

MATER FAMILIAS

SCRITTI ROMANISTICI PER MARIA ZABŁOCKA

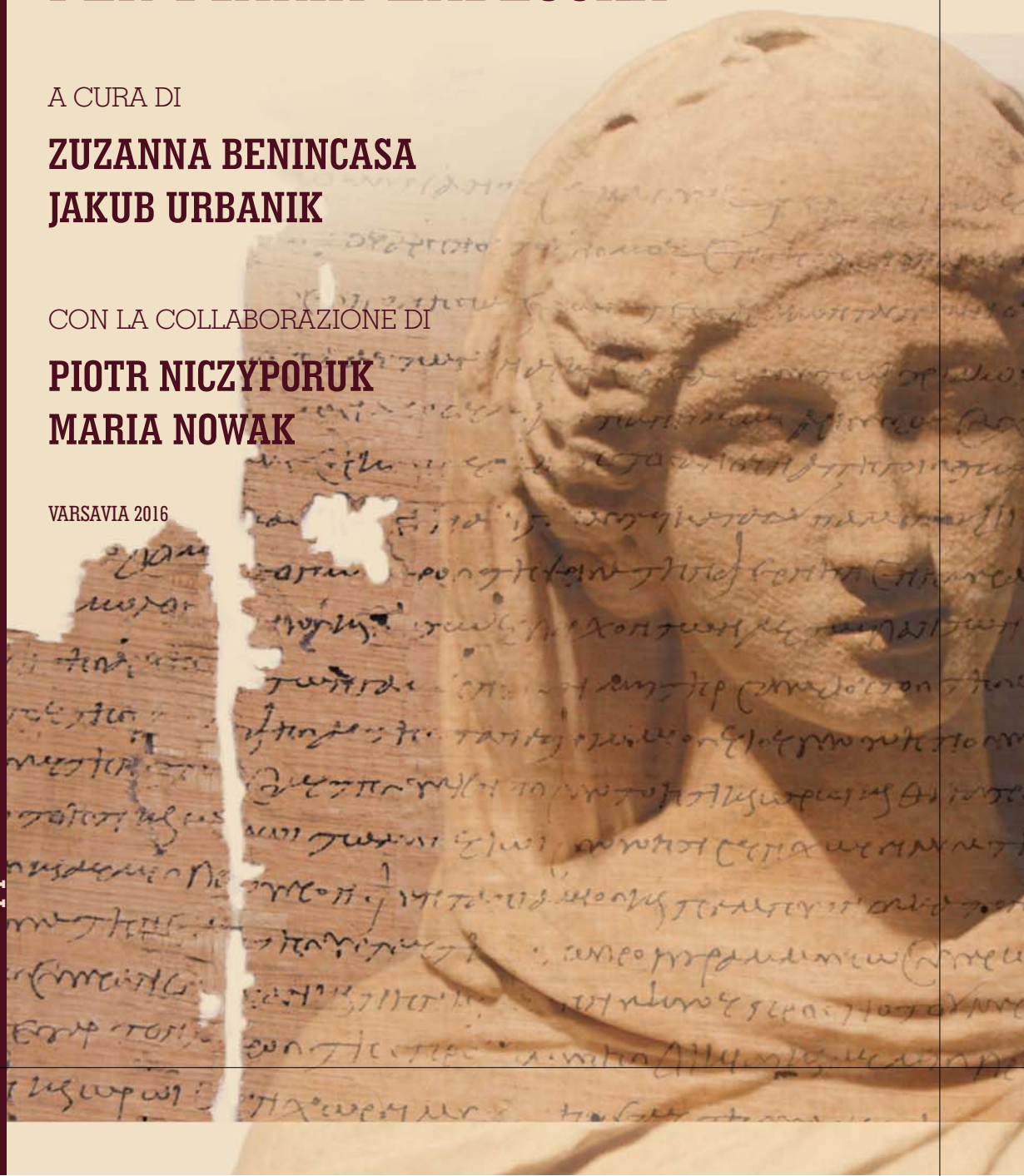
A CURA DI

ZUZANNA BENINCASA
JAKUB URBANIK

CON LA COLLABORAZIONE DI

PIOTR NICZYPORUK
MARIA NOWAK

VARSAVIA 2016



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Mater Familias
Scritti per Maria Zabłocka

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**FAMILY RELATIONS
IN CASES CONCERNING INIURIA**

FAMILY RELATIONS IN CASES CONCERNING *iniuria* were particularly important in two¹ often interconnected areas – legitimation in cases concerning an injury² committed against those who could not act by themselves in courts and the issue of a so-called indirect injury. As a consequence, in my paper, I will limit my analysis only to the aforementioned issues.

As far as it concerns the first question, the general rule determined that a head of a household was legitimated to bring an action to protect the dignity and reputation of his *alieni iuris*.

¹ This article will not address the issue of the passive legitimation of a *pater familias* in the case of an injury committed by his *alieni iuris*. On this matter, cf. especially J. C. NABER, ‘*Ad noxalem iniuriarum actionem*’, [in:] *Mélanges Gérardin*, Paris 1907; F. DE VISSCHER, ‘L’action noxale d’injures. Droit hellénique et droit romain’, *TJ* 11.1 (1930); T. SPAGNUOLO VIGORITA, ‘*Actio iniuriarum noxalis*’, *Labeo* 15 (1969); Marta FERNÁNDEZ PRIETO, ‘El esclavo en el delito de *iniuria*’, [in:] *Actas del III Congreso Iberoamericano de Derecho Romano*, León 1998; María José BRAVO BOSCH, *La injuria verbal colectiva*, Madrid 2007, pp. 195–207; M. FERNÁNDEZ PRIETO, *La difamación en el Derecho Romano*, Valencia 2002, pp. 317–351.

² In this article, the range of analysis is restricted to praetorian *actio iniuriarum*. On legitimation in cases of injuries subsumable under *lex Cornelia de iniuriis* – cf. *D.* 47.10.5.6–7. On this matter, cf. A. D. MANFREDINI, *Contributi allo studio dell’iniuria in età repubblicana*, Milano 1977, pp. 220–224.

There were situations, though, in which an entitled person could not act in the name of the victim. The primary cause of this situation was the father's – as the *pater familias* – absence; in such a case, if he did not appoint an agent to act in his name, it was possible for an *alieni iuris*, namely, a *filius familias*,³ to bring an action in his own name.⁴

³ On this subject, cf. also G. LAVAGGI, 'Iniuria e obligatio ex delicto', *SDHI* 13–14 (1947–1948), pp. 143–148; 182–198; Macarena GUERRERO LEBRÓN, 'El *filius familias* como legitimado activo en la *actio iniuriarum*', [in:] R. LÓPEZ ROSA & F. DEL PINO (eds.), *El Derecho de familia en la romanística española (1940–2000)*; *Segundas Jornadas Andaluzas de Derecho Romano*, Huelva 2001. However, the *filia familias* was also entitled to constitute her procurator to bring an action for injury in case of the father's absence – *D.* 3.3.8 *pr.* According to *D.* 3.3.8 *pr.* in fine this right was also valid in the case of the father's vileness – cf. E. LEVY & E. RABEL, *Index interpolationum quae in Iustiniani Digestis inesse dicuntur*, Weimar 1929, p. 32. Cf. also S. SOLAZZI, 'Sulla capacità del *filius familias* di stare in giudizio', [in:] *Scritti di diritto romano* 1, Napoli 1995, pp. 36–37. It seems convincing that the right to bring an action for a sustained injury was granted not only to *filius familias*, but also to *filia familias* and a wife *in manu* – cf. also MANFREDINI, *Contributi* (cit. n. 2), p. 226, n. 26.

⁴ However, it is to be stressed that every time a son-in-power was granted the possibility to act by himself (or by appointing a substitute – *D.* 47.10.17.19), a preceding thorough consideration of the case was required, not only in the area of the facts and the duration of the father's absence, but also in consideration of the son's character and qualities – *D.* 47.10.17.17 (cf. LEVY & RABEL, *Index interpolationum* [cit. n. 3], p. 519). On the basis of the tenor of the edict cited in *D.* 47.10.17.10, the right granted to *filius familias*, as rightfully stressed by SOLAZZI, is of neither a general, nor an absolute character – cf. SOLAZZI, 'Sulla capacità' (cit. n. 3), p. 42. Nevertheless, some sources suggest a different interpretation of this matter – cf. e.g., *D.* 44.7.9; *D.* 3.3.39.4; *D.* 47.10.11.8. It would seem that the *filius familias*'s right to bring an action for a sustained injury became, through a jurisprudential interpretation of the basis of this edict, understood to be granted to him directly. However, as SOLAZZI indicates, it is dubious that Ulpian still accepted only the original edict's regulation. Cf. SOLAZZI, *ibidem*, pp. 42–43. For a criticism of this view, cf. MANFREDINI, *Contributi* (cit. n. 2), pp. 227–228, n. 28. Another interpretation on the basis of *D.* 44.7.9 was given by MANFREDINI, who suggested that this text referred to an *actio iniuriarum ex lege Cornelia de iniuriis* – cf. *ibidem*, p. 227. Cf. also in this matter *D.* 2.14.30 *pr.* According to MANFREDINI, both of these texts concern an *actio iniuriarum ex lege Cornelia de iniuriis*, which was, as is also strengthened by the texts of PAULUS and GAIUS, of a private nature. Cf. *ibidem*, pp. 227–228, n. 28. Differently on this subject, cf. S. DI PAOLA, 'A proposito di: G. Lavaggi, *Iniuria e obligatio ex delicto*', [in:] *SDHI* 13–14 (1947–48), p. 279, claiming that the text is not to be interpreted as granting a *filius familias* a direct action for injury, but as concerning only a situation in which a son-in-power was entitled to act (*pater familias*'s absence, etc.) and meant only that the action he was – quite exceptionally – entitled to bring was an *actio suo nomine*.

D. 47.10.17.10 (Ulp. 57 ed.): Ait praetor: 'Si ei, qui in alterius potestate erit, iniuria facta esse dicetur et neque is, cuius in potestate est, praesens erit neque procurator quisquam existat, qui eo nomine agat: causa cognita ipsi, qui iniuriam accepisse dicetur, iudicium dabo'.

Generally, the priority given to the legitimation of a father's agent,⁵ even if he was not appointed specifically for a specific case,⁶ made it impossible for the son to act when an agent was present. However, there were situations in which the behaviour of the agent or his personal connections did not ensure the protection of the good name of a *filius familias*. Particularly, the agent's negligence, collusion with the would-be adversary, and a disability to act against a particular person could defeat the proper fulfilment of his duties. In such circumstances, the right to bring an action for injury could be granted to the injured himself.

*D. 47.10.17.15 (Ulp. 57 ed.):*⁷ Procuratorem patris praetulit praetor ipsis personis, quae iniuriam passae sunt. Si tamen procurator aut neglegat aut colludat aut non sufficiat adversus personas, quae iniuriam fecerunt, ipsi potius, qui passus est iniuriam, actio iniuriarum competit.

The father's insanity or any other affection of the mind⁸ disabling him from acting in the name of an injured son had an analogous effect to a case involving the father's absence, which was legally equivalent to the former.

D. 47.10.17.11 (Ulp. 57 ed.): Filio familias iniuriam passo, si praesens sit pater, agere tamen non possit propter furorem vel quem alium casum dementiae, puto competere iniuriarum actionem: nam et hic pater eius absentis loco est.

⁵ Cf. also *D. 5.1.18.1; D. 3.3.8 pr.*; LEVY & RABEL, *Index interpolationum* (cit. n. 3), *a.b.l.*

⁶ Cf. *D. 47.10.17.16*; LEVY & RABEL, *Index interpolationum* (cit. n. 3), *a.b.l.*

⁷ Cf. LEVY & RABEL, *Index interpolationum* (cit. n. 3), *a.b.l.*

⁸ Cf. LEVY & RABEL, *Index interpolationum* (cit. n. 3), *a.b.l.*

It seems understandable that objective obstacles in the form of absence and insanity resulted in the transfer of the right to bring an action to a son-in-power himself, as otherwise, no protection for the honour and dignity of the latter would have been provided. The basis for the above rules appears to boil down to an assumption that, if present and sane, a father, also being a *pater familias*, would act in the name of his injured son. However, there were situations in which a *pater familias*, who was present and capable of acting, chose not to use his right to sue the offender. Accordingly, his decision was generally treated as final, and no legitimation was transferred to his son, although from the tenor of the text below, it may be presumed that this was not a unanimous viewpoint.

D. 47.10.17.12 (Ulp. 57 ed.): Plane si praesens agere nolit, vel quia differt vel quia remittit atque donat iniuriam, magis est, ut filio actio non detur: nam et cum abest, idcirco datur filio actio, quia verisimile est patrem, si praesens fuisset, acturum fuisse.

If the *pater familias*'s legitimation to prosecute injuries sustained by his *alieni iuris* was treated only as his right, no exceptions to this rule should have been recognised. Apparently, however, although it was formally classified as a right, it was also considered to be the duty of a careful father. It seems that it was assumed and expected that a father's decision not to protect his son's good name must have been grounded by reasonable motives.

Therefore, the entitlement to decide not to protect one's son's good name or dignity was, in some situations, limited by law. In a case in which a vile and abject father⁹ waived an affront suffered by his decent son, the latter was legitimated to sue the doer himself.¹⁰

⁹ This fragment – at least in the range of referring to the suspect character of the father – similarly to the next one (in a part concerning the same issue) – is generally assumed to be interpolated, cf. LEVY & RABEL, *Index interpolationum* (cit. n. 3), p. 519, which seems convincing. Not being indicative of the classical period, it may be verisimilous of the post-classical one. See also LAVAGGI, '*Iniuria*' (cit. n. 3), pp. 191–192.

¹⁰ Whenever a *filius familias* was granted an action for his injury, his father, who was also his *pater familias*, could not bring one. Cf. *D. 47.10.17.21*. However, cf. also *D. 3.3.39.4*. On the last fragment: LAVAGGI, '*Iniuria*' (cit. n. 3), pp. 192–193.

D. 47.10.17.13 (Ulp. 57 *ad ed.*): Interdum tamen putamus et si pater remittat, iniuriarum actionem filio dandam, ut puta si patris persona vilis abiectaque sit, filii honesta: neque enim debet pater vilissimus filii sui contumeliam ad suam vilitatem metiri. Ponamus esse eum patrem, cui iure meritoque curator a praetore constitueretur.

A very similar situation that took place in a different stage of the proceeding is illustrated in the following text:

D. 47.10.17.14 (Ulp. 57 *ed.*): Sed si pater lite contestata coeperit abesse vel etiam negligere executionem pater vilis, dicendum est causa cognita translationem filio competere. Idem et si emancipatus filius esse proponatur.

Again, a decision not to – this time – continue to prosecute his son's injury after *litis contestatio* created no obstacle to the transfer of the right to bring an action to the son, just as in the case of a vile father's neglect of his duties as a prosecutor, even after the joinder of the issue had occurred in a previous proceeding.

Thereby, the aim of ensuring the protection of the honour of all Roman citizens¹¹ eventually prevailed over the absolute discretion of a father in the matter of bringing an action for an injury sustained by his *alieni iuris*. This provision seems to be the consequence of a conviction that it was a father's duty to protect his son's dignity and reputation. In the case of a vile father, he was unable to fulfil this duty – quite similarly to a situation in which he was absent or mentally ill – and thus, it was a reason to transfer legitimation to the son. This presumption, *i.e.*, the understanding that the protection of a son's honour was the duty of the father, seems to be confirmed by the fragment cited below, where an action for a grandson's injury, in case of the grandfather's absence, was to be brought, not by the grandson himself, but by his father.¹²

¹¹ A special regard towards providing protection for honour is especially stressed in the case of an emancipated son, as in the last sentence of *D. 47.10.17.14* cited above, as, or perhaps especially, in *D. 47.10.17.22*. On these fragments, cf. LAVAGGI, '*Iniuria*' (cit. n. 3), pp. 194–198. Cf. also LEVY & RABEL, *Index interpolationum* (cit. n. 3), p. 519.

¹² It should be underlined here that in order to ensure the proper protection of the son's honour, his father could appoint an agent to act in his name – *D. 47.10.17.19*; cf. LEVY & RABEL, *Index interpolationum* (cit. n. 3), *a.h.l.*.

D. 47.10.17.18 (Ulp. 57 ed.): Quod deinde ait ‘qui iniuriam accepit’, interdum ita accipiendum est, ut patri eius competat actio. Ut puta nepoti facta iniuria est, pater praesens est, avus abest: scribit Iulianus patri potius dandam iniuriarum actionem quam ipsi nepoti: ad cuius, inquit, officium pertinet etiam vivente avo filium suum in omnibus tueri.

As an explanation of this interpretation, Iulianus stated that ‘it is for the father, even while the grandfather is alive, to protect his own son in all things’.¹³ What should be underlined here is that the family relation between a father and a son, not *patria potestas*, was the ground for an action in the son’s name. Moreover, it should be emphasised that this was not a case of an indirect injury, which could imply that it was about the father’s *actio iniuriarum suo nomine*, but one to be brought *alieno nomine*, for it was the son’s good name, and not his father’s, that appears to have been the object of protection in this fragment.¹⁴ It is essential to notice that according to a ‘rule’ that can be interpreted from the aforementioned fragments, in the case of the grandfather’s absence and the absence of his agent, the grandson himself should – or at least could – have obtained a right to bring an action in his own name. According to this fragment, his legitimation comes second to his father’s, creating a significant exception to the presumed ‘rule’.

What seems to be of particular importance, in light of this last text, is that not only did *patria potestas*, and consequently – resulting from it – both the right and the duty to protect the honour and the dignity of all *alieni iuris* constitute a basis for an action, but also, the father-son relation, even if it was not strengthened by the legal bonds of subjection, was considered to be sufficient to institute a supplementary legitimation of a father to bring an *actio iniuriarum filii nomine* when the *pater familias*

¹³ The English translation in A. WATSON (ed.), *The Digest of Justinian* III, Philadelphia 1985, p. 781. The usage of the term *officium*, and not *potestas*, underlines LAVAGGI, ‘*Iniuria*’ (cit. n. 3), p. 191.

¹⁴ An analogous situation is illustrated in *D. 47.10.41 in fine*, where among two different *actiones iniuriarum*, the one *filii nomine* was also to be brought by the father of the injured. The problem of acting *suo nomine* and the possibility of appointing an agent in this case is confirmed for the father in *D. 47.10.17.20*. Cf. LEVY & RABEL, *Index interpolationum* (cit. n. 3), *a.b.l.*

(grandfather) was absent. Moreover, this particular and exceptional right of the father must have been seen as natural and as stemming directly from his parentage, since no prior authorisation from the *pater familias* was required. This conclusion will also be of use in analysing the issue of an indirect injury.¹⁵

The so-called indirect injury was generally¹⁶ regarded as a situation in which an injury to a specific person was committed, not against the individual him- or herself, but by means of hurting a subject related to the victim in

¹⁵ Macarena GUERRERO LEBRÓN, *La iniuria indirecta en derecho romano*, Madrid 2005, pp. 77;83, indicates that an indirect injury is a conception with a scientific origin. The origins of recognising the possibility of hurting a *pater familias*'s honour by means of injuring his *alieni iuris* are assumed to be dated even as early as the third/second century BC by Maria Floriana CURSI, *Iniuria cum damno. Antigiuridicità e colpevolezza nella storia del danno aquiliano*, Milano 2002, p. 267, on the basis of fragments of Plaut's comedies. However, as is underlined by M. GUERRERO LEBRÓN, this scarcely seems convincing, as a so-called *edictum generale*, dated approximately at the same time, addresses *iniuria* only as a physical assault. As the author indicates, the first mention of the matter of an indirect injury among jurists can be dated in the first century AD. (Labeo), which could suggest that the recognition of this kind of injury is rather to be connected with the conception of *iniuria* – *contumelia*. Cf. GUERRERO LEBRÓN, *ibidem*, pp. 134–135. Similarly, when considering the possible time of the establishment of an indirect injury, on the ground of *D. 47.10.17.10*, cf. MANFREDINI, *Contributi* (cit. n. 2), pp. 194; 226, who, joining it with the postlabeonian period (probably a time approximate to the introduction of *lex Cornelia de iniuriis*), suggests it is derived from an edict on *potestati subiecti*, which presumption seems to comply with the tenor of *D. 47.10.17.10* ('Ait praetor: ...'). Cf. *ibidem*, p. 227, n. 28. On the *edictum si ei, qui i alterius potestate erit, iniuria facta esse dicetur*, cf. O. LENEL, *Das Edictum Perpetuum*, Leipzig 1927 (3 ed.), pp. 402–403; J. PLESCIA, 'The development of *iniuria*', *Labeo* 23 (1977), p. 285, followed by BRAVO BOSCH, *La iniuria* (cit. n. 1), pp. 71–72, n. 210.

¹⁶ It must be underlined here that a much wider conception of an indirect injury is accepted by GUERRERO LEBRÓN, who claims that apart from particular categories of free persons (son, wife, daughter-in-law) and slaves, an indirect injury could also be committed through the person of a deceased (*D. 47.10.1.6*) and an image (*D. 47.10.27*), on the basis of the criterion of affection – cf. GUERRERO LEBRÓN, *La iniuria* (cit. n. 15), p. 84. On the matter of an injury committed through or against a deceased, cf. especially A. CENDERELLI, 'Il carattere non patrimoniale dell'*actio iniuriarum* e *D. 47.10.1.6–7*', *Iura* 15 (1964); E. DE SIMONE, '*D. 47.10.1.6–7*', *Labeo* 12 (1966); U. VON LÜBTOW, 'Betrachtungen zur *hereditas iacens*', [in:] *Scritti in onore di Giuseppe Grosso* 11, Torino 1968; F. LA PENNA, '*D. 47.10.1.6–7. Iniuria post mortem testatoris* e intrasmissibilità dell'*actio iniuriarum*', [in:] *Testimonium Amicitiae (Studi in onore di Franco Pastori)*, Milano 1992; Macarena GUERRERO LEBRÓN, *La protección jurídica del honor post mortem en derecho romano y derecho civil*, Granada 2002; EADEM,

a particular way.¹⁷ Apart from slaves¹⁸ and freedmen, through whom this particular sort of injury could be committed, free persons were placed in the foreground.

'La legitimación activa del heredero ante la *iniuria* contra el difunto', *Studia Iuridica* 88 (2006); FERNÁNDEZ PRIETO, *La difamación* (cit. n. 1), pp. 310–317. On the matter of committing an injury directly against *furiosi* or *impuberes* with reference to their *pater familias*'s indirect injury, cf. G. DONATUTTI, 'Il soggetto passivo dell'*iniuria*', [in:] *Studi di diritto romano*, Milano 1977, pp. 509–518.

¹⁷ What is of essential importance here is that an indirect injury done to a particular subject, and as a consequence – the legitimization to bring an *actio iniuriarum suo nomine* – was treated separately from an injury (and action) sustained by a direct victim. The most glaring example in this matter seems to be a situation in which only an action for an indirect injury is granted, as the doer's behaviour could not be qualified as a delict in accordance with the directly attacked person. Cf. *D.* 47.10.26. On this fragment, M. KURYŁOWICZ, 'Paul. *D.* 47.10.26 und die Tatbestände der römischen *iniuria*', *Labeo* 33 (1987); IDEM, 'Die Glücksspiele und das römische Recht', [in:] *Studi in onore do Cesare SanFilippo* IV, Milano 1983. It is sometimes claimed that the expression *vel filius* is interpolated – cf. e.g., B. ALBANESE, *Actio servi corrupti*, Palermo 1959, p. 29, n. 35 – which, as is rightfully underlined by M. KURYŁOWICZ, 'Paul. *D.* 47.10.26' (cit. n. 17), pp. 267–277, does not seem convincing. On the interpretation of this fragment, cf. also F. RABER, *Grundlagen Klassischer Injurienansprüche*, Wien – Köln – Graz 1969, pp. 139–144; R. WITTMANN, 'Die Entwicklungslinien der klassischen Injurienklage', *ZRG RA* 91 (1974), pp. 353–357. A very similar situation is pictured in *D.* 47.10.1.5. In the case of a *filius familias*'s agreement not to bring an action for his injury, cf. also *D.* 2.14.30 *pr.* Apart from the above, other sources stress the separate nature of the action (*suo* and *alieno nomine*) arising from the injury – cf. e.g., *D.* 47.10.41 – also on the basis of a different estimation in cases of actions in favour of the son and that of the father (cf. *D.* 47.10.30.1; *D.* 47.10.31). On the matter of estimation in cases concerning *iniuria*, cf. especially O. LENEL, 'Taxatio bei *actio iniuriarum*', [in:] *Gesamelte Schriften* IV, Napoli 1992; D. NÖRR, 'Zur taxatio bei der *actio iniuriarum*', [in:] R. FEENSTRA (ed.), *Collatio Iuris Romani. Études dédiées à Hans Ankum à l'occasion de Son 65^e Anniversaire* 1, Amsterdam 1995; U. VON LÜBTOW, 'Zum römischen Injurienrecht', *Labeo* 15 (1969), pp. 138–150; BRAVO BOSCH, *La injuria* (cit. n. 1), pp. 218–227; FERNÁNDEZ PRIETO, *La difamación* (cit. n. 1), pp. 393–407.

¹⁸ On the edict *de iniuriis quae servis fiunt*, restricted only to injuries suffered through slaves, cf. O. LENEL, *Das Edictum Perpetuum*, Leipzig 1927 (3 ed.), p. 401: 'Qui seruuum alienum aduersus bonos mores uerberauisse deue eo iniussu domini quaestionem habuisse dicitur, in eum iudicium dabo. item si quid aliud factum esse dicitur, causa cognita iudicium dabo.' On the edict *de iniuriis quae servis fiunt* cf. esp. WITTMANN, 'Die Entwicklungslinien' (cit. n. 17), pp. 339–346. Cf. also RABER, *Grundlagen* (cit. n. 17), pp. 77–91; M. HAGEMANN, *Iniuria von den XII-Tafeln bis zur Justinianischen Kodifikation*, Köln 1998, pp. 81–87; M. GUERRERO LEBRÓN, 'En torno a la injuria cometida contra el esclavo dado en usufructo', [in:] *Anuario da Faculdade de Direito da Universidade da Coruña* 11 (2007); FERNÁNDEZ PRIETO, *La difamación* (cit. n. 1), pp. 288–297.

An essential prerequisite¹⁹ to the qualification of an act as an indirect injury was its commission against a determined category of persons, as only an injury against a specific group of people was understood to be apt to harm one's honour or dignity.

In the consideration of this matter, some doubts emerge during the analysis and comparison of texts from the Institutes of Gaius and Justinian's Codification.

Gai. 3.22I: Pati autem iniuriam uidemur non solum per nosmet ipsos, sed etiam per liberos nostros, quos in potestate habemus, item per uxores nostras, quamuis in manu nostra non sint; itaque si ueluti filiae meae, quae Titio nupta est, iniuriam feceris, non solum filiae nomine tecum agi iniuriarum potest, uerum etiam meo quoque et Titii nomine.

According to Gaius,²⁰ the bonds that create an indirect injury are *patria potestas* and marriage.²¹ The same conclusion can be drawn from two texts from the Digest presented below.

D. 47.10.18.2 (Paul. 55 *ed.*):²² Si nupta filia familiae iniuriam acceperit et vir et pater iniuriarum agant, Pomponius recte putat tanti patri condemnandum esse reum, quanti condemnatur, si ea uidua esset, viro tanti, quanti condemnaretur, si ea in nullius potestate esset, quod sua cuiusque iniuria propriam aestimationem haberet. Et ideo si nupta in nullius potestate sit, non ideo minus eam iniuriarum agere posse, quod et vir suo nomine agat.

¹⁹ The second prerequisite, that is, *animus iniuriandi* considered as aimed at hurting the indirect victim of an *iniuria*, being a complex matter, will not be analysed here. On this subject, cf. e.g., RABER, *Grundlagen* (cit. n. 17), pp. 108–171; BRAVO BOSCH, *La injuria* (cit. n. 1), pp. 122–139.

²⁰ Cf. also P.E. HUSCHKE, *Gaius, Beiträge zur Kritik und zum Verständnis seiner Institutionen*, Leipzig 1855, p. 116.

²¹ It is sometimes argued that originally, not every marriage, but only a *cum manu* one, was a basis for a husband's legitimation to bring an action for injury in his own name. Cf. e.g., DORA DE LAPUERTA MONTROYA, 'La *contumelia* indirecta en los ataques a la buena reputación de la mujer e hijos', [in:] R. LÓPEZ ROSA & F. PINTO TOSCANO (eds.), *El Derecho de familia. De Rome al derecho actual*, Huelva 2004, p. 367, n. 54.

²² Cf. LEVY & RABEL, *Index interpolationum* (cit. n. 3), *a.b.l.*

D. 47.10.1.9 (Ulp. 56 ed.): Idem ait Neratius ex una iniuria interdum tribus oriri iniuriarum actionem neque ullius actionem per alium consumi. Ut puta uxori meae filiae familias iniuria facta est: et mihi et patri eius et ipsi iniuriarum actio incipiet competere.

It is, however, sometimes argued, in reference to Gaius's text, that exhaustiveness cannot be attributed to the enumeration contained in this fragment, and – in consequence – the two grounds for indirect injury defined by the jurist must be understood only as examples.²³ This seems somewhat convincing, given that there is no mention of an injury that could be committed through one's slaves here. On the other hand, as this issue is treated in another fragment, it could be argued that – within the category of free persons – Gaius's list is complete. The exemplary character of the jurist's statements, underlined, *e.g.*, in Gai. 3.220, does not seem to address this particular matter, as there are no clues in this source that could justify this view. Accordingly, it appears that the enumeration given by Gaius in 3.221 should be treated as a comprehensive one – for his times – if we are analysing the possibility of committing an injury through free persons. This limitation in the text seems to be quite understandable, especially as this kind of injury must have been of particular significance and must have deserved to be put in the foreground. Moreover, as no conception of an indirect injury was created in Roman law, there was no need to treat the whole issue – which was at that time non-existent – comprehensively.

A complete list of subjects through whom a *pater familias* (or *mater familias*) could be injured is believed to be found in *D. 47.10.1.3*.²⁴

D. 47.10.1.3 (Ulp. 56 ed.): Item aut per semet ipsum alicui fit iniuria aut per alias personas. Per semet, cum directo ipsi cui patri familias vel matri familias fit iniuria: per alias, cum per consequentias fit, cum fit liberis meis vel servis meis vel uxori nruive: spectat enim ad nos iniuria, quae in his fit, qui vel potestati nostrae vel affectui subiecti sint.

²³ Cf. GUERRERO LEBRÓN, *La iniuria* (cit. n. 15), p. 78.

²⁴ Cf. GUERRERO LEBRÓN, *La iniuria* (cit. n. 15), p. 79.

The main difference that emerges from the information provided in the aforementioned texts is the group of subjects whose injury may have been qualified as an indirect attack on a certain person. It seems incontestable that all of the individuals who were subjected to one's authority could have been thought of as a means of injuring one's *pater familias*.²⁵ As Gaius's text also states that the bond of marriage, even if it was a *sine manu* one, was considered to be a basis for an action for an indirect *iniuria*, both of the relationships mentioned by that jurist are based on a formal criterion.

It seems that an analogous statement is presented by the author of *Pauli Sententiae*, who mentions only two categories of subjects whose injury could have been treated as an indirect injury – children under one's control and one's wife.

PSent. 5.4.3: Si liberis qui in potestate sunt aut uxori fiat iniuria, nostra interest vindicare: ideoque per nos actio inferri potest. Si modo is qui fecit in iniuriam nostram id fecisse doceatur.

In Ulpian's statement from *D.* 47.10.1.3, both formal and informal criteria are considered. What is new, in comparison to Gaius's and Paulus's texts, is a much wider group of subjects whose injury may have been qualified as an act against another person. Apart from *patria potestas*, affection also is believed to have been a ground for *actio iniuriarum*, while there is no separate mention of marriage. That is why the examples of subjects whose injury could have been qualified as an injury to an individual include his wife, even if she was not under his authority.²⁶ As the afore-

²⁵ E. PÓLAY suggests that the basis for an indirect injury was to be found in the concept of house-community. Accordingly, this sort of injury could be inflicted by offending the *pater familias*'s *manus*, *mancipium* or *potestas*, as well as by deeds against his *clientes* and *libertini*, who belonged to the house-community. Cf. E. PÓLAY, *Iniuria Types in Roman Law*, Budapest 1986, pp. 71–75.

²⁶ GUERRERO LEBRÓN rightfully underlines that, in the time of the Republic, it was a *sine manu* marriage that was much more popular, making a *conventio in manu* rare in the time of ULPIAN. Cf. GUERRERO LEBRÓN, *La iniuria* (cit. n. 15), p. 79. It is rightfully argued by this author that a daughter-in-law is, in this case, subordinated to her father-in-law's *manus*, as his son, being her husband, is still a *filius familias*.

mentioned subjects were included in the group of individuals through whom an injury could have been suffered, it seems justified to assume *a fortiori* that one's natural children, not subjected to one's authority, could also have been the means of sustaining injury.

Moreover, a father's legitimation to bring an action *suo nomine* for an injury based on a deed aimed directly at his son's honour, although of a supplementary nature, is also confirmed in the text below.

D. 47.10.17.20 (Ulp. 57 ed.): Idem ait, et si nepoti facta sit iniuria et nemo sit, qui avi nomine agat, permittendum esse patri experiri, et is procuratorem dabit. Omnibus enim, qui suo nomine actionem habent, procuratoris dandi esse potestatem: intellegi autem filium, inquit, familias suo nomine agere, cum patre cessante praetor ei agere permittat.

The other difference between Ulpian's text from *D. 47.10.1.3* and those mentioned above is that, in Gaius's and Paulus's texts, only the head of family was granted an action, while in Ulpian's, the mother of a family was also considered as the possible subject of an indirect injury. It seems that it is rightfully suggested²⁷ that, in this text, a *mater familias* should be understood as a woman (wife and mother) *sui iuris*, without any further attributes required.²⁸ This statement strengthens the position of affection as a basic and essential ground for seeking to protect one's honour and reputation. Both of these differences, concerning *mater familias* and affection, were also argued to be interpolated. As this assumption seems quite probable when considering Ulpian's times, it is accepted that both of the above mentioned changes in the text were adequate for Justinian's times.

²⁷ Cf. GUERRERO LEBRÓN, *La iniuria* (cit. n. 15), p. 79.

²⁸ On the notion of *mater familias*, cf. especially: W. KUNKEL, s.v. 'Mater familias', *PWRE* XIV (1930), coll. 2183–2184; A. CARCATERRA, 'Mater familias', *Archivio Giuridico* 123 (1940), pp. 113–164; W. WOŁODKIEWICZ, 'Materfamilias', *Czasopismo Prawno-Historyczne* 16.1 (1964), pp. 103–142; IDEM, 'Attorno al significato della nozione di *mater familias*', [in:] *Studi in onore di Cesare Sanfilippo* III, Milano 1983, pp. 735–756; R. FIORI, 'Materfamilias', *BIDR* 96–97 (1993–1994), pp. 455–498; DORA DE LAPUERTA MONTROYA, *Estudio sobre el edictum de adtemptata pudicitia*, Valencia 1999, pp. 89–92; M. GUERRERO LEBRÓN, 'La idea de *materfamilias* en el *Edictum de adtemptata pudicitia*', [in:] *El Derecho de familia. De Roma al derecho actual*, Huelva 2004.

Also, Justinian's Institutes refer to persons regarding whom an attack on their dignity or good name could have been treated as an indirect injury. Although only children under one's control and wives are explicitly named in the first sentence, the mention of the daughter-in-law in the last sentence could – at first sight – suggest that other subjects were also taken into account.

Iust. 4.4.2: Patitur autem quis iniuriam non solum per semet ipsum, sed etiam per liberos suos, quos in potestate habet: item per uxorem suam, id enim magis praevaluit. itaque si filiae alicuius, quae Titio nupta est, iniuriam feceris, non solum filiae nomine tecum iniuriarum agi potest, sed etiam patris quoque et mariti nomine. contra autem, si viro iniuria facta sit, uxor iniuriarum agere non potest: defendi enim uxores a viris, non viros ab uxoribus aequum est. sed et socer nurus nomine, cuius vir in potestate est, iniuriarum agere potest.

The last sentence describes a situation in which an *actio iniuriarum* is granted to a person, who, being the *pater familias* of a woman's husband, was entitled to an action for an injury done to his daughter-in-law. If there was an *actio iniuriarum suo nomine* granted to this father-in-law, this would mean that not only were the bonds of *patria potestas* and marriage a basis for granting an action, but also, other bonds, perhaps those of affection, could have provided a basis for that action. However, this is not the case, as the last sentence of this text indicates that it was about an *actio iniuriarum nurus nomine*, and it was not in the name of her father-in-law. This constatation shows that this last sentence of the text does not concern the issue of an indirect injury at all,²⁹ referring only to an entitlement of the *pater familias* to bring an *actio iniuriarum* in the name of his daughter-in-law, who was married to his son, who, in turn, was subject to his authority.³⁰

²⁹ It should be underlined that if a daughter-in-law was in her father's-in-law's *manus*, he was also entitled to act for his own indirect injury by an *actio iniuriarum suo nomine*. It is not just this action to which the text refers in the given fragment.

³⁰ GUERRERO LEBRÓN, *La iniuria* (cit. n. 15), p. 82. Cf. also n. 25.

There are two issues in this source that should be underlined. First, the possibility of acting with *actio iniuriarum* because of an iniuria done to one's wife was not as obvious and consentaneously accepted as it would seem after reading Gaius's and Paulus's texts. Apparently, there were doubts concerning the legitimation of a husband in the case of a *sine manu* marriage. Finally, an injury done to a woman could give rise to three *actiones iniuriarum* – in her name, in her father's name and in the name of her husband, regardless of whether there was a *cum manu* or *sine manu* marriage. As in the text, the situation of this woman is an example of the rule comprised in the first sentence (as it is in Gaius's *Institutes*): It concerned a woman in her father's *manus*, who also was a wife in a *sine manu* marriage. But would a father have been entitled to this action if his daughter was the wife *in manu* of her husband? According to the first sentence of this text, he would not have been, but if this situation is considered in light of Ulpian's text, granting him an *actio iniuriarum* because of an insult to his daughter would have been more than understandable. This conclusion may also be confirmed in Justinian's Code 9,35,2, where the grounds of both legitimations – the husband's and the father's – are explained.³¹

Cf. 9.35.2 (Alexander Severus): *Iniuriarum actio tibi duplici ex causa competit, cum et maritus in uxoris pudore et pater in existimatione filiorum propriam iniuriam pati intelleguntur.* (a. 230)

The above text is quite difficult to interpret when considering a situation which could be the basis for this decision. By the tenor of the text, it should be assumed that from one situation, two different indirect injuries to the addressee of this decision would have arisen – one through the wife and one through his son.³² An alternative, according to which it might refer to the double legitimation of a father and a husband to act with *actio iniuriarum suo*, as well as *alieno nomine*,³³ does not seem grounded, as there is no mention of the presence of a harm done to one's wife

³¹ What is questionable here is whether *patria potestas* belonged to a father or whether his legitimation was treated as independent of this matter.

³² *Cf.* GUERRERO LEBRÓN, *La iniuria* (cit. n. 15), p. 80.

³³ *Cf.* GUERRERO LEBRÓN, *La iniuria* (cit. n. 15), p. 80.

or son; this implies that only a father's and a husband's (indirect) injuries, and consequently, the actions in their own names, were analysed.

Although the possible situation that resulted in the emperor's interpretation does not appear to be identified, it is of particular importance that both legitimations, *i.e.*, the ability of a both father and a husband to bring an action for his own injury, are confirmed here.

According to the text, both of these categories of subjects were personally interested in – accordingly – the wife's and the son's reputations, as they also affected their own good names. What is especially significant here is that it was not only completely unimportant whether the marriage was *cum* or *sine manu*, but also whether the sons were or were not under their father's control, which corresponds with the criterion of affection underlined in the above text ascribed to Ulpian.

A second observation on the ground of Justinian's Institutes concerns a fragment about the lack of legitimation in a wife in the case of an injury done to her husband.³⁴ When we examine this statement only in accordance with the first two sentences of this text, it is more than obvious, if not too obvious. If there was a need to emphasise the lack of the wife's legitimation in the case of *iniuria* inflicted by the husband, it would be justifiable to also assume that a woman could generally have been regarded as the actual victim of an indirect injury, which was suffered directly by others.³⁵ Again, this seems to correspond with Ulpian's text, which can be of use in naming the group of individuals through whom she could have sustained an injury. It would consist of all individuals who were subjects of her affection, apart from her husband, who was directly excluded from this group, not only by Justinian's Institutes, but also by Paulus's text in the Digest.³⁶

³⁴ Cf. *D.* 47.10.2. On *D.* 47.10.2 and a criterion of *aequitas*, cf. also WITTMANN, 'Die Entwicklungslinien' (cit. n. 17), pp. 305–306. On the problem of ascribing this fragment to a particular edict, cf. RODGER, 'Introducing *iniuria*' (cit. n. 17), pp. 6–8; and also RABER, *Grundlagen* (cit. n. 17), pp. 12–14.

³⁵ The classification of this fragment as concerning an indirect injury is quite common – cf. e.g., RABER, *Grundlagen* (cit. n. 17), p. 12; RODGER, 'Introducing *iniuria*' (cit. n. 17), p. 8; GUERRERO LEBRÓN, *La iniuria* (cit. n. 15), p. 82.

³⁶ Although this interpretation of the fragment, excerpted from Paulus' work, is commonly accepted in the doctrine, its second part seems dubious. If an explanation for the lack

Therefore, it seems that the text can be divided into two parts – one refers to an indirect injury that could have been suffered by a *pater familias* through children staying under his control and through his wife, as well as the absence of the possibility of a wife to sustain an indirect injury

of a wife's legitimation in the case of an injury done to her husband is to be seen in the duty of husbands to defend their wives, it would be the good name of a wife that was to be protected by an *actio iniuriarum* belonging to her husband. If this was true, the possibility of qualifying the case as an indirect injury would be out of the question, as this kind of *iniuria* gives rise to an action *suo nomine*, which was based on an injury sustained by a husband because of a deed aimed directly against his wife. Therefore, it should be his honour that would be protected in the case of an indirect injury, and not hers, as the protection of the latter was provided by an action *uxorii nomine*, which could be brought by the one to whose authority she was subjected. It seems that the only solution is to accept the clause *quia-fin* as interpolated. It could have been added under the influence of the postclassical conception of duties ascribed to a father and a husband, which addition corrupted the original meaning of Paulus' statement, or it could have concerned quite a different matter, but was misjoined with the statement of the lack of legitimation of a wife in the case of an injury sustained by her husband. Accepting that this *quia-fin* clause could not refer to an indirect injury, but concerned an *actio iniuriarum uxorii nomine*, it should be approved that the wife was under her husband's *manus*. In such a case, the concept of connecting this situation with PAULUS's assertion on the lack of legitimation of a wife in accordance with an injury committed against her husband (as a reversed situation) would not have made sense. If a wife was *sui iuris*, she herself would have been entitled to an action in her own name, so there would have been no need to provide husbandly protection for her – *D. 47.10.18.2*; LEVY & RABEL, *Index interpolationum* (cit. n. 3), *a.b.l.* The only possibility of an interpretation based on the traditional tenor of the text seems to be the result of accepting that the wife was still in her father's (grandfather's, etc.) *manus*. Although, in such a situation, her father was solely legitimated to act in her name, perhaps another peculiarity in the area of legitimation is to be presumed. Suppose the father (being her *pater familias*) could or would not bring an action for an injury sustained by his daughter. In these circumstances, analogous to the case of one under his grandfather's control, the legitimation of the one who should naturally protect an injured person could arise, especially because, otherwise, no supplementary protection would be provided. It seems that both the father's right and duty to protect his son, even if not in his power, against any attack upon his honour, and a husband's right, and probably also his duty, to ensure the protection of his wife's good name and dignity, even in a *sine manu* marriage, were based on the same ground – the aim to provide protection for an individual's honour even when one's *pater familias* was unable or unwilling to fulfill his duties in this matter. The ones who were granted the supplementary legitimation to bring an *actio iniuriarum* in the name of the victims were those whose natural role was – paraphrasing Ulpian's statement from *D. 47.10.17.18* – 'to protect them in all things'. Regardless of the possible interpretation of the clause *quia-fin*, this seems incompatible with the concept of an indirect injury, to which only the first part of *D. 47.10.2* can be assigned.

through her husband, and the second is legitimation to bring an *actio iniuriarum* in the name of a daughter-in-law. As the first part is modelled on the above-mentioned fragment of the Institutes of Gaius, with an additional commentary of a lack of unanimousness in regard to the possibility of an action for an injury sustained through one's wife, it is understandable that only children under the father's control and wives are mentioned. A widening of the group of subjects by whom and through whom an indirect injury could have been sustained must have been taken into consideration, although probably not before the late classical period. Therefore, the completion of the group of subjects was achieved by using Paulus's statement, which was known from *D. 47.10.2*.

It should be also noticed that there is one other category of subjects who were entitled to an *actio iniuriarum suo nomine* in the case of an injury that directly harmed a different person, namely, a fiancé. Although a related text is located among the fragments that refers to an action based on a special edict *de adtemptata pudicitia*,³⁷ it seems that it can be understood as relevant in all cases concerning an indirect injury as well.

D. 47.10.15.24 (Ulp. 77 *ed.*): Sponsum quoque ad iniuriarum actionem admittendum puto: etenim spectat ad contumeliam eius iniuria, quaecumque sponsae eius fiat.

A fiancé's legitimation to bring an *actio iniuriarum suo nomine* should be treated as a consequence of the liberalisation of the formal criterion of marriage by replacing it with that of affection.

³⁷ On this special edict focused on injuries sustained directly by *matresfamilias*, *virgines* and *praetextati/praetextatae*, that is, those who were mostly under someone's control, cf. especially: A. GUARINO, 'Le matrone e i pappagalli', [in:] *Inezie di Giuriconsulti*, Napoli 1978; Dora DE LAPUERTA MONTOYA, 'El elemento subjetivo en el *edictum de adtemptata pudicitia*: la contravención de los *boni mores* como requisito esencial para la existencia de responsabilidad', [in:] *Anuario da Facultade de Dereito da Universidade da Coruña* 2 (1998), pp. 237–252 EADEM, *Estudio* (cit. n. 28), pp. 89–92; F. RABER, 'Frauentracht und *iniuria* durch *appellare*: *D. 47.10.15.15*', [in:] *Studi in onore di Edoardo Volterra* III, Milano 1971; IDEM, *Grundlagen* (cit. n. 17), pp. 39–55; HAGEMANN, *Iniuria* (cit. n. 18), pp. 71–75; María José BRAVO BOSCH, 'Algunas consideraciones sobre el *Edictum de adtemptata pudicitia*', *Revista xuridica da Universidade de Santiago de Compostela* 5.2 (1996), pp. 41–53; WITTMANN, 'Die Entwicklungslinien' (cit. n. 17), pp. 314–320.

A very special case based on the nature of an injury committed is also presented in *Cf.* 9.35.10:

Cf. 9.35.10 (Diocletianus, Maximianus): Si quidem aviam tuam ancillam infamandi causa rei publicae civitatis comanensium dixit zenodorus ac recessit, iniuriarum actione statim conveniri potest. Nam si perseveret in causa facultatem habens agendi, super hac deferri querellam ac tunc demum, si non esse serva fuerit pronuntiata, postulari convenit. (a. 294)

An issue of particular significance here is that an allegation that one's grandmother was a female slave may, after it was decided that she was not one, have constituted a basis for an injury sustained by her grandson. This means that, at the close of the third century AD, an indirect injury could also have been committed by means of a false assertion referring directly to another subject related to an individual, namely, his grandmother. However, the possibly exceptional character of this case, as concerning the matter of *status libertatis*, must be underlined. Nonetheless, it confirms that a wider range of subjects than only individuals who were subject to one's power or connected by the bonds of marriage could have become a means of hurting someone else's good name.

After a brief analysis of the above texts, it seems incontestable that an indirect injury in Justinian's time could be sustained by both the father and the mother of the family; further, when deciding whether the dignity or good name of one of the above could be injured through a particular person, the criteria which were taken into account were no longer only *patria potestas* and marriage, but also affection. The only text from the Codification that still recognised only formal criteria was a fragment of Justinian's Institutes, where two different issues – an indirect injury and legitimation in the case of an injury of a wife or a daughter-in-law – are mixed together. The predominance of statements confirming the possibility of sustaining an injury through one's children, daughters-in-law, wife or even fiancée makes it clear that formal criteria were not the only criteria that could provide a basis for an indirect injury. On the other hand, it seems that not every affection was understood as a sufficient bond to act with *actio iniuriarum*. All of the subjects who were named in the sources as the possible means of sustaining an injury, apart from being

close to the indirect victim of the delict, were, at the same time, his or her family members or would be family members in the future, as in the case of a fiancée.

To sum up this brief study on family relations in cases of an injury committed against the dignity or reputation of a family member, it should be stated that, although in cases of bringing an action for an injury in the name of an *alieni iuris*, an entitlement to act was almost always based on agnatic bonds between an *alieni iuris* and the head of the household, even in this sort of case, some exceptions to the rule were provided. Their aim, apart from ensuring the protection of every citizen's good name, was to empower a father to act in defence of his son's reputation, and – perhaps – a husband to protect his wife's honour. In cases concerning an indirect injury, family bonds, such as those based on affection, were of essential significance, although it seems that originally, only *patria potestas* and the bond of marriage were relevant to the matter. Both of the latter, formal bonds were still widely represented in the Codification, but subsequently, the new criterion of affection was introduced. Thus, finally, both *patria potestas* and affection, typical in family bonds, seem to have provided a basis for an action for an indirect injury.

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