and crime in the protection of personality rights had a theoretical underpinning which crossed the boundaries of all sub-categories. The action whatever the remedy or remedies sought, following universally accepted classification taking the lead from Roman texts was an *actio poenalis*.

VII. Conclusion

Doctrinal legal history can consistently and accurately present pictures that illuminate the law concentrating on different dimensions of legal rules and institutions. The picture put forward here concentrates on the micro-level of the law of protection of personality rights in sixteenth and seventeenth Europe. As stated at the outset this complements the wider picture revealed by path-breaking modern scholars, but it shows a further level of complexity. It may be thought not surprising that in many important respects the law protecting personality rights should have been complex and dominated by the use of sub-categories and sub-divisions. This is an obvious observation with regard to the law in many jurisdictions today. That this was the case in the law applied by courts in the period of the *ius commune* as well, though in the different, and often to our eyes artificial, ways outlined here, has been given relatively little attention in the literature. At the same time, this shows how the functions of an overarching general principle, *injuria*, were diverse. Even if it turns out that there is no or very little direct evidence of this structure appearing as directly manifested in the civil codifications¹²² of Europe today, it shows that diversity within unity was a practical approach to the protection of personality rights in the society and culture of the early modern period. Modern law in many jurisdictions, likewise, shows diversity within unity in the protection of personality rights. Though the diverse rules that have been and are being developed in jurisdictions today are in many respects quite different, some features of them, prominently the tendency to see cases of bodily physical injury and of deprivation of physical liberty as boxes separate from, for instance, privacy, may either in part explain or cohere with some tendencies apparent as aspects.

¹²⁰ The approach in the *ius commune* built on the clear statement in Justinian’s *Institute* IV,12,1.

¹²¹ Such courts could also impose fines as well as penance, in addition to ordering a palinode and or monetary compensation to the private party.

¹²² It is manifest in many criminal codes.

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