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Personal Injury Claims

Adolfo A. Díaz-Bautista Cremades *

Abstract

In Roman Law, both offense and malicious aggression were considered iniuria. The legal consequence of the iniuriae in the XII Tables was a fixed fine, but over time, a variable fine was established whose determination corresponded to the victim, who received the amount as a „compensation" for the offense suffered. In the High Middle Ages, the penalty of fixed fine was recovered, combined with other corporal punishment, but in the VII Partidas, compensation is reintroduced by a variable amount. On the other hand, in England the punitive damages system was developed for aggressions contrary to honor and dignity. In this paper, we explore the relationship between both institutions.

Keywords: *iniuria; damages; tort law; punitive damages; injuries; Roman law; medieval law.*

1. The repair of the iniuriae in Roman law The XII Tables

As is well known, the XII Tables [1] do not establish a general system of civil liability but regulate a series of unlawful acts which accompanies a consequence that is generally punitive and not compensatory. Property damage.[2]

Apparently, the XII Tables provide pecuniary and personal penalties for those who commit willy damage to people and things [3], usually referred to what we now call "non-contractual liability" [4]:

In Rome, intentional physical aggression was treated as an insult, which was considered an attack on the honour of the free citizen committed by word or deed. Certainly, the modern consideration of "iniuria" [5] as an expression - generally verbal - specifically aimed at harming the honour of the victim goes a long historical path that we can barely aim for. It is true, as MIGLIETTA [6] points out, that in an origin the *iniuria* was not linked to verbal expression. Proof of this point is that *mala carmina* was typified autonomously - and not as a modality of *iniuria* [7]- as well as the regulation, already in law, of the *convicium* as an autonomous modality of *iniuria*.

First, with systematic differences, the reconstructions insert a text related to the *iniuria*:

Tab. VIII.4 SI INIURIAM FAXSIT, VIGINTI QUINQUE POENAE SUNTO

The text, taken from a variety of sources (Gaius, 3, 223; Gell., 20, 1, 12; Coll., 2, 5, 5; Fest., 508 L; Gell., 16, 10, 8), appears almost identical in all reconstructions, although in some of them (Riccobono and Girard) it is preceded by another similar fragment:

Iniuriarum actio aut legitima est –. Legitima ex lege XII Tab. 'qui iniuriam alteri facit, V et XX sestertiorum poenam subito.

The rule, as noted, is the same, although here the penalty is established in twenty-five sestertia instead of the twenty-five asses of the later fragment. As is well known, sestertium, silver, currency equivalent to a quarter of a denarium, was introduced into the Roman monetary system around the 3rd century BC, long after the promulgation of the XII Tables (V century BC) so

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1 Probably, following Watson, A.: *Rome of the XII Tables*, Princeton University Press, New Jersey, 1975, p. 5 and Rodríguez Montero, RP.: *Responsabilidad contractual y extracontractual en Derecho Romano*, Andavira, Santiago de Compostela, 2015, p. 155, the cases included in the decenviral regulation indicate the most important legal assets in the fifth century BC Rome: the house, the slaves, the fields. Although, Rodríguez Montero suggests that there may be more assumptions in the XII Tables (such as the death of the other slave) that have not come to us.

2 Vid. Díaz-Bautista Cremades, A.: *De la actio iniurarum a los daños punitivos, la reparación de lesiones dolosas en la tradición jurídica continental*, Tirant Lo Blanch, Valencia, 2019.

3 Cursi warn that, while the rules on theft or injury contained in the XII Tables are considered a compact table, those relating to damage to things are dispersed and do not seem to offer a unitary logic. Cursi, F.: Gli illeciti privati, en *XII Tabulae,* Napoli, 2018, p. 560.

4 There are few vestiges of consequences established by the *decenviri* to the breach of pre-existing obligations (contractual liability) although they are not entirely unknown.

5 Spanish Criminal Code: Artículo 208. *Es injuria la acción o expresión que lesionan la dignidad de otra persona, menoscabando su fama o atentando contra su propia estimación*. Certainly, the words of the rule would include not only expressions but also physical aggressions. However, at the light of the crime of intentional injury (art. 147 and concordants) would have no systematic reason.

6 Miglietta, M.: Le norme di diritto criminale, en Cursi, F.: *XII Tabulae, testo e commento*, Napoli, 2018, p. 488.

7 In fact, the crime of *malum carmen* should not include defamatory songs, in view of Cic. *Rep*. 4.12, quoted by Miglietta.

the reference to the sestertium cannot be original in the decenviral text. It may correspond to an attempt to update the fine that apparently became soon obsolete. By the way, Inst.4.4.7 report that the fixed penalty was soon deprecated, allowing the praetors to be set by the judge at his discretion depending on the seriousness of the offense:

> sed postea praetores permittebant ipsis qui iniuriam passi sunt eam aestimare, ut iudex vel tanti condemnet, quanti iniuriam passus aestimaverit, vel minoris, prout ei visum fuerit.

Aulo Gelio (20.1.13) tells the story of a wealthy citizen (L. Verazio) who, faced with the small amount of the sentence, went through the streets slamming all who were in his way, immediately paying them the fine of twenty-five Asses:

> Itaque cum eam legem Labeo quoque 1 vester in libris, quos Ad Duodecimn Tabulas conscripsit, non probaret: 'Quidam,' 2 inquit, 'L. Veratius fuit egregie homo inprobus atque inmani vecordia. Is pro delectamento habebat, os hominis liberi manus suae palma verberare. Eum servus sequebatur ferens crumenam plenam assium; ut quemque depalmaverat, numerari statim secundum Duodecim Tabulas quinque et viginti asses iubebat.' Propterea," inquit, "praetores postea hanc abolescere et relinqui censuerunt iniuriisque aestumandis recuperatores se daturos edixerunt.

The decenviral text, on the other hand, does not specify what kind of offense is repressed by the established penalty[8], but the authors assume that it would be mild slander, since together with this the XII Tables place offenses of "aggravated"[9] injuries, rupture of teeth and breakage of limbs[10]:

> Tab VIII.3 MANU FUSTIVE SI OS FREGIT LIBERO, CCC, SI SERVO, CL POENAM SUBITO

The idea, as we can see, is to knot body damage an amount in a lump sum, not to mention a resarcitory content that, as we have noted, does not correspond to personal injury.

Alongside this, decenviri introduce a rule that we know from various sources and which is generally reconstructed as

> Tab. VIII.2 : SI MEMBRUM RUP[S]IT, NI CUM EO PACIT, TALIO ESTO.

This fragment, in our view, opens the possibility of financially compensating for injuries. It must be understood that, although for us the repair of property damage and compensation for personal injury is almost the same, it did not have to be in archaic Rome, nor even in the classic. The decenviral rule, as we know, provides that if a person breaks a member the law of talion will apply unless victim and aggressor reach an agreement. In our modern mentality the mention of the agreement *(si pacit)* leads us to think about compensation and therefore the "repair" of personal injury, but the XII tables do not speak here of repair (*sarcio*) but of agreeing (*pacio*). It is understood that the victim can freely assess the "price" of his indemnity and agree with the aggressor for adequate compensation (which does not redress) appropriately, which would be maintained for a long time in the so-called "*actio estimatoria*".

2. Subsequent evolution

In the post-decenviral evolution of Roman law, the property damage was regulated by the *lex Aquilia* while the *iniuriae*, whose fine of twenty-five asses were soon outdated, were treated in the *lex Cornelia.*

Although it is possible that the concept of *iniuria* initially encompassed elements of property damage that could be framed in the broad concept of offense, or perhaps those cases of intentional harm, certainly a plebiscite dictated, probably, between 287 and 217 BC proposed by a tribune named Aquilius, specifically regulated the *damnum iniuria datum,* in which, according to all the doctrine, are framed cases of property damage caused illegally. The *lex aquilia*, which has been extensively analyzed by doctrine, is commented upon by Ulpianus, Gaius and other jurists in D.9.2;[11] contained three chapters, the second of which apparently referred to the action against the co-creditor that had released the pro-debtor in creditor fraud. The first and third chapters concern the offence of damages. As is well known, the first chapter punished the cause of death of a slave or quadruped outside the payment of the maximum value of the good in the previous year and the third chapter condemned the author of any other property damage *(urere, frangere, rumpere*) to pay the maximum value of the object within thirty days[12].

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[8] Santa Cruz Teijeiro, d' Ors y Pérez-Peix say that at this time the expression *iniuria* referred only to the less serious offenses, distinguishing as different categories the *ruptum* and the *fractum.* Vid. "A propósito de los edictos especiales "de iniuriis" en *AHDE* 49(1979) p. 653. Carvajal analyses the different doctrinal positions regarding the decenviral scope of these terms: *La membri ruptio de la Tabla VIII,2 consistiría, según algunos, en la pérdida física de una extremidad (mutilación) y, según otros, en la pérdida de su funcionalidad –lo cual incluiría una ossis fractio que tuviera este efecto–; pero también ha sido entendida como cualquier tipo de lesión corporal, o como cualquiera que no constituya una ossis fractio.* Carvajal, PI.: La función de la pena por la "iniuria" en la Ley de las XII Tablas, en *Rev. estud. hist.-juríd*. Valparaíso 35(2013) p. 153.

[9] In different opinion, Pugliese, *Op. cit,* p. 5, expresses its conviction that this decenviral foresight is a crime other than *iniuria,* citing authors as Voigt, Cornil and others.

[10] The doctrine has, however, expressed its perplexity because in these cases the term *iniuria* is not mentioned. Vid. Guerrero Lebrón, M.: *La injuria indirecta en el Derecho Romano*, Dykinson, Madrid, 2005, p. 15.

[11] The fact that we know the law by the references that are made of jurists who lived a few centuries after its promulgation may make us suspect that there are original aspects of the legislative text that we cannot know, or that they were interpreted differently mode over time.This alludes, Valditara, G.: *Damnum iniuria datum*, Giappichelli ed., Turín, 1996, p. 8 n. 46.

[12] The reference to the „thirty days to come"(in diebus triginta proximis) together with the future form of the verb sum (erit), used by Ulpiano in D.9.2.27.5 has generated that much ink has been spilled in the doctrine, which is debated between the possible interpolation of the text (originally speaking of the 30 days before the event) and the possibility of refer to the value of an object similar to that damaged, to the possibility that the rule refers to the traditional period of voluntary payment of debts contained in the XII Tables. Vid. Ankum, H.: Quanti ea res erit in diebus XXX proximis dans le trosieme chapitre de la loi Aquilia; un fantasme florentin, en *Mélanges Ellul*, (Paris 1983) 171.

Let's highlight two gigantic steps in legal thinking. The first was to interpret that the damage caused by the person who has acted on the other is so unfair as that produced by the one who has been negligent and has not put the necessary care to avoid it. This interpretation was very novel for its time, because ancient peoples tended to punish only those who wished to harm another, and not those who recklessly or negligently damaged it. In Rome, one could now hold accountable both for willful acts and for negligent acts.

The second discovery of Roman jurisprudence is to understand that damage is caused not only through physical contact with the damaged object, but by performing any action or omission from which the harm logically arises. In other words, the important thing to hold someone responsible for property damage is that between their conduct and the damage there is a "causal link".

We do not know the assumptions of *iniuria* to which the decenviral penalty of twenty-five asses applied, but we know that very soon its amount proved derisory,[13] so the Pretor admitted, in fact, an assessment subjective harm caused by the plaintiff.[14] This practical reality was elevated to the standard category by a law proposed by the dictator Lucio Cornelius Sila in 81 Bc.[15]

The *Lex Cornelia de iniuriis* established a *quaestio* for certain particular qualified *iniuriae* hypotheses, such as beatings, floggings, homelessness, injuries and attacks on personal freedom; as a result, the aggressor was required to pay pecuniary compensation, the amount of which was set at the request of the victim; a subsequent *senatusconsultum* extended the material field, including the drafting and publication of defamatory writings including, in addition, the ancillary penalty of *intestabilitas,* or loss of active probate.

Ulpianus, in D. 47.10.5, specifies the scope of the offence of *iniuria* relating to injuries,[16] clarifying that it includes beatings, whippings and tresing:

> …Lex itaque cornelia ex tribus causis dedit actionem: quod quis pulsatus verberatusve domusve eius vi introita sit. Apparet igitur omnem iniuriam, quae manu fiat, lege Cornelia contineri.

Although, in the accompanying examples, it points to the need for direct recourse to aggression, as Paulo clarifies in D.74.10.4

Paulus libro 50 ad edictum

> Si, cum servo meo pugnum ducere vellem, in proximo te stantem invitus percusserim, iniuriarum non teneor.

Concerning locus standi, the action corresponds to the free citizen who has suffered the offense - including women and *puber alieni iuris*- as well as the owner of the slave attacked. But the husband may also bring the action with respect to the wife and father to the daughter:

D. 47.10.1.9

Ulpianus libro 56 ad edictum

> 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.

Subsequently, it was envisaged that, apart from the dictates of the Lex Cornelia, some types of *iniuriae*, such as crimes against the modesty of women and children, crimes caused by people of high lineage, contempt, personal injury and rape of domicile, would be punishable[17], alternatively, with consistent corporal punishment, depending on the severity of cases, in flogging, *deportatio in in insulam,* confiscation of property, and even the penalty of death.[18]

In the *actio iniurarum*, the penalty was not a pecuniary assessment of the material damage suffered[19], because the integrity of a free person was priceless, but a lump sum that compensated the victim for the affront suffered, considering both the suffering and evil of the agent. Faced with the difficulty of measuring moral affront financially, the judge used to accept the victim's assessment, provided it was reasonable, although the Pretor could limit the condemnatio to a ceiling by means of a *taxatio*.

3. High Middle Ages

After the fall of the Western Empire, the High Middle Ages was a time of poor social and commercial activity; therefore, Roman law, which had served for a developed society, was inapplicable. In the Germanic kingdoms that emerged after the fall of the Empire, compilations of vulgar Roman law were drafted, which continued to apply for a long time. In the legal collections of this era, elements from Roman Law are noted, especially from the Justinian Code, together with the Canon Law and the local law of each of the small feudal states.

In the barbaric kingdoms that emerged after the fall of the Western Roman Empire (476 AD) some compilations of post-classical Roman law were made, such as the Edictum Theodorici, the Codex Euricianus, the Lex Romana Wisigothorum or the Lex Romana Burgundionum.

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[13] Vid. supra. About Tab. VIII.4.

[14] Possibly this practice was generalized following the *edictum generale de iniuriis aestimandis* (227- 150 a.C). Bravo Bosch, M. J.: *La injuria verbal colectiva*, Dykinson, Madrid, 2007, p. 6.

[15] Zumpt, AW.: *Das kriminalrecht der röm. Republik*, Scientia Verlag, Amsterdam, 1993, denies the autonomous existence of such a law that it links, on the other hand, the *Lex Cornelia de sicariis et veneficis.* The sources, however, seem to be decisive in the opposite direction.

[16] Later, however, according to Ulpianus, the Pretor extended the scope of the iniuria to any infamous act, as set out in D. 47. 10. 15.25(*Ulpianus libro 77 ad edictum*) Ait praetor: "Ne quid infamandi causa fiat. Si quis adversus ea fecerit, prout quaeque res erit, animadvertam".

[17] Guerrero Lebrón, *Op. cit*, p. 46.

[18] Barbero Santos, M.: "Honor e Iniuria en el Derecho Romano", in *Estudios de Criminología y Derecho Penal*, Universidad de Valladolid, Secretaría de Publicaciones, Valladolid, 1972, p. 323.

[19] But if, through the *iniuria*, material damage had been caused, in addition, *the actio legis aquilia*.

It maintains the criminalistic doctrine that the Germanic influence in the late Middle Ages provoked a spiritualization in the concept of *iniuria* that shifted the focus of physical injuries to offenses, shaping the insult as an attack on honor that may be or not accompanied of physical aggression. In our view, this process (if was) would be gradual and could be nuanced; because in classical sources we can find enough arguments to defend the importance, since the earliest times, of honor as a legal good protected with *actium iniurarum.* In addition, as we will see, even the legislation under medieval law includes, as *iniuriae*, the willful physical aggressions.

Therefore, some specialists such as Grande Pascual[20], consider the concept of *iniuria* as an offence against honor to be formed in this period. Confusion seems widespread in some historiographic doctrine. In our view, these authors allow themselves to be the polysemic nature of the term *iniuria* in classical law which, while meaning any action contrary to law, also soon takes place in the private crime of *iniuria,* which includes the physical injuries caused intentionally and offenses, as we have already seen.

In the *liber iudiciorum* there is a publification of the insults, called here *contumeliae,* which are usually punished with personal penalties, as in the case of the son or grandson who outrage parents and grandparents who, in addition to lose hereditary rights are punishable by flogging:

Liber 4.5.1 (Ervigio)

Exheredare autem filios aut nepotes licet pro levi culpa inlicitum iam dictis parentibus erit, flagellandi tamen et corripiendi eos, quamdiu sunt in familia constituti, tam avo quam avie, seu patri quam matri potes tas mane bit. Nam si filius filiave, nepos veI neptis tam presumtiosi extiterint, ut avum suum aut aviam, sive etiam patrem aut matrem tam gravibus iniuriis conentur afficere, hoc est, si aut alapa, pugno vel calce seu lapide aut fuste vel flagello percutiant, sive per pedem vel per capillos ac per manum etiam vel quocumque inhonesto casu abstrahere contumeliose presumant, aut publice quodcumque crimen avo aut nvie seu genitoribus suis obiciant: tales, si quidem manifeste convicti, et verberandi sunt ante iudicem quinquagenis flagellis et ab hereditate supradictorum, si idem avus aut avia, pater vel mater voluerint, repeilendi. Tamen si, resipiscentes a suo excessu, veniam a suprascriptis, quibus offenderant, inploraverint, eosque in gratiam receperint paterna pietate aut rerum suarum successors instituerint, neque prohiben ab eorum hereditate neque propter disciplinam, qna correpti I sunt, infamiam poterint ullatenus sustinere.

A corporal punishment (fifty lashes) is also applied, along with a fine of five solids, to whom he committed unlawful detention, considered an insult:

Lib. 6.4.4

Si in itinere positum aliquis iniuriose sine sua voluntate retinuerit, et ei in nullo debitor existat, quinque solidos pro sua iniuria consequatur ille, qui tentus est et si non habuerit, unde conponat, ille, qui eum re tinue ra t, L flagella suscipiat.

Specifically referred to injuries (separated already from moral offenses) the Liber Iudiciorum establishes fixed pecuniary sanctions reminiscent of decenviral legislation, including the noxality of the aggressor slave.

Lib. 6.4.1

Si ingenuus ingenuum quolibet bictu in capite percusserit, pro libore det solidos v, pro cute rupta solidos X, pro plaga usque ad ossum solidos XX, pro osso io fracto solidos C. Quod si ingenuus hoc in servo alieno conmiserit, medietatem superioris conpositionis exolvat. Si vero servus in servo hoc fecerit, tertiam eiusdem conpositionis adinpleat et L flagella suscipiat. Si autem servus ingenuum vulneraverit, ita componat, sicut curo ingenuus servum vulneraverit alienum, et LXX flagella suscipiat. Si vero dominus noluerit pro servo conponere, servus tradatur pro crimine.

Also following the decenviral model, the talion is established, although without express possibility of financial compensation, which we nevertheless assume would be admitted in avoidance of the talion:

Lib. 6.4.3

Quorumdam seva temeritas severioribus penis est legaliter ulciscenda, ut, dum metuit quisque pati quod fecerit, saltim ab inlicitis invitus abstineat. Quicumque igitur ingenuus ingenuum pertinaciter ausus decalvare aliquem aut turpibus maculis in faciem vel cetero corpore flagello, fuste seu quocumque hictu feriendo aut trahendo malitiose fedare vel maculare sive quacumque parte membrorum trucidare presumserit, aut etiam ligaverit, vel in custodiam aut in quocumque vinculo detinuerit, seu ligari ab alio aut custodie vel vinculo mancipari preceperit, iuxta quod alii intulit vel in-ferendum preceperit, correptus a iudice in se recipiat talionem; ita ut his, qui male pertulerit aut corporis contumeliam sustinuerit, si conponi sibi a presumtore voluerit, tantum conpositionis accipiat, quantum ipse taxaverit, qui lesionem noscitur pertulisse…

Although the talion is then replaced for a variety of cases, with flogging penalties.

Lib.6.4.3

…Pro alapa vero, pugno vel calce aut percussionem in capite proibemus reddere talionem, ne, dum talio rependitur, aut lesio maior aut periculum ingeratur…

In the case of reckless injuries, however, a fixed fine is imposed:

Lib.6.4.3

Certe qui lesit vel ledendum dicitur instituisse, si non ex priori disposito, sed subito exorta lite et cede conmissa

[20] Grande Pascual, A.: El delito de injurias en la documentación procesal vizcaína a finales del Antiguo Régimen (1766-1841), en *Clio & Crimen, n° 13 (2016), pp. 213-232.*

aliquo casu id convicerit se nolente perpetratum fuisse, pro evulso oculo det solidos C. Quod si contigerit, ut de eodem ocuio ex pa rte videat, qui percussus est libram auri a percussore in conpositionem accipiat…

The "Fuero Juzgo" adds, to this regulation (present in FJ 6.4), a new chapter (Book XII, Title III) that includes corporal punishment (lashes) to those who utter insulting expressions. However, according to the doctrine, it should be borne in mind that at this time not all persons are honorary holders and therefore as likely to be victims of crime[21]

4. Low Middle Ages. The ius commune

4.1 Reception of Roman Law

From the 11th century onwards, a cultural and social resurgence took place in Western Europe. Roman Law in its justinian version was re-studied and applied together with the Canon (Roman-canonical reception or "ius commune").

In this period the texts of Corpus Iuris Civilis were remanaged, which had remained almost forgotten, and especially the Digest, which was the highest technical part. Some circumstances of this time made it difficult to apply Roman law, but they slowly overlapped. Roman law appeared as the Law of the Holy Empire, and the Canon Law of the Pontificate. In times of discord between the two powers, the Church tried to stop the application of Roman law. On the other hand, the practice of the Western European population was based on vulgar Roman law, so that the „classicist" Roman law of the Justinian Compilation appeared as „strange" and too complicated technically. In addition, in each city or small state an indigenous law („Statutes") strongly entrenched in the population had developed.

The jurists of this era managed to incorporate canonical elements into Roman law, creating the so-called *ius commune* that spread throughout Europe. This law was composed of a technical element (the concepts of Justinian Roman law) and an ideological element (Christian thought incorporated through Canon Law).

The method for the study of the *ius commune* was the scholastic logic, initially cultivated by the Schools of Bologna. The Reception was a cultural phenomenon that arose with the creation of the medieval Universities, (11th and 12th centuries) especially that of Bologna and from there it was extended to all other European Universities. Later (12th and 13th centuries), glossa school emerged throughout Europe, jurists who made terminological clarifications in the texts of Corpus Iuris and incorporated them in the pages themselves as side notes. Finally, post-glossatores (14th and 15th centuries), instead of clarifying the texts, made systematic comments on Corpus Iuris.

The monarchs, although often did not accept the supremacy of the Holy Empire, were favourable to the Reception, to strengthen their power against the nobility. They mainly took advantage of the absolutist ideas of the public Roman Law of the *Imperium*, which was the one that had been transmitted in the Justinian Compilation, to justify the independence of civil power from the papacy. Students at Italian universities, and then in those of their own countries, learned the Roman Law of Reception, and sought to apply it in their professional work. The bourgeoisie accepted Roman law as it was considered more suitable for the commercial economy. They mainly took advantage of the "liberal" private law of the classical era that was collected in Justinian's compilation. The nobility, which continued to be attached to feudal privileges, showed resistance because it understood that the Roman Law of Reception favoured on the one hand the absolutism of real power, and on the other the rise of the bourgeoisie. The people, linked to tradition, of vulgar Roman law, received through the *leges Romanae barbarorum,* and to their local systems and jurisdictions, was contrary to the roman-canonical law that appeared as a "new" law.

In the southern regions of France, the penetration of common law was very easy and rapid, because the Roman tradition was stronger in those lands. In the northern regions, on the other hand, penetration was slower and more difficult because there was a very developed customary law ("Droit coutumier"), but the jurists were harmonizing this indigenous law with common law and in the Modern Age ended up succeed the Reception.

In the different Spanish kingdoms, there was also a different reception of the Reception: In Catalonia, Mallorca and Valencia, the penetration of the Reception was rapid and very intense, due to the greater proximity with Italy, the tradition of a very strong Romanization, and the development of a commercial and industrial bourgeoisie. The influence of the Reception is particularly evident even today in the Foral Law of these regions. In Aragon and Navarre, the penetration was slower and of a more doctrinal than practical character, but also left its mark. In Castile and León, penetration was slow and it founds strong resistance, until the arrival of Alfonso X "El Sabio".

4.2 Fuero Real

The discovery of the Corpus entails the breaking of the traditional principle of medieval law ("as far as all is concerned must be by all approved") which required medieval monarchs to agree on the law with the nobles in the courts. The generalization of the principle "Princeps legibus solutus est", decontextualized from its classical origin, can be interpreted so much as that "the right that governs for its people. it does not oblige the monarch" - which Alfonso X would soften by stating that the king must comply with his own laws "pero sin premia" - or as an expression of the monarch's ability to "create right, without having to rely on the existing right". This legislative capacity of the monarch will prove capital in the construction of the Modern States, which begins, in the case of Spain, with Alfonso X.

[21] Pérez Martín, La protección del honor y la fama en el derecho histórico español, en *Anales de Derecho, Universidad de Murcia, 11(1991) 117. In the same way, Masferrer Domingo cites the Breviary of Alaric y PS 5. 4. 1-20 (22). Masferrer Domingo, A.: La pena de infamia en la codificación penal española, en Ius fugit: Revista interdisciplinar de estudios histórico-jurídicos, 7(1998) pp. 123-178. However, the words of the Wise King, in Partidas VII.9.9 are clear: Tuerto o desonrra puede ser fecha a todo ome, o mujer de qualquier edad que sea, maguer fuese loco o desmemoriado… where, expressly, servants are included.*

In parallel with the VII Partidas, the Wise King promulgated the „Fuero Real de España" with the intention of replacing traditional Spanish law and unifying the rules of the different territories. This new "Fuero" was granted to Aguilar de Campoo, in 1256, the text was granted to different Castilian villages and cities (Burgos, Palencia, Sahagún, Santo Domingo de la Calzada, Valladolid and probably Miranda de Ebro), as well as communities of villa and land of the Castilian Extremadura (Alarcón, Alcaraz, Atienza, Arévalo, Avila, Buitrago, Cuéllar, Hita, Peñafiel, Segovia, Soria, and possibly Cuenca) and even the Extremadura of León (Trujillo). In 1257 Talavera de la Reina was granted, for three years later to resume the policy of concessions of the same text to localities such as Agreda (1260), Béjar, Escalona and Villa Real (1261); and finally, to Guadalajara, Madrid, Plasencia and Tordesillas in 1262. The policy of uniformity of the law through the application of the Fuero Real was paralyzed coinciding with the economic problems that the kingdom was going through and with the uprising of the Mudejars in Murcia and Andalusia in 1263, probably by the resistances of nobles to the implementation of this *ius commune*.

In the Fuero, the *Liber Iudiciorum* tradition of punishing insults and injuries with fixed monetary penalties is maintained. Thus, in the first law, title III of the fourth book, it is provided:

> Todo ome que metiere la cabeza a otro so lodo, peche trecientos sueldos, los medios al rey e los medios al querelloso: et si nol fuer provado, salvese asi como manda la ley.

And it continues in Law II:

> Qualquier que a otro denostare, quel dixiere gafo o fodudinculo, o cornudo, o traydor, o herege, o a muger de su marido puta, desdigalo antel alcalle e ante ornes buenos al plazo que! pusiere el alcalle e peche ccc sueldos, la meytad al rey e la meytad al querelloso: et si negare que lo non dixo e non ge lo pudieren provar, salvese como manda la ley, et si salvar non se quisiere, faga la enmienda e peche la calonnaa: et qui dixiere otros denuestos, desdigase antel alcalle e ante omes buenos, e diga que mentió en ellos: et si ome de otra ley se tornare cristiano e alguna le llamare tornadizo, peche x maravedis al rey e otros x al querelloso, e si non oviere de que los pechar, caya en la pena que dice la ley

However, the amount of the fine corresponding to the injuries is undetermined in Law IX, opening the door to the reintroduction of the estimate by the victim:

> Sy alguno firiere a otro, e el ferido diere la boz al merino o a los acalles, maguer que se avenga con aquel quel firió por los fieles, o por sí, o por otro qualquier, non pierda el merino la calońa, o aquel que la oviere de avera; pues la voz le fue dada.

The text offers - in the style of the XII Tables - the possibility of composition between the parties, which, tacitly, implies the payment of an amount that the victim considers enough, although this does not exclude the fine because the voice was given.

We find in the texts of the Fuero a "pubification" of the crime of insults, which here appears as a novelty, unfolded in two crimes: offenses (laws I and II) and injuries (Law IX). As stated, the action for injuries becomes public here, excluding forgiveness of the offended as a cause of termination of criminal liability. But even in the offenses, where the offended offense holds, we believe, the possibility of forgiving the author, the fine is no longer a private penalty, but half will be given to the King. In this case, moreover, if the offender does not wish to apologise, he must pay both the fine and the amendment, understood as compensation estimated by the actor.

4.3 VII Partidas

The regulation of *iniurae* will be different in the VII Partidas: First, word and deed offenses are reunify in a single type. In addition, the amendment (estimated compensation by the victim) will be an alternative to the penalty. The Wise King includes it in Heading VII, Title IX, Law VI:

> Firiendo un ome a otro con mano, o con pie, o con palo, o con piedra, o con armas, o con otra cosa qualquiera, dezimos que le fase tuerto, e desonrra. E por ende dezimos que el que recibíese tal desonrra, o tuerto; quier salga sangre e de la erida, quier no, puede demandar que le sea fecha enmienda della, e el judgador deve apremiar a aquel que lo firio que lo enmiénde…

The Wise King then includes a long list of actions that involve "disgrace," including unlawful detention and kidnapping.

Later, in Law XX of the same title, the Headings classify dishonors into appalling, serious and minor and clarify how amendments should be calculated:

> …por ende mandamos que los juzgadores que hubieren a juzgar las enmiendas dellas que se aperciban por el departimiento susodicho e esta ley a juzgarlos: de manera que las enmiendas de las graves deshonras sean mayores, e de las mas ligeras sean menores, ansí que cada uno reciba pena según meresce e según fuere la deshonra, o ligera o grave, que fizo o dixo a otro.

And it continues in law 21st

> E si pidiere el que recibe la desonrra que sea fecha la enmienda de dineros, e prouare lo que dixo, o querello: deue entonces preguntar el judgador al querelloso, por quanto nó querria aver recebido aquella desonrra: e desque la hubiere estimado, el deve mirar qual fue el fecho de la desonrra, e el lugar en que fue fecha, e qual es aquel que la recibio, e el que la fizo. E catadas todas estas cosas, si entendiere que la estimó derechamente, deve el mandar que jure que por tanto cuanto estimó la deshonrra, que la non querría aver recibido…

The action, in any case, shall last for one year, as was the case, in classical law, for the foregoing actions. In addition, it is included in forgiveness, express or tacit, as a mode of extinction of the action:

Partidas VII.9.22
Fasta un año puede todo ome demandar enmienda de la desonrra, o del tuerto que recibió. E si un año passasse desde el día que le fuese fecha la desonrra, que non demandasse en juyzio enmienda della, de allí en adelante non la podría fazer… Otrosí dezimos que si un ome recibiesse desonrra de otro, e después de ello se acompañasse con él de su grado, e comiesse o bebiesse con él en su casa, o en la de otro, o en otro lugar, que de allí adelante non puede demandar enmienda de tuerto, o de desonrra quel ouiesse ante fecha. E aún dezimos que si después que un ome ouiesse recebido desonrra de otro, que si aquél que gela ouiesse fecho le dixesse asi: ruego vos que non vos tengades por desonrrado de lo que vos fize, e que non vos quexedes de mi: e el otro respondiesse que se non tenía por desonrrado, o que non lo quería mal, o que perdía querella del: que de allí adelante non es el otro tenudo de le fazer enmienda por aquella desonrra.

The action, for its part, as was already the case in classical law - and continues to happen today - was personal, prohibiting, in Law XXIII, the beginning of the action by the heir.

También contemplan las Partidas la *exceptio veritatis*, según la cual, *si aquel que deshonrase a otro por tales palabras o por otras semejantes dellas, las otorgase o quisiese demostrar que es verdad aquel mal que le dixo del, non cae en pena ninguna, si lo probase*. Esta exceptio queda, sin embargo, limitada en la siguiente ley, al disponer que no se admitirá la *probatio veritatis* a los hijos, nietos o biznietos, respecto del ascendiente, ni al criado respecto al señor.

4.4 Evolution of iniuriae in Anglo-Saxon law

Although at first there was the reception of the justinian texts also in England, the jurisprudential practice was to depart the application of the Digest in the interests of a system - much closer to the classical tradition - of legal creation based on the Precedent. Thus, Anglo-Saxon law was separated from *civil law,* forming the so-called Common *law.*

In *tort law,* the expression *punitive damages* (also exemplary *damages, punitory damages, non-compensatory damages,* etc.) has been formed as a part of the consequences legal damage. Alongside this, other categories are often considered, lost of *income,* out of *pocket expenses, hedonic damages, pain and suffering* (damage from pain or suffering), etc.

According to the authors, the figure of "punitive damages" is first regulated in a statute of 1275[22] which sentences the penalty of the *duplum* to the person who caused harm to a religious.[23] Revealingly to our thesis, the early evolution of this institution develops around the injuries of honor, understood in a broad sense[24], as understood in the Roman world.

Most of the doctrine places the first jurisprudential application in the judgments in *Huckle v. Money* and Wilkes *v. Wood* of 1763. As CARRASCOSA González[25] explains, the British government tried to prevent the publication of a pamphlet (the North *Briton)* by unlawfully arresting the editor and editor, which sued the government. The judge proposes to the jury that it impose pecuniary sentences in charge of the government and for the benefit of those injured in excess of the actual damages caused, understanding that the offense involved in arbitrary imprisonment is far superior to the actual damage. From our perspective, such an "arbitrary" condemnation may be shocking, given the strict principle of legality that governs in continental countries, but no Romanist will be surprised:

1. That the judge imposes pecuniary penalties for the benefit of the victim
2. That in assessing the damage the court has sufficient arbitrate to determine the amount unmatched by the damage caused
3. To impose - as proposed by the statute of 1275 - sentence the *duplum*

All this would, in our view, perfectly consistent with the pre-coding Romanesque tradition, at least with the principles underlying the construction of the Western legal tradition and which have not been fully received in coding, which is why *punitive damages* appear as an element systematically foreign to our modern law.

The doctrine usually considers the institution of *punitive damages* as a primarily sanctioning measure[26], it could properly be characterized as a pure criminal action, as it was, for example, the *actio furti*, since the possibility of the victim claiming compensation for the damage caused is not excluded[27]. As a sanctioning and not properly restorative action, the characterization of this institution entails the usual notes of any punitive[28] standard: this is usually the purposes of general and special[29] prevention and satisfaction of the victim's need for justice. Alongside this, in a manner consistent with the criminal nature of the sanction,

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22 Saux, E.I.: *Responsabilidad civil contractual y aquiliana*, Universidad Nac. del Litoral, 2005, p. 217.

23 Aliste Santos, T. J.: *El origen histórico de los punitive damages como presupuesto de su rechazo procesal en los países de civil law*, *La Ley* 1699/2014, relates its origin to medieval *amercements* (p. 3).

24 Calls, in modern English,"injuries". Vid. Rodríguez Samudio, R.: El daño no económico en el derecho estadounidense. *Revista Facultad de Derecho y Ciencias Políticas* 44(2014). Available in: http://www.redalyc.org/articulo.oa?id=151433273008. Within the category of *non-economic* damages, the author make an interesting historical analysis of the case law of the institution in English and American law, around the protection of honor.

25 *Op. cit,* p. 389.

26 García Matamoros y Herrera Lozano, MC.: El concepto de los daños punitivos o punitive damages in *Estud. Socio-Juríd*., 5 (2003), 212.

27 Some criminal actions, such as the actio furti, did have this compatibility with the *rei-persecutio* claim while others, such as the actio legis aquilia were incompatible with a claim for damages; while such a character may have appeared in late times, being originally a pure actio, as Diaz Bautista argues, A.: La función reipersecutoria de la poena ex lege Aquilia, en *La responsabilidad civil: de Roma al derecho moderno: IV Congreso Internacional y VII Congreso Iberoamericano de Derecho Romano* (coord. por Alfonso Murillo Villar), Burgos, 2001, p. 269.

28 García Matamoros y Herrera Lozano: *Op. cit.* p. 216,

29 According to some authors, this is the main function of the institution analyzed. Vid. Zavala De Gonzalez, M.: Función preventiva de daños, *LA LEY*, 03/10/2011.

the Anglo-Saxon doctrine includes a subjective[30] element that is defined as *outrageous conduct, due to its perverse motivation or careless indifference to the rights of others*. According to the doctrine[31], the agent's malicious behavior is precisely the differentiating and quantifier element of punitive damage.

However, it is not possible to provide a precise definition of the conduct motivating the imposition of punitive damages because this regulation is not uniform across *common law* countries. Thus, in the United Kingdom, the figure of exemplary *damages* was reduced in 1964[32] to typical cases such as the violation of constitutional rights, the harmful conduct expressly calculated and those cases in which the law expressly foresee it. In the United States, where the punitive *damage figure* is much more widespread, the application of this is not totally uniform, presenting peculiarities in the different states.

While the direct malice[33] and its variants (second-degree direct malice and recklessness[34]) appear to be clearly covered by the assumption, it is doubtful that punitive damages may be incurred in the event of action so that while some authors expressly rule out the extension of this rule to cases of guilt can[35], the description of the conduct that is usually offered, usually includes criminal *indifference to obligations civil or to the rights of others*[36], which could be described as "*culpa lata*" Anyway, the limits in our doctrine between malice and willful blindness are very diffuse[37]. As Paulus points out, *magna culpa dolus est (culpa lata a dolo equiparetur*).

One of the famous cases of punitive damage was that of the "Ford Pinto". The Pinto model was a compact, low-weight vehicle developed by the American company in the early 70 s in the context of the oil crisis. It was designed by Lee Lacocca to compete with the lighter, lower-power Japanese vehicles. Even in the design and manufacturing process, engineers warned of two structural problems (placement of the gasoline tank behind the rear axle and weakness of the materials) that frequently caused the explosion of the vehicle and the entrapment of the occupants in the event of a rear collision. However, the need to launch the vehicle and meet the company's financial expectations ruled out safety warnings, thus put on the market a product that the manufacturer knew unsafe.

In May 1972, Lily Gray was traveling with the youngest Richard Grimshaw in a Ford Pinto, when her vehicle was hit by another one driving about 30 miles per hour. The crash effectively caused a fire in the vehicle, as well as the locking of the doors, leaving the occupants trapped in the fire. Lily Gray died of heart problems from burns, while Richard survived with severe aftermath.

Grimshaw and Ms. Gray's heirs sued Ford Motor Company. After a six-month trial, the jury ordered Ford Motor Company[38] to pay Grimshaw two and a half million dollars for compensatory damages and more than one hundred million in punitive damages, and the Grays half a million dollars in damages compensation, although these amounts were revised downwards in the appeal.

This case shows the subjective element of the action deserving of the conviction for punitive damages: obviously it cannot be attributed to the company or its direct collateral. It does not seem likely that there was a deliberate intention to provoke the result, but it does prove a very serious willful blindness, since it appears that the company, prior to marketing, was the presence of deficiencies which, in the event of range, would cause the explosion and entrapment. As Carrascosa González[39] argues, Ford made calculations and determined that it would be cheaper for him to compensate damages than modifying the vehicle to make it safer, this is the malice that American jurisprudence considers necessary for the *punitive damages* to be generated and which, in our view, is consistent with The axioma of Paulus that equates the negligence with the malice.

5. Conclusions

Thus, according to our study, there is a long evolution of the *iniuriae*, which comprise both intentional and affront injuries, from the dawn of law, with the XII Tables, to the Partidas, passing through the lex Cornelia that includes a means of sanction private economic economy *(actio estimatoria)* which, although disappeared in the early Middle Ages, is reintroduced, quite faithfully, by Alfonso X The Wise in the VII Partidas. In parallel with this, a concept of *punitive damages* is developed in the United Kingdom - and subsequently in the United States- which, although it seems strange to the continental tradition, is perfectly consistent - in our view - with the classic system of the estimated private fine. It will therefore be from the Codification, when the offence is disregarded, which constitutes a criminal offence of insults, of the damage (patrimonial or bodily) which is subject, in our law, at least apparently, to reparation, with the abolition of the private fine.

[30] Vid. AMERICAN LAW INSTITUTE; Restatement of the Law of Torts, Art. 908, vol. 4. ST Paul, Minn, 1979, p. 464.
[31] Vadillo Robredo, G.: daños punitivos en el proceso civil norteamericano, *en Estudios de Deusto: revista de la Universidad de Deusto*, 44, 2 (1996) p. 178.
[32] Case Rookes v Barnard and others [1964] UKHL 1, [1964] AC 1129.
[33] The agent wants to perform the action and produce the result.
[34] When the agent desires the action, but not the result, however, and being aware that the result is inevitable or very likely, performs the action.
[35] Vid. Keeton, D., Dobbs, D., Keeton, R. & Owen, D., *Prosser and Keeton on the Law of Torts*, 5.a edic., West Publishing Co. (Lawyers edition), St. Paul (Minn.), 1984, pp. 9-10.
[36] Vid. a. e. Field, G.W., A Treatise on the Law of Damages, Mills & Company Law Publishers, Des Moines (Iowa), 1876, pp. 82-83
[37] *Paulus libro primo manualium* D. 50. 16. 226: Magna neglegentia culpa est: magna culpa dolus est.
[38] Grimshaw vs Ford Motor Company, 119 Cal App 3d 757 (1981).
[39] Carrascosa González, *op. cit.*, p. 390.

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