Punishment, reparation and the evolution of private law: the actio iniuriarum *in a changing world*

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Tracking the long journey of the *actio iniuriarum* from its Roman origins via seventeeth century Holland to South African law today, this contribution explores its transformation from a punitive action into a reparative one. In doing so, it engages with vital questions about the evolution of our contemporary concept of private law: how did it come about, how did this conceptual development of the law interact with the law's substantive content, and what does this tell us about the way in which private law relates to a changing environment? This survey shows how the growing differentiation of private law as a distinctive field drove forward conceptual and procedural innovations which, with increasing intensity, focused attention on the nature of the individual entitlements at play, and tended to a bilateral form of justice in which liability is imposed only when, and only to the extent that, it is justified to hold one person liable to the another. Whereas in Roman law hubristic behaviour was the core of the wrong and any impact on the victim the means bringing this about, the South African law of delict treats the impact on the victim as the gist of the wrong, and the defendant's behaviour as the means. It is this change, along with the associated separation of criminal and civil liability, that has enabled the *actio iniuriarum* to survive into a fundamentally changed world.

I INTRODUCTION

As an uncodified system with some roots stretching back to Roman law, South African law provides us with a window on how private law innately, without significant injections of public purposes via legislative reform, interacts with a changing environment. It is surely remarkable that the venerable Roman delict of *iniuria*, originating in the fifth century BCE, still features prominently in every text on the South African law of delict.[1] Even today, these tell us, the *actio iniuriarum* provides the foundation for liability for non-pecuniary harm, complementing the *actio legis Aquiliae* on which liability for economic loss is based. Yet its South African incarnation is far from identical to its Roman antecedent. There are important differences in substantive content as well as in remedial responses: while *iniuria* in Roman law sanctioned disrespect, South African law has come to focus on injured feelings; and the Roman private

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[1] See, for example D Visser 'Compensation for harm to the personality — the *actio iniuriarum*' in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 1165; J Neethling, J Potgieter & J Knoebel (eds) *Law of Delict* 7 ed (2015); J Midgley & J Van der Walt *Principles of Delict* 4 ed (2016); M Loubser & R Midgley (eds) *The Law of Delict in South Africa* 3 ed (2018).

penalty has been replaced by a clear separation between private claims issuing in compensatory damages and publicly prosecuted *crimen iniuria* leading to punishment.[2]

This striking combination of continuity and change invites exploration of the relationship between the law and its evolving environment. The existence of the South African *actio iniuriarum* in a world fundamentally different from that of ancient Rome raises questions about how much of the original has been retained, about how such persistence is realised, as well as about connections between changes in the law and changes in its context. These questions resonate beyond the fate of *iniuria* as a distinct delict, and indeed beyond South African law, for the continuity and change that we can observe here are linked to the very notion of private law. This, too, can be traced to Roman roots. Ulpian (ca 170–223 CE) already identified private law as a fundamental legal category, distinguishing it from public law: 'Public law is that which pertains to the constitution of the Roman state, private law concerns the interest of individuals'.[3] While this looks familiar to contemporary eyes, even in common law systems,[4] the Roman conception of private law was not the same as ours. In contrast to our demarcation of the boundary between private law and criminal law on the basis of whether the unsuccessful defendant must either undo a wrong or be punished for it,[5] Roman private law included punitive remedies. The various delictual actions, including the *actio iniuriarum*, were penal actions resulting in punishment of the perpetrators, their private character and distinction from public crimes residing in the exclusivity of the victim's power to sue the perpetrator.[6]

Private law is, therefore, not a concept with an immutable content. It has a history: its differentiation from other legal categories is constructed, not given, and capable of change. Examining the evolution of the *actio iniuriarum* may, consequently, shed light on vital questions about the evolution of our contemporary concept of private law: how did it come about, and how did this conceptual development of the law interact with the law's substantive

[2] These changes are detailed in Part III below.

[3] D 1.1.1.2 (Ulpian, *Institutes* 1). Ulpian's *Institutes* date from the early third century CE. See also, I 1.1.4. For different assessments of the Roman distinction, see A Watson *The Making of the Civil Law* (1981) 144–67 and J Harries 'Roman law codes and the Roman tradition' in J Cairns & P du Plessis (eds) *Beyond Dogmatics: Law and Society in the Roman World* (2007) 85, 90–2.

[4] See eg the two volumes published by Oxford University Press: A Burrows (ed) *English Private Law* 3 ed (2013) and D Feldman (ed) *English Public Law* 2 ed (2009).

[5] See eg J Gardner *From Personal Life to Private Law* (2018) 3–4; M Dyson (ed) *Unravelling Tort and Crime* (2014); M Dyson (ed) *Comparing Tort and Crime* (2015). Although the availability of exemplary/punitive damages in common law jurisdictions shows that the border has been breached in places, it does not refute its existence; unlike in Roman law, where remedies for delicts were intrinsically penal (see below text accompanying notes 56-64), exemplary/punitive damages are only awarded in special circumstances (see JY Gotanda 'Punitive Damages: A Comparative Analysis (2003-4) 42 *Columbia. Journal of Transnational Law* 391).

[6] A Sirks 'Delicts' in D Johnstone (ed) *The Cambridge Companion to Roman Law* (2015) 246.

content? What does this tell us about the way in which private law relates to its changing environment?

That is the purpose of this contribution, in homage to our honorand's inspiring work on the history of private law in South Africa and elsewhere.[7] I will do so in two steps. South Africa received the *actio iniuriarum* via Roman-Dutch law, so that is where the analysis will start, after a brief sketch of the Roman legacy. Two departures from the position in Roman law are particularly noticeable in the works of Dutch authors prior to the codification of law in Holland. These are, firstly, the use of the *actio iniuriarum* as conceptual home for a range of legal responses to what one could broadly describe as marital sexual wrongs, which fell outside its purview in Rome; and, secondly, its transformation from an entirely penal action into one that was understood to contain both penal and reparative elements. The transplantation of Roman-Dutch law to South Africa stimulated further movement along both pathways, and this is the focus of the second step. Here, the *actio iniuriarum* divided conclusively into a publicly prosecuted, criminal strand and a purely reparative, private law strand. As we shall see, writers of the Roman-Dutch period were already concerned with identifying the individual entitlements protected by the *actio iniuriarum,* but it was particularly its survival in South Africa, after its legislative abolition in Holland and the rest of Europe as part of the state monopolisation of penal law during the eighteenth and nineteenth centuries, that brought out the implications of its migration from punishment to reparation. Here, its private law incarnation came to display, especially in these cases of marital sexual wrongs, a palpable concern with bilateral justice. This comes to light particularly clearly in the reasoning employed when South Africa's highest courts eventually confronted the question whether these wrongs still merited legal recognition in the twenty-first century.

In tracing these developments, I shall combine the close analysis of legal doctrines and dogmas that is the standard methodology in this field of legal history with a law-and-society approach drawing on the insights of both leading theorists of the sociology of law and leading

[7] D Visser & N Whitty 'The Structure of the Law of Delict in Historical Perspective' in K Reid & R Zimmermann *A History of Private Law in Scotland Vol II* (2000) 422 provides direct inspiration for this tribute. See further, D Visser (ed) *Essays on the History of Law* (1989); R Zimmermann & D Visser (eds) *Southern Cross: Common Law and Civil Law in South Africa* (1996); R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective; Property and Obligations in Scotland and South Africa* (2004); D Visser 'Placing the civilian tradition in Scotland: a Roman-Dutch perspective' in DL Carey-Miller & R Zimmermann (eds) *The Civilian Tradition and Scots Law* (1997) 239–58; F du Bois & D Visser 'Der Einfluss des Europäischen Rechts in Südafrika' (2001) 2 *Jahrbuch für Europäische Geschichte* 47–108; D Visser 'Cultural forces in the making of mixed legal systems' (2003) 78 *Tulane Law Review* 41–78.

theorists of private law.[8] In adopting this interdisciplinary methodology, I seek to build on the ambitions for a more contextualised legal history that has been articulated especially in recent work on Roman law.[9] My approach in this paper draws inspiration from the legal sociology of Niklas Luhmann,[10] which, as he himself points out, closely tracks the internal perspective of legal thought.[11] Luhmann depicts the law as a subsystem of society that, being distinct from both the social system as a whole and other subsystems like the economy, religion and morality, 'relies exclusively on self-generated information and is capable of distinguishing internal needs from what it sees as environmental problems'.[12] The important point for our purposes is that law is here seen not as an open system receiving inputs from its environment which it then transforms into outputs — that is, as responsive to its environment and shaped by the latter and its needs — but rather as 'operationally closed', concerned only with its own distinctive task of identifying what is lawful and what unlawful.[13] To be sure, it is part of the social system and connected to other subsystems — 'structurally coupled', in Luhmann's vocabulary — and could not exist in their absence,[14] but it is the law itself that determines what it is to make, for its own purposes, of the messages it receives from its environment. Thus, the 'perturbations, irritations, surprises, and disappointments channeled by its structural couplings' are not environmental phenomena transmitted into the system from outside but are 'purely internal constructs because they appear only as deviations from [its own] expectation'.[15] At the same time, because 'structural couplings provide a continuous influx of disorder against which the system maintains or changes its structure', they make it possible for the law to evolve, to learn

[8] My understanding of law-and-society approaches and their varied possibilities owes much to D Galligan *Law in Modern Society* (2006).

[9] See eg, Cairns & du Plessis (n 3); P du Plessis (ed) *New Frontiers: Law and Society in the Roman World* (2013). The editors' introductions in both works provide insightful overviews of work in this vein and the challenges posed by this ambition. A contextual approach has long been followed in work on English legal history, eg P Atiyah *The Rise and Fall of Freedom of Contract* (1985); P Mitchell *A History of Tort Law 1900–1950* (2015). These do not, however, draw directly on the sociology of law.

[10] N Luhmann *Law as a Social System* (2008); N Luhmann 'Law as a social system' (1988) 83 *Northwestern University Law Review* 136; N Luhmann 'Operational closure and structural coupling: the differentiation of the legal system' (1991) 13 *Cardozo Law Review* 1419.

[11] Eg in 'Social system' *Northwestern University LR* (n 10) 143; and in 'Operational closure' (n 10) 1427 (referring to HLA Hart).

[12] Luhmann 'Operational closure' (n 10) 1422. This applies not just to law, but to all subsystems — each operates in this way, often on the same subject matter.

[13] 'As a closed system, the law is completely autonomous at the level of its own operations. Only the law can say what is lawful and what is unlawful, and in deciding this question it must always refer to the results of its own operations and to the consequences for the system's future operations ... . It achieves its structural stability through this recursivity and not, as one might suppose, through favorable input or worthy output.': Luhmann 'Social system' *Northwestern University LR* (n 10) 139.

[14] Luhmann 'Social system' *Northwestern University LR* (n 10) 136.

[15] Luhmann 'Operational closure' (n 10) 1432.

and transform its structures (always to maintain itself in its own distinctiveness).[16] It is for these reasons that legal doctrines and dogmas, although not static and inflexible, do not simply reflect and respond to societal changes, but are autonomous, as some legal historians have pointed out.[17] As Luhmann explains, the 'doctrinalization and systematization' which stabilise law as a distinctive system often 'outlast changes in society by virtue of their own potential for innovation, which is inherent in their concepts', and, by virtue of the demands of internal consistency, 'very often a system fails to make full use of the degrees of freedom the environment permits it and restricts its own evolution to a greater degree than would be ecologically necessary'.[18]

Whilst this means that a law-and-society approach must take legal thought seriously on its own terms, and not treat it as a mere epiphenomenon, it does not yet provide us with the tools for identifying the 'influx of disorder' relevant to our analysis or for tracing the law's evolution. To do this, I will on the one hand invoke a distinction between different social systems drawn by Emile Durkheim,[19] and, on the other, employ an understanding of private law, specifically the law of obligations, articulated especially clearly by Ernest Weinrib and other 'corrective justice' theorists.[20] As neither of these represents an uncontroversially accurate description of the full reality of the phenomena each seeks to describe,[21] I will make use of another methodological contribution made by the sociology of law: Max Weber's ideal types. An ideal type is a theoretical construct which advances understanding not through

[16] Thus, 'operational closure' describes the way in which the law operates and does not claim that law does not interact in any way with its environment. To the contrary, operational closure enables a certain kind of openness: because the system itself always determines how it interacts with its environment, adjustments and changes do not threaten its differentiation from other systems. It can exist as an 'an open-ended, ongoing concern structurally requiring itself to decide how to allocate its positive or negative value.': Luhmann 'Operational closure' (n 10) 1428.

[17] Eg: 'Law once created lives on even in very different circumstances, also for a very long time, even for centuries': A Watson 'Law and society' in Cairns & Du Plessis (n 3) 9. See also the description by Cairns & Du Plessis (n 3) in 'Introduction: Themes and literature' 3–8 of the difficulties encountered in various attempts to relate Roman law to Roman social and economic conditions.

[18] Luhmann 'Social system' *Northwestern University LR* (n 10) 146–8.

[19] E Durkheim *The Division of Labor in Society* 1893 translated by G Simpson (1933). See especially S Lukes *Emile Durkheim: His Life and Work, a Historical and Critical Study* (1985). Also, S Lukes & A Scull (eds) *Durkheim and the Law* 2 ed (2013); R Cotterrell (ed) *Emile Durkheim: Justice, Morality and Politics* (2010).

[20] E Weinrib *The Idea of Private Law* (1995); E Weinrib *Corrective Justice* (2012); A Ripstein *Private Wrongs* (2016); A Beever *A Theory of Tort Liability* (2016). The ideal type is not narrowly focused; it would also encompass the positions of R Stevens *Torts and Rights* (2007) and even Gardner (n 5) (see J Gardner 'What is tort law for? Part 1. The place of corrective justice' (2011) 30 *Law and Philosophy* 1).

[21] According to Lukes *Life and Work* (n 19) 159, Durkheim 'vastly understates the degree of interdependence and reciprocity in pre-industrial societies' and 'vastly overstates the role of repressive law in pre-industrial societies'. Regarding corrective justice theory, see especially the critiques by S Hedley 'Looking outward or looking inward? Obligations scholarship in the early 21st century' in A Robertson & Tang Hang Wu (eds) *The Goals of Private Law* (2009) 193; S Steel 'Private Law and Justice' (2013) 33 *Oxford Journal of Legal Studies* 607; J Gardner 'What is tort law for? Part 2. The place of distributive justice' in J Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (2014) 335; and S Hedley 'The Rise and Fall of Private Law Theory' (2018) *LQR* 214.

capturing the whole reality accurately but by abstracting from it so as to highlight features of particular explanatory importance.[22] From Durkheim's social typology, I shall take the distinction between a society exhibiting 'mechanical solidarity' — one whose cohesion and integration comes from fixed roles, typically due to a high degree of shared values and understandings of the world, religious beliefs, etc. — and one exhibiting 'organic solidarity', where mutual functional interdependence holds together free and divergent individuals whose roles are fluid and open, typically inhabiting industrial societies.[23] To me, as to others,[24] these appear to provide useful ideal types, representing the outer poles of a spectrum, and, I think, are helpful in bringing out salient differences between the social system in which the *actio iniuriarum* took its initial shape, and those in which it developed further due to its reception into Roman-Dutch and South African law. In a similar way, Weinrib's highly differentiated notion of private law as giving effect to purely bilateral justice, especially his account of delict/tort as corrective rather than punitive, provides us with an ideal type — this time, one that highlights legal evolution, when the private penalties of Roman law are set against Roman-Dutch and South African legal remedies. By relating the development of the *actio iniuriarum* to these ideal types of society and of private law respectively, the two stages of the ensuing analysis will lay the foundations for a conclusion proposing answers to the questions animating this contribution. At the same time, they will enable us to reflect on the utility of splicing doctrinal analysis with sociological theory in this way.

II ROMAN-DUTCH LAW

(1) *Roman beginnings*

The *actio iniuriarum* has a long history in Roman law, dating back to the Twelve Tables.[25] In Justinianic law, *iniuria* was a protean concept, Book 47 of the Digest listing diverse instantiations, stretching from assault to sexual harassment, defamation and other affronts.[26] Yet already in the classical period (from the first century CE to roughly the middle of the third

[22] See R Swedberg 'How to use Max Weber's ideal type in sociological analysis' (2018) 18 *Journal of Classical Sociology* 181.
[23] This is not very far removed from Sir Henry Maine's account of the development from 'status' to 'contract' in his *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (1861). For all its weaknesses, Durkheim's typology seems to me much richer than Maine's, also maintaining a clearer distinction between social and legal concepts.
[24] Eg L Herzog 'Durkheim on Social Justice: The Argument from "Organic Solidarity"' (2018) 112 *American Political Science Review* 112.
[25] See generally, R Zimmerman *The Law of Obligations* (1996) 1050–94; E Descheemaeker & H Scott '*Iniuria* and the common law' in E Descheemaeker & H Scott (eds) Iniuria *and the Common Law* (2013) 1, 3–11.
[26] See D 47.10.

century) its gist was *contumelia*,[27] which, according to Peter Birks, consisted in 'violating, not an interest in emotional calm, but the victims's right to his or her proper share of respect'.[28] David Ibbetson translates *contumelia*, as 'disrespect', pointing out the importance of both the defendant's intention and the relative status of the parties to this notion.[29] An injurious act was accordingly one that infringed the *dignitas* of another, which, in the context of Roman society, signified their social rank, status or importance, the esteem due to them by virtue of their standing within society.[30] The *actio iniuriarum* was thus closely linked to social conventions and codes of proper behaviour, as is further evident from the requirement that, to be actionable, the defendant's conduct must have been *adversus bonos mores*, contrary to sound morals.[31] With liability revolving around 'thick' concepts[32] such as these, the adjudication of disputes involved extracting 'from social relations how the parties should have acted and what was reasonable and supportable in the circumstances'.[33] As such, it was law of, and for, a society with a high level of shared understanding and social relations marked by clear and stable role-expectations — a society closer to Durkheim's 'mechanical solidarity' than to 'organic solidarity'.[34] Like the other Roman delicts, *iniuria* served less to repair harm wrongfully inflicted than to right a wrong: Roman law never developed a full separation between compensation and punishment, between private law and criminal law. Although a private action, the *actio iniuriarum* was thus purely penal in nature.[35] Here, too, it is possible to draw a connection to Durkheim's social typology, as he associated punitive law with 'mechanical solidarity' while linking restitutive law to the 'organic solidarity' of functionally differentiated societies.[36]

Along with the fractured, casuistic, pattern of the Roman law of delicts, this persisted in the second life of Roman law, after the rediscovery of the *Corpus Iuris Civilis*, through the

[27] D 47.10.1 pr (Ulpian, 56 *Ad edictum*); see also I 4.4 pr.
[28] P Birks 'Harassment and hubris: the right to an equality of respect' (1997) 32 *Irish Jurist* 1, 11.
[29] D Ibbetson '*Iniuria*, Roman and English' in Descheemaeker & Scott (n 25) 33, 40. See also Sirks (n 6) 254–5.
[30] Descheemaeker & Scott (n 25) 13, 19; *Oxford Latin Dictionary* (1968) 542 'dignitas'. See also Zimmermann (n 25) 1062.
[31] Ibbetson (n 29) 42–3.
[32] Bernard Williams introduced the term 'thick concept' in his *Ethics and the Limits of Philosophy* (1985) to classify ethical concepts that are plausibly controlled by the facts. They are not 'action-guiding' and 'world-guided' in that their correct application depends on how the world is (128, 140–1).
[33] Galligan (n 8) 73.
[34] This is not to ignore either the enormous difference between the society of the Twelve Tables and that of the Justinianic compilation, or the significant evolution of the delict over the course of the long history of Roman law; the point is that, structurally, *inuria* continued to reflect such assumptions of the nature of society. Here it is important to bear in mind Watson's point quoted (n 17).
[35] Zimmermann (n 25) 1061–2.
[36] See Durkheim *Division of Labour* (n 19); and Lukes & Scull *Durkheim and the Law* (n 19).

Middle Ages into the era of the *ius commune*.[37] Reinhard Zimmermann ascribes the appeal of the *actio iniuriarum* during this period to the concurrence of an even greater social attachment to good name, dignity and honour with an enhanced need for effective legal remedies capable of displacing self-help, in particular in the form of the duel as a means for obtaining satisfaction for outraged honour.[38] The 'thick' criteria for determining *iniuria* made it possible to calibrate liability with contemporary values and concerns, enabling a combination of conceptual continuity and substantive adaptation.[39] In Luhmann's terms, we can understand this as a demonstration of the 'cognitive openness' that co-exists with law's 'operational closure': the law's control of its own concepts and their meaning is compatible with its utilizing 'facts' produced by other systems when it is making its own determinations,[40] for example about whether using obscene language, pulling faces or sticking out one's tongue are contumacious.[41]

Still, 'the so-called renaissance of Roman law was less the rebirth of a long-forgotten romanitas than the dawn of a new legal system where the interpretation and application of Roman rules did not always follow the reasoning of former Roman jurisconsults or the pronouncements of emperors'.[42] Important developments in legal thought took place during this period, especially in the work of the late scholastic Spanish natural law school of Salamanca,[43] which laid the groundwork for the emergence of a clear demarcation between private law and criminal law in the works of Roman-Dutch writers. Not fully realised in practice before Roman-Dutch law was swept away by codification, the complexity and implications of this innovation are perhaps even more clearly visible in their treatment of the *actio iniuriarum* than in the *actio legis Aquiliae*, where it has been carefully analysed by Feenstra and others.[44]

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[37] Zimmermann (n 25).

[38] Zimmermann (n 25) 1062–3; H Lange *Schadenersatz und Privatstrafe in der mittelalterlichen Rechtstheorie* (1955) 155–6 argues that initially the law of damages became increasingly punitive in character in the Middle Ages; he writes of an 'Entprivatisierung des Privatrechts'.

[39] See the examples in Zimmermann (n 25) 1065–6.

[40] Luhmann 'Operational closure' (n 10) 1427. This does not threaten the law's autonomy as it is the law that determines what counts as law and what as fact.

[41] These are among the examples listed by Zimmermann (n 25) 1065.

[42] L Mayali 'The legacy of Roman law' in Johnstone (ed) (n 6) 374, 377. See also J Cairns & P du Plessis (eds) *The Creation of the* Ius Commune*: From* Casus *to* Regula (2010).

[43] N Jansen 'Ausgleich und Strafe: Das gelehrte Recht und der Naturrechtsduiskurs' in R Gamauf (ed) *Audgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart* (2017) 73; G Dolezalek 'The Moral Theologians' doctrine of restitution and its juridification in the sixteenth and seventeenth centuries' 1992 *Acta Juridica* 104.

[44] R Feenstra *Vergelding en Vergoeding — Enkele Grepen Uit de Geschiedenis van de Onrechtmatige Daad* 4 ed (2014); R Feenstra & R Zimmermann (eds) *Das Römisch-hollandische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992); R Feenstra 'Grotius' doctrine of liability for negligence: its origin and its influence in Civil Law countries until modern codifications' in E Schrage (ed) *Negligence — The Comparative Legal*

(2) *Transformation: from punishment to reparation and the expanding scope of* iniuria

The reception in Holland of the Roman *actio iniuriarum* is perhaps most obvious in Johannes Voet's *Commentarius ad Pandectas* (1698), which closely follows the structure and coverage of the *Corpus Iuris Civilis*.[45] Thus Book 47 of the *Commentarius* is modelled on the treatment of the *actio iniuriarum* in Book 47 of the Digest, simply repeating many of the original examples, including *ademptata pudicitia, comes abducere*, etc.[46] But it is also present in the work of Grotius, who wrote in the vernacular and was engaged in a project of reconstructing the law on the basis of natural-law thinking. Grotius' *Inleidinge tot de Hollandsche Rechts-geleerdheid*,[47] despite famously replacing the multiplicity of Roman delicts with a single general conception of civil liability as arising from the wrongful imposition of harm,[48] and reorganising the landscape of liability according to his framework of five fundamental natural rights,[49] still shows clear traces of the *actio iniuriarum* as a distinct form of liability. Chapters 35 ('*Van hoon*') and 36 ('*Van lasteringh*') of this work are clearly rooted in the *actio iniuriarum*, the division between them replicating — according to the influential eighteenth century lectures on Grotius by the Leiden professor DG Van der Keessel — the distinction between real and verbal *iniuriae* drawn by Ulpian (and apparently already by Labeo (d. 10/11 CE).[50] English translations of this work accordingly translate *hoon* as 'injury' (as English equivalent of *iniuria*) and '*lasteringh*' as defamation[51] (although 'disrespect' would be a better translation of *hoon*). Simon van Leeuwen drew the boundary between the various

History of the Law of Torts (2001) 129; T Finkenauer 'Pönale Elemente in der *lex Aquilia*' in Gamauf (ed) (n 43) 73.

[45] English translation: *The Selective Voet. Being the Commentary on the Pandects (Paris edition of 1829) by J Voet, and the supplement to that work, by J Van Der Linden* translated P Gane (1955). On Voet, see F du Bois 'Sources of law: common law and precedent' in du Bois (ed) (n 1) 64, 74–5.

[46] Voet 47.10.7.

[47] See du Bois 'Sources of law' (n 45).

[48] See especially *Inleidinge tot de Hollandsche Rechts-geleerdheid* 3.1.18 and 3.32.12 *De Iure Belli ac Pacis* 1.3. See Visser & Whitty (n 7) 428-430. There is a significant difference between these formulations in that only the latter refers to fault (*culpa*): see N Jansen 'Duties and rights in negligence: a comparative and historical perspective on the European law of extracontractual liability' (2004) 24 *Oxford Journal of Legal Studies* 443, 457.

[49] Life, body, freedom, honour and goods: *Inleidinge* 3.33.1. On the history and significance of this rights-based approach, see Jansen (n 48).

[50] D Van der Keessel *Praelectiones iuris hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* 3.35.1 and 7. Willem Schorer's notes on Grotius, published as part of his 'improved and extended' re-publication Of Grotius' *Inleidinge* in 1767, which are included in an appendix to A Maasdorp's English translation of the *Inleidinge* (*The Introduction to Dutch Jurisprudence of Hugo Grotius* (1888) also identifies chapter 35 with the *actio iniuriarum*. On the distinction's Roman roots and medieval history, see especially, P du Plessis 'An infringement of the *corpus* as a form of *iniuria*: Roman and Medieval reflections' in Desheemaeker & Scott (n 25) 141.

[51] See Maasdorp's translation (n 50) as well as the more widely used translation by R Lee *The Jurisprudence of Holland* (1936).

manifestations of *iniuria* somewhat differently from Grotius, allocating it between wrongs 'against natural liberty', all of which involved violence, and wrongs 'against honour and reputation' (now identified with *hoon*), which, he noted, can be injured by words as well as deeds,[52] but the Roman legacy of the distinctive wrongfulness of contumacious conduct is clearly evident. The same can be said of a book published not long before codification in the Netherlands, Van der Linden's *Regtsgeleerd, Practicaal, en Koopmans Handboek*, where *misdaad tegen de eer* (wrongs against honour) is said to consist of two kinds: firstly, the *actio iniuriarum*, covering all acts and words directed against someone's honour with the aim of insulting that person, and, secondly, the action for defloration (seduction).[53]

As Van der Linden's classification makes overt, Roman-Dutch writers came to associate the *actio iniuriarum* with various wrongs pertaining to sexual conduct and marriage, which derived for the most part from Church rules and Germanic customs. As we shall see below, some, notably Grotius, went further than Van der Linden, presenting these as integrated with the *actio iniuriarum*. The Roman-Dutch writers' version of *iniuria* therefore differed in what it covered from its Roman antecedent. This was accompanied by a further major departure — the legal response came to include reparation. This, too, was taken furthest by Grotius, especially in his chapter on *hoon*, where these two divergences from Roman law come together.

(a) Grotius

Grotius treated the *actio iniuriarum* as an anomalous, archaic remnant to be brought into line with his general conception of civil liability, and therefore identified, and emphasised, the reparative element in the contemporary remedies available for *iniuriae*. In developing this approach, Grotius was decisively influenced by the work of the late scholastic Spanish natural lawyers, in whose wake he developed a clear distinction between private and criminal law.[54] Following their theory of restitution as an interpersonal act required for the absolution from sin by God,[55] Grotius' writings associate criminal law with punishment and private law with restitution/reparation, a very different classification from that in which the *actio iniuriarum* originated.

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[52] *Het Roomsch Hollandsh Recht* (1664) chapter 36. Grotius described only defamation as a wrong against honour because, as he took trouble to explain, he adopted a narrow sense of honour as denoting 'the good esteem in which others hold us': *Inledinge* 3.36.1. On the other hand, as explained below, Grotius employed a very broad notion of infringement of liberty.

[53] *Regtsgeleerd, Practicaal en Koopmans Handboek* (1806) 1.16. 4; 2.5.16. By employing neither liberty nor reputation Van der Linden went one step further than Van Leeuwen in widening the concept of honour/dignity (*eer*), using it as a catch-all category covering the whole field of *iniuria*.

[54] Jansen 'Ausgleich und Strafe' (n 43); Jansen 'Duties and rights' (n 48) 456.

[55] For an excellent account, see Jansen 'Duties and rights' (n 48) 454-5.

Roman civil proceedings could result in either a reipersecutory remedy that aimed at reparation (e.g. the *rei vindicatio*) or a *poena*, a fine, payable to the victim of the private wrong (e.g. the *actio furti*, *actio legis Aquiliae* and, importantly, as Gaius made clear,[56] the *actio iniuriarum*),[57]or it could be mixed, combining reparation and punishment.[58] An extensive system of public criminal prosecutions developed alongside this in the imperial period,[59] but Justinian maintained the institution of *delicta privata* with their private penalties.[60] In addition to passive intransmissibility (ie only the perpetrator personally could be sued, not his heir), and the possibility of cumulating several delictual actions arising from a single act against one perpetrator (or cumulating actions against several perpetrators),[61] the defining penal feature of the latter was that the size of the sum payable did not track the loss, but generally exceeded the loss.[62] An *actio poenalis* typically involved the imposition of a fixed penalty, for example a multiple of the loss suffered. In the case of *iniuriae* the penalties originally fixed in the Twelve Tables was replaced by a praetorian innovation, the *actio aestumatoria*, which allowed the sum payable to be fixed by reference to the seriousness of the *iniuria* and the status of the parties.[63] But this remained a penalty rather than reparation, sharing the characteristics of other penal actions, such as passive intransmissibility, and in Justinianic law the victim had to choose between bringing such a private claim or setting a criminal prosecution in train.[64]

Private penalties fell out of favour during the *ius commune* era, however. On the one hand, there were developments in penal thought and practice.[65] Private penalties ran up against the notion, supported by Canon law as well as passages in the *Corpus Iuris*, that judges should fix penalties according to the specific circumstances of every case. They also conflicted with the feudal practice, reflected in many local laws and customs, that the feudal lord was entitled to penalties paid into his court, and they sat uneasily with the growth of public enforcement of criminal law that accompanied the evolution of state organisation from the late Middle Ages onwards. Moreover, new, non-monetary forms of reparation developed in Ecclesiastical and

[56] Gai 4.8.
[57] See generally, Zimmermann (n 25) 915 ff.
[58] Gai. 4.6; I. 4.6.16–19. The latter shows that by Justinian's time the *actio legis Aquiliae* was described as mixed. The precise nature of *actiones mixtae*, is, however, complex and contentious: see N Jansen *Die Struktur des Haftugnsrechts* (2003) 237 ff.
[59] See A Jones *The Criminal Courts of the Roman Republic and Principate* (1972).
[60] See also I. 4.3.11: It is open to someone whose slave has been killed both to pursue a private action under the *lex Aquilia* and to institute criminal proceedings on a capital charge.
[61] Sirks (n 6).
[62] H Coing *Europäisches Privatrecht* Band I (1985) 503.
[63] I. 4.4.7.
[64] I. 4.4.10.
[65] For this point and what follows, see Coing (n 62) 50–5; U Wesel *Geschichte des Rechts in Europa* (2010) 171–3, 280–2.

secular practice for wrongs which did not sound in money.[66] On the other hand, the Spanish late scholastics developed a refined notion of restitution which limited a wrongdoer's obligation to compensate his victim to the full — and only the full — reparation of the harm inflicted on the latter, applying this also to remedies for marriage-related sexual wrongs.[67]

These changes laid the groundwork for the differentiation of private law and criminal law along the lines we are familiar with today. It is not surprising that this divergence from Roman law should have taken place, for the society into which it was received after its rediscovery was a very different one from that in which it had emerged and developed.[68] Society was developing away from the 'mechanical solidarity' end of the spectrum towards the 'organic solidarity' end, which, Durkheim argued, brings with it a movement from punitive to reparative law.[69] Thus 'by the 15th and 16th centuries, punishment and compensation were clearly different things',[70] although this came about in fits and starts, and was not completed in Europe until codification in the Age of Enlightenment. Theory typically surged ahead of practice, the Spanish scholastics' adherence to the strict compensation principle running counter to the positive law, Canon as well as secular, of their time.[71] Significantly, reconceptualisation of the *actio iniuriarum aestumatoria* lagged behind that of other delicts, notably the *actio legis Aquiliae*. The latter, being an action for pecuniary loss, was easy to reshape into a one where the remedy — payment of a sum of money — compensated rather than punished the victim.[72] But the former raised the special difficulty of repairing non-financial harm through a monetary award, for any payment made to remedy a loss which does not sound in money, such as an infringement of honour, is much more difficult to differentiate

[66] Zimmermann (n 25) 1072–4.
[67] Jansen 'Ausgleich und Strafe' (n 43); Jansen 'Duties and rights' (n 48).
[68] Luhmann's depiction of law as operationally closed yet structurally coupled to the social system makes legal reception despite vast differences in social context intelligible: reception takes place because of the legal system's perceptions of its needs, rather than society's actual needs — although changes in the latter generates the 'influx of disorder' that evokes the legal response. This fits with Mayali's observation (n 42 at 376) about the reception of Roman Law that:

> The adoption of new legal instruments and procedures met concrete and practical needs that could no longer be satisfied by adherence to local usage. By the end of the twelfth century, in both the private and public spheres, the increased complexity of daily transactions and a changing economic environment necessitated the implementation of new sets of rules and principles. The success of Roman law was thus conditioned by its perceived historical prestige, but also heightened by its ability to provide suitable solutions to growing legal challenges.

[69] Durkheim *Division of Labour* (n 19).
[70] Jansen 'Duties and rights' (n 48) 451.
[71] Jansen 'Ausgleich und Strafe' (n 43).
[72] See Schrage (n 44), especially the contributions by Dondorp, Hallebeek and Feenstra.

from a penalty.[73] This general development took place rather early in Holland,[74] where the conditions of 'mechanical solidarity' were arguably being left behind more quickly than elsewhere.[75] Grotius played a leading role in its articulation through the development of suitable legal doctrines and systematization, which makes his treatment of *iniuria* of particular interest.

In his path-breaking *Inleidinge tot de Hollandsche Rechts-geleerdheid*, Grotius wrote that a wrong 'can give rise to two obligations: the one to suffer punishment, the other to redress the inequality resulting from it', adding to this the observation that 'the right to punish belongs to the rulers of the State, but the right to claim reparation belongs to those who have suffered wrong'.[76] Grotius acknowledged that (in his day, still) 'the same person is frequently entitled to something as compensation and also to something as penalty' and that 'both of these are frequently included under one word', but he saw such private penalties as 'remnants of the old law' and insisted that it was necessary to distinguish between reparative and penal awards.[77] This led him to take considerable trouble to differentiate the penal elements of the remedies provided by the law of his time from their reparative elements, including the remedies for wrongs traceable to the *actio iniuriarum*.[78] Thus he describes the monetary award for *hoon*, originating in the *actio aestumatoria*, as penal, but the *actio ad palinodiam*, a claim for public recantation that derives from both Germanic and Ecclesiastical practices and became widespread throughout the *ius commune*,[79] as a compensatory remedy:

> According to our law the author of an injury is understood to be liable to compensate it, with public confession of fault and prayer of forgiveness, and in addition to that in money: to this end the victim of the injury usually mentions a certain sum of money and offers his oath that he would not willingly suffer such injury for the named sum or a larger one. The first of these liabilities is properly described as compensation; the second is a penalty.[80]

Just how challenging it was to accommodate the *actio iniuriarum* in such a bifurcation between criminal law and private law is evident in Grotius' failure to settle on a single

[73] Coing (n 62) 513; see further Jansen 'Ausgleich und Strafe' (n 43) 89–90; E Desheemaeker '*Solatium* and injury to feelings: Roman law, English law and modern tort theory' in Desheemaeker & Scott (n 25) 67.
[74] Coing (n 62) 505 n14.
[75] See S Schama *The Embarrassment of Riches: An Interpretation of Dutch Culture in the Golden Age* (1987).
[76] *Inleidinge* 3.32.7.
[77] *Inleidinge* 3.32.7.
[78] *Inleidinge* 3.35 and 3.36.
[79] Zimmermann (n 25) 1072–74.
[80] *Inleidinge* 3.35. This depiction of the *actio ad palinodiam* as compensatory rather than punitive is in itself interesting in light of the observation by Jansen 'Ausgleich und Strafe' (n 43) 79 that the *actio ad palinodiam* had less to do with the reinstatement of honour than with avenging an injustice suffered. He points out this was treated as a criminal action in older law and that even in the seventeenth century such a recantation had to be done in a humiliating way.

explanation of the available remedies. Compare the account just quoted with the rather different discussion of infringements of honour and reputation in *De iure belli ac pacis*, written after the *Inleidinge* as a more accessible version of his thought:

> [I]n these acts, no less than in theft and other crimes the criminality of the act must be distinguished from its effects. For the former punishment corresponds, for the latter reparation, which is made by confession of the fault, by manifestation of honour, by giving evidence of innocence, and through means similar to these: though such damage may also be made good through money, if the injured person so desires, as money is the common measure of useful things.[81]

Nevertheless, in both of these works, Grotius brings together within a single classificatory category, and on the basis of a general liability principle, what were distinct wrongs in Roman law, and, importantly, focuses attention on harm and its remediation as central to civil liability. As these quotations show, this vision of the received *actio iniuriarum* as at least partly compensatory raises a new challenge. If a legal response is punitive, its justification turns only on the identification of a wrong. This might consist in the violation of an individual entitlement, but that is not essential to the justification of punishment: violation of a public duty will do, and on some accounts constitutes the focal point of its justification.[82] However, if the remedy is to count as reparative, then, as Grotius plainly recognised, again following the late scholastic Spanish model,[83] an individual interest in need of, and entitled to, restoration must be identified, and the violated entitlement has to be described in a manner that makes it plausible to treat the available remedy as restoring the entitlement. That is, the transformation of the *actio iniuriarum* into a private law liability focused attention on the identification of private interests meriting legal protection — on the legal rights of individuals. For example, in the case of defamation, where Grotius saw the reparative remedy in the public declaration that the author of the statement 'knows nothing of the person defamed but what is upright and honourable', he carefully delineated the protected interest as honour in the narrow sense of 'the good esteem in which others hold us'.[84] In this way, Grotius developed a conceptualisation of delictual liability generally, and *iniuria* specifically, that prefigured the ideal type of a distinctive private law liability for wrongs reflected today in the writings of Ernest Weinrib and other corrective justice theorists.[85] In contrast to the Roman conception of

[81] *Inleidinge* 3.17.22. The point made about the uses of money, which can be traced back to Aristotle, is a further example of scholastic influence: see Jansen 'Ausgleich und Strafe' (n 43) 88–9. It is still popular today: see eg Ripstein *Private Wrongs* (n 20) 252–53.
[82] See R Duff *The Realm of Criminal Law* (2018).
[83] Especially Molina: see Jansen 'Duties and rights' (n 48) 455.
[84] *Inleidinge* 3.36.
[85] (n 20).

iniuria, it is not the wrongdoer's behaviour that stands at the forefront — as is expected in a punishment-oriented conception — but the victim's infringed right — in line with an orientation towards reparation. The relationship between his rights-based explanation of delicts and their remedies and his account of private law's distinctiveness is plain.

Others, including those more closely attached to Roman law, followed him in this, and they are worth looking at for an illustration of the variety of approaches possible. Before doing so, a further aspect Grotius' treatment of the *actio iniuriarum* should be highlighted, however, as it sets the scene for these discussions as well as their subsequent history in South Africa. This is that the development during the Middle Ages of non-monetary remedies which, as seen above, could plausibly be presented as repairing individual harm rather than imposing punishment, also appears to have facilitated the expansion of the substantive reach of the received *actio iniuriarum*. Although Book 47 of the Digest included within its purview some forms of inappropriate sexual conduct — attempting to render a chaste person unchaste, accosting young women or boys and abducting a matron's attendants[86] — it did not cover all sexual misconduct. *Stuprum* (fornication) and adultery, which had been criminalised by the *lex Julia de adulteriis coercendi*, were covered in a different book of the Digest.[87] Contraventions of the *lex Julia* were met with public criminal proceedings whereas *iniuriae* were classified as *delicta privata* giving rise to private claims. This makes the three examples (only) that Grotius gives of *hoon* particularly notable. They are: *vrouw-kracht* (rape), *beslapinge met wille* (consensual sex — seduction) and *overspel* (adultery). Not one of these is mentioned in the Digest treatment of *iniuria*, all three being dealt with under the rubric of the *lex Julia* in Book 48 Title 5.[88]

Strikingly, all three gave rise to legal responses in Holland that had been unknown to Roman law. Derived from a mixture of Canon law and Germanic law,[89] it is easy to see how these remedies fit into the same reparative pattern as outlined by Grotius in the two quotations above. Grotius was also able here to draw on arguments to that very effect by the Spanish natural lawyers. Thus, Canon law adopted the punitive rule, already present in Exodus, that a man who seduced a virgin had to endow as well as marry her. In Holland, as elsewhere in

[86] D.47.10.9.4 (Ulpian, *Edict* 5) and 47.10.15.15-23 (Ulpian, *Edict* 77).
[87] Book 48. See D. 48.5.
[88] Although the title on extraordinary crimes (those without fixed penalty) in Book 47 is also pertinent. D 47.11.1pr (Paul, *Views* 5): Those who intrude upon or disturb the marriage of others, even if they cannot be charged with a particular crime, are punished by extraordinary process by reason of their proclivity for base desires.
[89] See D Van der Keessel *Praelectiones ad Jus Criminale* 48.5.24 translated by B Beinart and P Van Warmelo as *Lectures on Books 47 and 48 of the Digest, setting out the criminal law as applied in the courts of Holland (based on Cornelis Van Eck) and on the New criminal code, 1809* (1969); F Van den Heever *Breach of Promise and Seduction in South African Law* (1954) 42–3.

Europe, temporal authorities modified this so as to give the seducer an option between marrying or endowing the woman, unless he had promised to marry her. The Spanish late scholastics conceptualised this not as punishment but as compensation: absent a promise to marry, which could be specifically enforced like any other contract, the woman was entitled to be compensated for her reduced prospects of obtaining a good dowry.[90] Significantly, the sum payable was not intended to assuage wounded feelings.[91] The claim for marriage or endowment the woman obtained in this way was combined with a further claim, received into Canon law from Germanic notions, for the costs associated with the pregnancy and birth and for maintenance of the child.[92] This, too, is easy to see as compensatory.[93] Rape seems to appear on Grotius' list because the remedies just listed were available in addition to those for the infringement of bodily integrity and infliction of injuries, which he dealt with in a different chapter. The origins of the claim granted to the deceived spouse against a third-party adulterer are more obscure, but this also appears to have Germanic roots. It has been said to be 'really a substitute for the ancient "wergild"',[94] an explanation that seems plausible in view of the right of a deceived husband in Germanic law to kill such a third party.[95] The practice of taking money instead of a life as satisfaction for the injury would have been encouraged and reinforced by religious authorities' consistent disapproval of revenge killings in such cases.[96]

In Grotius' treatment, these were all manifestations of *hoon*, which, commentators agree, is meant to stretch well beyond these examples, encompassing all *iniurae reales*,[97] and thus a range of acts far removed from sexual conduct. Such a broadly drawn civil wrong is much more difficult to relate to an individual entitlement than defamation, yet Grotius found a suitably capacious one: freedom. *Hoon*, he wrote, is a wrong against freedom:

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[90] Jansen 'Ausgleich und Strafe' (n 43) 84–7. The right in question was the woman's entitlement to control her own body: *domina sua corporis*. This meant that liability depended on duress, fraud, or some trickery affecting her consent.
[91] Jansen 'Ausgleich und Strafe' (n 43) 84–7
[92] Van den Heever (n 89).
[93] Grotius had already described the alternative to marriage as compensation: *Inledinge* 3.35.8. Schorer (n 50) Note CCCCLXXVII ad 3.35.8 (Maasdorp's translation (n 50 at 658) explains this by analogy to remedies for breach of contract: marriage is specific performance, the dowry compensation in lieu thereof).
[94] M De Villiers *Roman and Roman-Dutch Law of Injuries: A Translation of Book 47, Title 10 of Voet's Commentary on the Pandects, With Annotations* (1899) 55.
[95] J Brundage *Law, Sex and Christian Society in Medieval Europe* (1987) 132.
[96] Brundage (n 95) 248.
[97] Van der Keessel (n 50) 1574. 3.35.1. See also Schorer's Notes (n 50) and the translations of *hoon* in the texts cited (n 51).

> We say that this wrong is particularly directed against freedom, because persons who are not subject to one another, although they may be in other respects unequal, are equal in the matter of freedom, by virtue of which freedom one is entitled to expect that others shall do him no injury.[98]

This is not a perspicuous explanation. Reference to a right not to be injured by another does not serve to demarcate a wrong against freedom from wrongs against life, body, reputation and property. Nor is the link with *hoon*, disrespect, immediately obvious. However, in his lectures on Grotius' *Inleidinge,* Van der Keessel proposed that freedom must here be understood in reference to the right everyone has to deal as they wish with their body, goods and other entitlements, within the bounds of the law.[99] He argued that the fact that it is a wrong against the body to wound someone does not prevent the same act from also constituting an additional wrong, if carried out intentionally.[100] Someone who intentionally harms another's body appropriates, and takes away from his victim, against the latter's will, the victim's right to his own body or limbs, and this is contrary to freedom, he wrote.[101] In other words: wrongfully injuring another infringes his right; doing so intentionally goes beyond this and appropriates that right, thus also violating the victim's right to self-determination. In this way, Grotius succeeds in explaining legal responses to a broad array of *iniuriae* as reparative rather than punitive: they reinstate the victim's right to self-determination which had been appropriated by the defendant.

Several features of this account stand out. In the first place, there is the identification of distinct entitlements as being implicated respectively in *hoon* and in defamation: freedom and honour. Secondly, freedom is in this argument intimately tied up with the conception of natural rights on which Grotius built his account of law, especially of delictual liability: these rights safeguard not only material interests of fundamental importance, such as bodily integrity, or social interests, such as honour, but also a moral interest in freedom. Thirdly, there is the insistence on *freedom* as the pertinent entitlement, not dignity as in Ulpian's famous triad of *corpus*, *fama*, *dignitas*.[102] This is worth noting because Grotius shows that he was perfectly aware that there is another possible way of describing the impact of *hoon*, very close if not identical to the Roman notion of *dignitas*, when he acknowledges at the start of his discussion of defamation that honour broadly conceived, reaching beyond reputation, is also said to be infringed by *hoon*.

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[98] *Inledinge* 3.35.1
[99] Van der Keessel (n 97).
[100] Grotius considers negligence sufficient for liability for causing death or injury: *Inleidinge* 3.33, 34.
[101] Van der Keessel (n 50) 1575.
[102] D 47.10.1.2 (Ulpian, *Edict* 56).

Here it is telling that Grotius' discussion of liability for seduction harks back to that of the Spanish scholastics, following their observation that, as consent excludes harm, consensual sex would not appear to require compensation according to natural law.[103] In his view, this liability instead originated in archaic local laws rooted in convictions about the weakness of women, and had gradually been diluted as these convictions were proven wrong by experience, so that reparation came to be restricted to economic loss.[104] It is this rooting of liability for seduction in a presumption of defective consent (which it is worth noticing he does not endorse) that enables Grotius to associate it with the violation of freedom and thus to include it under the heading of *hoon*. Thus, Grotius' focus on freedom appears to be another example of how the influence of Spanish natural law thought facilitated his stripping away of the punitive legacy of Roman law. This is also true of those cases where he acknowledges that liability exceeds compensation for economic loss: in respect of both rape and adultery,[105] his depiction of the wrong as arising from the loss of freedom inflicted by an intentional appropriation of the other's right to self-determination makes it possible to present the victim's legal remedy as reparative rather than punitive.[106]

(b) Followers of the Grotian approach

The essence of Grotius' approach was followed by other influential writers, although their identification of the violated individual entitlements often differed from Grotius's account and freedom became less prominent. Thus, it is clear from their treatment of the sexual wrongs mentioned above that Van Leeuwen, Huber and Van der Linden were equally concerned with identifying individual interests that could plausibly be seen as being restored by a successful private claim. Van Leeuwen differentiated between offences against liberty and hoon, giving each its own chapter, treating both injuries to honour and to reputation as manifestations of the latter. He discussed seduction of a young woman and rape in both chapters, while describing adultery in his chapter on honour and reputations as 'the dishonouring of another's spouse' without making clear which spouse (the deceiver or the deceived) he was referring to.[107] Van der Linden, also adopting a wider concept of *eer* (honour) than Grotius, likewise used this as the heading under which to place seduction.[108] And Huber explained that adultery 'is an act by

[103] Jansen 'Ausgleich und Strafe' (n 43) 84–5.
[104] *Inleidinge* 3.35.8.
[105] *Inleidinge* 3.35.7 and 9.
[106] In the case of rape, Grotius also links *hoon* to the suffering of distress or pain (*smart*, which could mean either of these) in addition to harm (*schade*): *Inleidinge* 3.35.7.
[107] Van Leeuwen (n 52) Vol II Book 4 Chapters 36 and 37 respectively. The quotation is from 4.36.7.
[108] Van der Linden (n 53).

which a person is injured and distressed in the very dearest and holiest relation found in human affairs'.[109] Given the distance between our social world and that occupied by these authors, it is worth observing that that these references to honour were underpinned by social and religious norms of propriety that had a major impact on someone's ability to participate in social life.[110]

In keeping with this, and like Grotius, these authors distinguish between the punitive and compensatory remedies to which *iniuriae* might give rise, while often noting that both are available. Thus Van Leeuwen describes the private remedies for verbal *iniuriae*, '*amende honorable*' and '*amende profitable*', as compensatory, even though he notes that the 'sum is mostly asked for and on behalf of the poor' or awarded to the poor by the judge in the exercise of his discretion, while taking care to observe that 'the sheriff or the State has no special right to prosecute the same criminally, unless it be an extraordinary case of defamation, affecting the common weal in its results'.[111] Likewise, 'he who deflowers or seduces a young girl without violence, is not liable to anything beyond marriage with her, or to pay her a money compensation, at his option, according to the circumstances of both parties, and at most so much as the girl, by reason of the seduction, would require by way of marriage property in order to enable her to marry her equal.'[112] Van der Linden, too, depicts both the *amende honorable* and the *amende profitable* as civil remedies, distinguishing them from criminal sanctions, which he describes as rarely employed for infringements of honour (*eer*) and then only in cases of public importance.[113] The action for defloration he describes as giving rise to a claim for marriage or reparation of honour through money, plus a claim for the costs of birth and maintenance of the child.[114] If anything, Van der Linden's treatment of sexual wrongs draws the divide between punishment and compensation even more starkly than Grotius and Van Leeuwen, in that he places those that in his account gave rise only to a public criminal penalty — amongst which he includes adultery — in a separate chapter from those giving rise to private claims.[115] Much the same can be said of Huber, who, as we saw above, includes adultery and seduction in the chapter on *hoon* or *iniuria*, yet also discusses the criminal penalties to which they give rise in separate chapters along with the other sexual misdemeanours that are subjected to similar punishments.[116]

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[109] U Huber *Heedendaegse Rechtsgeleertheyt* (1686) 6.11.1. The quotation is taken from the English translation by P Gane *Huber's Jurisprudence of My Time* (1939).
[110] See Schama (n 75).
[111] (n 52) 4.37.1.
[112] (n 52) 4.37.6.
[113] (n 53) 1.16.4.
[114] (n 53) 1.16.4.
[115] (n 52) 2.7.
[116] (n 10) 9, 6.9 and 6.11.

Huber's discussion of the criminal or civil character of the action for *iniuria* is particularly significant, as it proceeds from the observation that contemporary legal practice departed from Roman practice by permitting the cumulation of civil and criminal actions for an *iniuria*. Noting that in Roman law this 'was even less allowable than... it was in the regard to theft and other crimes committed against the property of one's fellow-men', because 'both the civil and the criminal action of injury tend to the punishing or avenging of crimes', he concluded that the monetary award for *iniuriae* (the *amende profitable*) must now be regarded as having a compensatory rather than a punitive function:

> The only reason I can give for this [departure from Roman law] is that the fines ... are not so much punishments of criminals as assessments of the pain and suffering of those affected by the damage or injury, so that the fines take the place of restitution of damage suffered ... whereas the prosecution by the Attorney-General must be taken as aimed at punishment alone.[117]

But most striking is the parallel between Grotius and Voet. Despite his much closer attachment to Roman law, Voet also draws a distinction between punishment and compensation that assigns the former exclusively to a criminal process under state auspices and the latter to claims instituted by private persons: 'By our customs however ... private persons ... have an action for the following up of their personal loss merely, and not for a penalty'.[118] He, too, suggests that *palinodia* or *amende honorable* is a mode of compensation, carefully noting in his discussion of this remedy that it is to be regarded as civil rather than criminal, as 'such penalty is neither monetary or to be devoted to the treasury, nor corporeal' and private persons, moreover, 'cannot set in motion any criminal proceeding, but can only sue for indemnity when they have been injured by the wrongdoing of another'.[119] The *amende profitable*, on the other hand, he treats as penal in nature, clearly distinguishing its availability from the possible additional claim under the *lex Aquilia* 'when perhaps the wrong inflicted has also redounded in a loss to his household estate',[120] and describes the *actio iniuriarum* as passively intransmissible.[121] Moreover, in terms reminiscent of Grotius's explanation of *hoon* as infringement of freedom, Voet describes *iniuria* as 'the wrongful act which is done to a free person when his body, dignity or reputation are violated by the disregard, with evil intent, of

[117] (n 10) 9, 6.10.4. This civil claim for the 'fine', he points out, is in practice combined with an action for recantion in the case of verbal injuries (6.10.5), which is also civil in nature in that it may not be included in proceedings instituted by the Attorney-General (6.10.6).
[118] 47.10.3.
[119] 47.10.17.
[120] 47.10.18.
[121] 47.10.20.

his rights'.[122] However, unlike Grotius and the other writers surveyed, Voet remains true to Roman law in treating the legal response to marital sexual wrongs as entirely criminal, even where the penalty has changed as in the case of seduction[123] and adultery.[124] Voet's division between private and criminal legal responses here largely tracks the division between Books 47 and 48 of the Digest.

Voet's approach is echoed in Van der Keessel's extensive treatment of both *iniuria* and the *lex Julia* in his published lectures on criminal law.[125] There is nevertheless one notable difference with Voet. This is Van der Keessel's unambiguous statement that the seducer's obligation to marry or endow 'is not properly a public penalty suffered for the crime ... but private satisfaction' to the violated woman, which is not claimed in a criminal, but in a civil, action.[126] This brings out much more clearly the difference between civil and criminal law, harking back to Grotius's description of the dividing line. As significantly, this understanding of the seducer's obligation leads him to examine carefully the basis of that obligation in a manner reminiscent of Grotius' attempt to identify a repairable entitlement. He concludes that 'the foundation of this obligation lies in the injury done in robbing the woman of her virginity', it being a mixture of a penalty and redress for injury done.[127] His divergence from Voet, and re-orientation of attention to the interest violated, is also evident from his observation that the division between real and verbal *iniuriae* 'is not quite suitable for accommodating the various kinds of *injuriae* into their definite classes, for which purpose the division of *injuriae* based on its objects is far more apt'.[128] His own classification is reminiscent of Grotius: *corpus, libertas, bona,* and *dignitas/existimatio.*[129]

It is clear from the discussion so far that these two developments in Roman-Dutch law — the expansion of the area covered by the concept of *iniuria* to include an array of marriage-

[122] 47.10.1. He proceeds to list a range of Roman examples of *inirurіae* consisting in diverse interferences with rights: 47.10.7.
[123] 48.5.2 and 3. But Voet does display some ambiguity in this regard — contrary to the nature of an *actio poenalis,* in 48.5.5 he allows an action against the heirs of the seducer which 'will aim at an indemnity, that is to say, since it has not been possible for the marriage to ensue, that dowry shall be substituted in return for her virginity as being the assessed value of the theft of her virginity', and relies on delictual actions for the following up of property as analogous.
[124] 48.5.10. Apart from criminal penalties, Dutch law according to Voet permitted divorce on account of adultery, along with a dowry or donation *propter nutpias* (a donation on account of the marriage) and a forfeiture of one-third of the offending spouse's goods: 48.5.11. These amounts were not claimable if reconciliation had taken place, although, as Voet notes in another clear differentiation of criminal and civil law, reconciliation did not affect the public right to claim a penalty or lay a charge: 48.5.16.
[125] Van der Keessel (n 89).
[126] 48.5.24. He goes on to state that: 'Nowadays another punishment of imprisonment or of a monetary penalty has been accepted too in addition to this private penalty.'
[127] 48.5.24.
[128] 47.10.3.
[129] 47.10.

related sexual wrongs and the transformation of the *actio iniuriarum*, in fact if not in name, into an *actio mixta* issuing in distinctive private compensatory and public punitive responses — were closely interrelated and mutually reinforcing. In relation to these wrongs in particular, attention was paid to identifying plausible infringements of individual entitlements whether to liberty, honour or reputation (eg in the case of adultery), or to casting the remedial responses in plausibly reparative terms (eg in the case of seduction or where the *amende honourable* was available).

(3) The European demise of the *actio iniuriarum*

The line of development sketched so far came to an end in Holland and elsewhere in Western Europe with the demise of the *actio iniuriarum*.[130] In essence, this took the form of the absorption of its penal dimension into codifications of criminal law and the overtaking of its civil dimension by the provisions of delictual liability in civil codes. In France, the Code Civil replaced the distinct Roman civil liability actions with a single principle obliging everyone who causes harm to another through his fault to compensate the victim.[131] Here, the civil dimension of the *actio iniuriarum* was swallowed up by a general principle of liability for harm in the Grotian tradition. Although worded widely enough to cover all forms of harm that might flow from an *iniuria*, this left no scope for civil claims of a penal character. Accordingly, when it was felt necessary to sanction violations of reputation and honour, this was done by stipulating criminal sanctions for *diffamation* and *injure* in the Press Law of 1881 (*loi du 29 juillet de 1881*).[132] Holland followed suit when Roman-Dutch law was displaced by a Napoleonic code in 1811, although the Civil Code introduced in 1838 after the Netherlands had regained its independence did contain a set of provisions dealing specifically with insults.[133] Significantly, this expressly provided that 'the civil claim concerning insult serves to compensate harm, and to restore the damage done to honour and reputation'.[134] The present Code has returned to the French way of doing things, with the general provision regarding civil liability in Art 6:162 providing the only avenue for a private claim, and the Criminal Code functioning as principal

[130] See generally, Zimmermann (n 25) 1085–94, Coing (n 62) Vol II 513–20.
[131] *Code Civil* Art 1382ff. See Coing (n 62) Vol II 173–5.
[132] Since the contravention of a criminal prohibition constitutes fault for the purpose of civil liability, and French procedure allows civil claims for damages to accompany the public prosecution of crimes, this legislation exerted strong influence on the scope of civil liability. See A Trebes *Zivilrechtlicher Schutz der Persönlichkeit vor Presseveröffentlichungen in Deutschland, Frankreich und Spanien* (2002) 108–9.
[133] Arts 1408–1416. This made specific provision for damages for non-pecuniary loss as well as for retraction: the old *amende profitable* and *amende honorable*.
[134] Art. 1408.

source of norms regarding infringements of honour and reputation.[135] As is to be expected, the French approach was also followed in other jurisdictions that came under French legal influence. But the same general pattern can be observed in Germany, where it had for some considerable time been regarded as anomalous that private claimants should be able to enrich themselves through monetary awards for *iniuriae*.[136] The *actio iniuriarum* was abolished over the course of the nineteenth century in most of the local legal systems that existed before unification and finally repealed for the whole of Germany with the introduction in 1877 of a new Code of Criminal Procedure.[137] The aim behind this was to confine civil law to the protection of pecuniary interests, leaving the task of protecting personality interests exclusively to the criminal law, and it was therefore accepted by the dominant legal opinion of the time that there was no place left for a civil claim of a penal nature.[138] Upon entering into force in 1900, the BGB enumerated in section 823.I specific legal interests protected by civil liability, and *corpus* was the only one of the traditional Roman *iniuria* triad to appear on this list. All that remained was the possibility of riding piggy-back on the criminal law, as in France and Holland, by arguing that breach of criminal provisions concerning insult constitutes a breach of a protective law, leading to liability under section 823.II.[139] Arguably, faint traces of the *actio iniuriarum* remained discernible in the existence of a separate article dealing with sexual wrongs and the claim, now removed, granted to a seduced fiancée who found herself the victim of a breach of promise to marry.[140] But Germany's aversion to the *actio iniuriarum* was placed beyond doubt by the BGB, which after considerable debate during the drafting process, included an unambiguous general restriction of damages to the compensation to economic loss.[141] Important differences remained, not least between the German dismissal of the possibility of compensating non-pecuniary harm and the French willingness to contemplate

[135] See A Bloembergen (ed) *Onrechtmatige Daad* (loose-leaf) Vol 3 Chap VII (by G Schuijt) Afdeling I: Inleiding (supplement of 20 October 1995). The *amende honorable* is retained in Art 6:167, and the *amende profitable* in 6:106 (which allows damages, determined on the basis of fairness, for non-pecuniary loss in the event of intentional infliction of bodily injury or harm to honour or reputation).

[136] U Walter *Geschichte des Anspruchs auf Schmerzensgeld* (2004) 101–2; Coing (n 62) 519–20; Zimmermann (n 25) 1090–2.

[137] See generally, H Coing, 'Entwicklung des zivilrechtlichen Persönlichkeitsschutzes' 1958 *Juristenzeitung* 588.

[138] See generally Zimmermann (n 25) 1088 ff; Coing (n 137); D Leuze *Die Entwicklung des Personlichkeitsrechts im 19 Jahrhumdert* (1962) 77–80; E Kaufmann 'Dogmatische und rechtspolitische Grundlagen des §253 BGB' (1963) 162 *Archiv für die civilistische Praxis* 425.

[139] Sections 185–188 of the *Strafgesetzbuch* deal with 'Beleidigung'.

[140] See section 1300 BGB (original version). F Müllereisert *Die Ehre im Deutshen Privatrecht* (1931) 393–7 describes this as a protection of 'ehre im Familienrecht'.

[141] Art 253 BGB. Hence Art 824 does not protect personal honour but only commercial reputation, that is, commercial interests: BGH NJW 1984, 1207, 1608ff. See generally Hage 'Der Schutz der Ehre im Zivilrecht' (1996) 196 *Archiv für die civilistische Praxis* 168.

dommage moral.[142] In addition, Germany's post-war constitutional jurisprudence developed a general personality right which does give rise to civil liability for non-pecuniary losses.[143] Nevertheless, throughout Europe the anomaly of a form of civil liability that was part penal and part compensatory was resolved by restricting civil liability to compensation and confining punishment to the system of state-administered criminal justice that had been growing in size and significance.

III SOUTH AFRICA

(1) *Roman-Dutch beginnings*

The survival of Roman-Dutch law in South Africa also ensured the continuation there of the *actio iniuriarum*.[144] But South African law was not isolated from the intellectual currents that had led to the latter's demise in Europe. And so, it continued in an environment in which the bifurcation of civil and criminal liability intensified. As society moved ever further away from the conditions of Durkheim's 'mechanical solidarity', the *actio iniuriarum* split in two: a criminal branch in the form of *crimen iniuria*[145] and criminal defamation,[146] prosecuted by public prosecutors employed by the state, and a private-law delict.[147] Absent modernisation through codification or significant legislation, the civil *actio iniuriarum* lost its penal remnants via the remaining avenues of legal change: judicial development and scholarly reinterpretation. This brought about its transformation during the nineteenth and twentieth centuries into a claim conceived as purely reparative, closely approximating the ideal type of bilateral private law

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[142] On *dommage moral* in this context, see Coing (n 62) Vol II 175–80; more generally, V Palmer 'Dommages moraux : l'éveil français au 19e siècle' (2015) 67 *Revue internationale de droit comparé* 7. The notion that violations of honour could not be compensated by mere money was forcefully expressed during the drafting of the BGB, where it won the day — see Zimmermann (n 25) 1090–1. However, the courts subsequently developed extensive protection of personality interests under the post-war Constitution has resulted in wider availability of damages for non-pecuniary harm, diluting the contrast between the French and the German traditions: see Zimmermann (n 25) 1092–94.

[143] Zimmermann (n 25) 1090–1.

[144] On the history of Roman-Dutch law in South Africa, see Zimmermann & Visser *Southern Cross* (n 7); Du Bois & Visser 'Der Einfluss' (n 7).

[145] See e.g. *S v S* 1964 (3) SA 319 (T); *S v Lewis* 1968 (2) P.H. H367 (T); *S v Puluza* 1983 (2) P.H. H150 (E); *S v Steenberg* 1999 (1) SACR 594 (N); *S v Sharp* 2002 (1) SACR 360 (CkHC).

[146] Considered and upheld in *S v Hoho* 2009 (1) SACR 279 SCA.

[147] To warrant criminal prosecution, the *iniuria* must be a serious one (*R v Walton* 1958 (3) SA 693 (SR) at 695) and 'detrimentally affect the interests of the State or of the community' (*S v Jana* 1981 (1) SA 671 at 677), but the elements of *iniuria* are the same, whether it be punished civilly or criminally' (*Walker v Van Wezel* 1940 WLD 66 at 69; *R v Walton* (n 145) 695B). The requirement of seriousness has however been doubted: *S v Bugwandeen* 1987 (1) SA 787 (N) 796; *S v Steenberg* 1999 (n 145) 596). Many convictions have concerned improper sexual behaviour or conduct; the use of derogatory racial epithets has also featured: *S v Steenberg*, (n 145); *S v Mostert* 2006 4 All SA 83 (N). Compare the position in Roman-Dutch law as set out by Van Leeuwen (n 111) .

reflected in corrective justice theory.[148] As we shall see, this was not a simple, linear development, and there are several examples of how law's 'operational closure' maintained doctrines which outlasted changes in society, or, in order to maintain internal consistency, 'restricted its own evolution to a greater degree than would be ecologically necessary'.[149] But the general direction of travel maintained and heightened the pressure to identify *iniuria* with the infringement of individual entitlements capable of reinstatement through the available remedies. The outcome was an understanding of these entitlements that is conspicuously different from what we encountered in the writings of the Roman-Dutch writers, a change which, I shall argue below, is related to society's ongoing movement towards the conditions of 'organic solidarity'. As during the Roman-Dutch period, the conceptual challenges posed by marriage-related wrongs provided the stimulus and context for much of the changing analysis.

Grotius' conceptual innovations played a background role in these developments, for South African law eventually followed Voet's Romanistic approach to civil liability. It categorised civil liability (and still does) not on the basis of a classification of rights as Grotius had done, but by distinguishing (principally) between liability arising from the *actiones iniuriarum* and *ex lege Aquiliae*,[150] and it adopted Voet's definition and account of *iniuria* as protecting *corpus*, *fama* and *dignitas*.[151] These three concepts came to be treated as occupying the field of *iniuria*, the justification of liability typically involving an explanation of how either *corpus*, *fama* or *dignitas* had been infringed. In a society which, despite its own entrenched inequalities, especially racial, lacked the nuanced hierarchy and accompanying conception of status that had given *dignitas* its meaning in Roman law, but also increasingly loosened the social and religious norms of propriety that underpinned the concepts of *hoon* and *eer* by which it had been replaced in Holland, *dignitas* inevitably underwent two developments. Both were aided by the absence of a definition of *dignitas* in Voet. On the one hand, it came to be a catch-all concept, capable of accommodating all *iniuriae* that could not be brought home under the

[148] For this ideal type see (n 20) and the accompanying text. J Wessels *History of Roman-Dutch Law* (1908) 705 attributes the development of a clear distinction between crimes and torts in South Africa to the influence of English legal literature, and ultimately to Jeremy Bentham and John Austin.
[149] Luhmann 'Social system' *Northwestern University LR* (n 10) 146.
[150] See Voet 47.10.1 quoted in the text to (n 122). De Villiers JA observed in *Matthews and Others v Young* 1922 AD 492 at 503–5 that, in principle, patrimonial damages must be claimed under the *actio legis Aquiliae*, while the *actio iniuriarum* is only available for sentimental damages. The need for the plaintiff to satisfy the specific requirements of the action governing the type of damages being claimed, was emphasised in *Media 24 and Others v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA).
[151] *O'Keeffe v Argus Printing and Publishing Co Ltd and Another* 1954 (3) SA 244 (C) 247–8.

first two heads,[152] much like *hoon* in the Grotian scheme.[153] On the other hand, it was necessary to find an understanding of *dignitas* that would make sense in the contemporary world and could take the place of Grotius' reliance on a set of natural rights. These developments were accentuated by the democratic re-foundation of South African law on the bedrock of a constitutional Bill of Rights,[154] which brought with it a close association between the constitutional right to dignity and the protection of dignity via the South African version of the *actio iniuriarum*.[155]

(2) *Transformation: the protection of feelings*

Voet's title *De iniuriae et libelli famosis* has been said in South Africa to bear 'the distinction of having been more often quoted and more thoroughly canvassed in proportion to its moderate length than any other title in the whole of the *Commentaries*'.[156] Its domination of the field is largely attributable to the publication in 1899 of Melius De Villiers's *Roman and Roman-Dutch Law of Injuries*,[157] which offered an English translation thereof, accompanied by translations of the pertinent Roman texts as well as a commentary drawing extensively on other sources of Roman-Dutch law and South African cases. This work quickly established itself as the standard text and set the basic framework for subsequent legal development, and it is here that the seeds were sown for the emergence of an alternative to Grotius' freedom-based explanation of liability for *hoon*. Commenting on Voet's statement on the triad of protected interests, De Villiers adopted an expansive notion of dignity, describing it as: 'that valued and serene condition in … [a person's] social or individual life which is violated when he is, either publicly

[152] Thus a claim for *iniuria* can succeed where the claimant's reputation is already such that the insulting, degrading and humiliating words used by the defendant do not tend to lower the esteem in which she is held (and therefore does not amount to defamation): *Ryan v Petrus* 2010 (1) SA 169 (ECG). In *O'Keeffe* (n 151) invasions of privacy were depicted as aggressions upon dignity.

[153] As J Neethling, J Potgieter & A Roos *Neethling's Law of Personality* 2 ed (2005) put it at 50: '*Dignitas* is therefore a collective term for all personality rights (or objects) with the exception of the rights to a good name and the right to bodily integrity'.

[154] On the nature and legal significance of the new constitutional dispensation, see especially L Ackermann 'The legal nature of the South African constitutional revolution' (2004) 4 *New Zealand Law Review* 633. See E Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013).

[155] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 14: 'For present purposes … there is little difference between the right to dignity as it is comprehended under the Constitution and its Common Law counterpart.' The constitutional right to dignity is however seen as underpinning all of the interests protected by *iniuria*, not merely *dignitas:* see *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) paras 27–8. See also *NM and Others v Smith and Others (Freedom of Expression Institute as* Amicus Curiae*)* 2007 (5) SA 250 (CC); *Dendy v University of Witwatersrand and Others* 2007 (5) SA 382 (SCA) 387–8.

[156] Gane (n 45) 201.

[157] De Villiers (n 94).

or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt'.[158]

As significant for subsequent legal development are two claims linked hereto. The first is that *dignitas* is a residual concept in that '[i]njuries against dignity evidently comprise all those injuries which are not aggressions upon either the person or the reputation; in fact, all such *indignities* as are violations of the respect due to a free man, as such'.[159] The second claim seeks to provide a single justificatory grounding for the entire triad:

> Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of the character for moral and social worth to which he may rightly lay claim and of that respect and esteem of his fellow-men of which he is deserving, and against degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such right.[160]

Again:

> The reparation claimed in the action is on account of that pain of mind which is naturally felt by any one who has been the object of vexatious personal aggression on the part of another, or who has been humiliated by becoming the object of that feeling of repulsion which is naturally entertained by others towards a person who bears an evil reputation or is otherwise obnoxious, or of that disrespect which is evidenced by exposing another to contempt, ridicule, dislike, disfavour or disesteem.[161]

This feelings-focused account of the purpose of the *actio iniuriarum* is no accident; it is the natural corollary of De Villiers' understanding of the nature of the available legal remedies. Whereas Voet (like Grotius) was still willing to accept grudgingly that the monetary award was penal in nature, De Villiers drew a clear line between 'a claim for reparation at the instance of the injured person in an action of injury' and 'other modes of external compulsion'.[162] This purely reparative conception of the *actio iniuriarum* amplified the challenge already faced by the Roman-Dutch writers of describing the protected interests in terms that made it plausible to regard them as capable of being repaired by the available remedies. Moreover, the *amende honorable*, which most of the Dutch writers surveyed in the previous section, including Voet, had described as the reparative remedy, had fallen into disuse in South Africa, leaving only the

[158] De Villiers (n 94) 24.
[159] De Villiers (n 94) 24.
[160] De Villiers (n 94) 24–5
[161] De Villiers (n 94) 25. Similarly, at 155: 'sentimental damages, that is to say, for the pain of mind of the plaintiff'; at 185: 'a pecuniary penalty awarded for the benefit of the sufferer, in order to satisfy his injured feelings'.
[162] De Villiers (n 94) 182.

amende profitable, the action for damages.[163] The latter now became the sole focus of explanations of attempts to explain the reparative character of the liability. De Villiers referred to 'sentimental damages, that is to say, for the pain of mind of the plaintiff',[164] and described the monetary remedy as 'awarded for the benefit of the sufferer, in order to satisfy his injured feelings'.[165]

De Villiers's separation of punishment and compensation in the context of the South African *actio iniuriarum* was precocious. In fact, for some considerable time after the publication of his book, damages awards for *iniuria* were treated by courts and writers alike as having in part a punitive purpose, in terms that sometimes hark back to Roman law but occasionally also show traces of English legal influence. Thus, Sir Leslie Maasdorp wrote in his *Institutes of Cape Law* of 1909:

> [When] a wrong is accompanied with circumstances of insult, and a desire to hurt the feelings of the plaintiff and to injure him in his honour, dignity, or reputation, the law breathes a spirit of revenge and of punishment, and ... the Court will sometimes grant vindictive damages, and will even grant exemplary damages where a defendant has been guilty of a wilful disregard of the rights of others.[166]

This was no flash in the pan. McKerron's influential book on the South African law of delict described reparation for harm done as merely the primary object of an action in delict, its being accepted that 'even in modern law, where the line between crime and delict is more clearly drawn than it was in Roman law, the damages recoverable in respect of a delict may sometimes include a penal element'[167] And more than fifty years after the publication of De Villiers's work, Van den Heever's authoritative monograph on breach of promise and seduction still described the remedy for seduction as having both compensatory and penal dimensions.[168]

However, De Villiers was on the side of history; the momentum behind the de-penalisation of the *actio iniuriarum* was irresistible and led South African lawyers to complete the work of their predecessors in Holland. Statements acknowledging a penal purpose are easily matched by others reflecting a purely reparative understanding with injured feelings as the

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[163] *Hare v White* (1865) 1 Roscoe 246; L Maasdorp *Institutes of Cape Law* 7 ed Vol IV (1909) 88. Something like this appears to be revived however in *Mineworkers Investment Company (Pty) Ltd v Modibane* 2002 (6) SA 512 (W); see J Burchell 'Retraction, apology and reply as responses to *iniuriae*' in Scott & Descheemaeker (n 25) 197.
[164] De Villiers (n 94) 155.
[165] De Villiers (n 94) 185. Despite using 'penalty', De Villiers is plainly here concerned to depict the award as reparative.
[166] Maasdorp (n 163) 16. Maasdorp supports this statement not only with citation of South African cases, but also with a reference to Voet 47.10.13.
[167] R McKerron *The Law of Delict* 3 ed (1947) 2, citing cases. This statement did not appear in the first edition (published in 1933 under the title *The Law of Delicts in South Africa*), which set out an unqualified distinction between crimes and delicts but was still included in the seventh and final edition published in 1971.
[168] Van den Heever (n 89) 64–5.

object of compensation.[169] They are, moreover, frequently contradicted by other statements in the same works. Thus Maasdorp's remarks on vindictive and exemplary damages stand in evident tension with his own statement:

> Two-fold punishment of the criminal [in Roman law] has ... never obtained under our law, the criminal responsibility of the wrong-doer being limited to his liability for the wrong done to the State, ... and the only remedy of the injured party being by way of civil action for compensation in damages for the injury done to him.[170]

And he takes considerable trouble to fit the payment of damages for non-pecuniary harm into a depenalised framework of delict in which '[i]n order to make a wrong actionable, it is essential that it shall have caused some damage, actual or implied in law, to some one'. In the case of wrongs to honour, dignity or reputation, he tells us, we are dealing with 'wrongs as to which damage will be presumed, even though none may have been actually proved'.[171] McKerron similarly fits damages for *iniuria* into a reparative framework by using 'the term "harm"... in an extended sense to include not merely material damage, ie actual pecuniary loss, but also moral or sentimental damage', by which he says he means 'pain or distress which is the natural result of those wrongful acts which are technically known as "injuriae".[172] And Van den Heever's discussion of damages for breach of promise unambiguously rejects the award of punitive damages.[173]

In this way, once separated from *crimen iniuria*, the private *actio iniuriarum* came to be seen as every bit as reparative as the *actio legis Aquilia*.[174] The only difference was that, while the latter repaired economic loss, the former protected bodily integrity (*corpus*)), reputation (*fama*) and salved injured feelings (*dignitas*).[175] The statements by De Villiers quoted above were repeatedly approved by the courts as an accurate statement of the law in regard to the dignity limb of *iniuria*,[176] and reference to feelings as the gist of such an action

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[169] Eg Watermeyer J insisted in *Bredell v Pienaar* 1924 CPD 203 at 210 that 'the actio injuriarum was instituted for the very purpose of receovering damages' that would provide 'compensation for injured feelings or for injury to the plaintiff's reputation'.
[170] Maasdorp (n 163) 8.
[171] Maasdorp (n 163) 3.
[172] McKerron (n 167) 3; see also 146.
[173] Van den Heever (n 89) 30.
[174] Nevertheless, the Roman rule, rooted in the originally penal nature of the action, that the *actio iniuriarum* was neither actively nor passively transmissible upon the claimant's death, which had been taken over in Roman-Dutch law, were maintained by South African case law (Neethling, Potgieter & Roos (n 153) 78). In light of the repeated affirmation of the reparative purpose of the modern action, this is best regarded as an anomalous legacy still awaiting reform.
[175] Loubser & Midgley (n 1) 26.
[176] See eg *R v Umfaan* 1908 TS 62 at 66–7; *Walker v Van Wezel* 1940 WLD 66; *S v A and Another* 1971 (2) SA 293 (T) 297; *Minister of Police v Mbilini* 1983 (3) SA 705 (A) 715–16; *Ryan v Petrus* 2010 (1) SA 169 (ECG).

became standard, as in the following representative passages: 'It is clear that the protected interest of the plaintiff — which she complains has been harmed — is her subjective feelings of dignity';[177] 'what the appellant is claiming is an award of damages to assuage his wounded feelings arising from the insult and humiliation he suffered …'.[178] Indeed: 'It is not sufficient to show that the wrongful act was such that it would have impaired the dignity of a person of ordinary sensitivities.'[179] No less an authority than the Constitutional Court declared that: 'In the context of the actio injuriarum … (d)ignitas concerns the individual's own sense of self worth.'[180] Leading authors similarly endorsed a feelings-based account of dignity, associating it with someone's 'feelings of dignity, chastity, piety and self-respect',[181] or emphatically insisting that 'dignity embraces only the *subjective feeling of dignity* or self-respect or the personal sense of self-worth'.[182] Perhaps unsurprisingly, some took this as a springboard for claiming that other feelings too — 'feelings of chastity, faith (religion) and piety'— are protected in modern South African law.[183]

This emphatic foregrounding of feelings represents a transformation in the understanding of *iniuria*. The continuing movement towards the ideal type of a fully differentiated private law was accompanied by a legal interiorisation, a turn to the inner, mental, life of individuals, as the law's primary concern.[184] The change is clear in the sharp contrast between, on the one hand, De Villiers's conceptualisation (and the judicial remarks quoted in the previous paragraph) and, on the other hand, both the Roman concept of *contumelia*, with its focus on proper respect rather than emotional calm,[185] and Grotius' use of natural rights and equal freedom.[186] This displacement, during the nineteenth and twentieth centuries, of respect, with its dependence on clear social conventions, and of natural rights, which in turn (at least in the natural law tradition of which Grotius formed part) relies on the

[177] *Jackson v NICRO* 1976 (3) SA 1 (A).
[178] *Dendy* (n 155) (per Farlam JA).
[179] *Delange v Costa* 1989 (2) SA 857 (A) at 861.
[180] *Khumalo* (n 155) para 27.
[181] N Van der Merwe & P Olivier *Die onregmatige daad in die Suid-Afrikaanse Reg* 6 ed (1989) 445–6.
[182] Neethling, Potgieter & Roos (n 153) 28.
[183] Neethling, Potgieter & Roos (n 153) 28–9, 199–215.
[184] For avoidance of doubt, I should state that this description is compatible with limiting protection (as the South African courts do) to feelings that are 'objectively reasonable'. As explained below (text accompanying n 231) the requirement of 'objective reasonableness' gives effect to the bilateral structure of private law wrongs.
[185] See (n 28–30).
[186] The courts nevertheless occasionally associated the *actio iniuriarum* with the protection of freedom: in *GA Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 at 6–7 the court stated with reference thereto that: 'Freedom duly and lawfully to exercise one's energies and to engage in one's own activities is an absolute right'. But influential authors rejected the notion that freedom as such could be the object of a personality right: at most bodily freedom can be protected as an aspect of physical integrity (Neethling, Potgieter & Roos (n 153) 16, 64–5).

possibility of eternal truths about human destiny, by feelings, parallels a broader intellectual movement in legal thought. Especially in the English-speaking world, of which South Africa had become part, this found expression in the rise of utilitarianism and positivism. Although one would look in vain for any reference to Jeremy Bentham in the South African judgments and literature, his dismissal of natural rights as 'nonsense upon stilts' and associated championing of the happiness principle can be seen as articulating the *leitmotiv* of the South African transformation of the *actio iniuriarum*.[187] It seems that in South Africa, as elsewhere, notions of proper respect and eternal truths about human destiny were no longer part of the intellectual assumptions of the judges and jurists shaping the law, and that they turned instead to what was seen as an empirical truth about people: their capacity to experience pleasure and pain — their feelings. That assumptions should have altered in this way is not altogether surprising. As the conditions associated with 'mechanical solidarity' were left further and further behind, at an accelerating pace, in the wake of industrialisation and urbanisation,[188] the older ways of legal thought lost the social scaffolding which had made them intelligible and credible focal points for legal concepts.

The marriage-related wrongs provided the crucible for the process whereby this depenalisation of the *actio iniuriarum* led to the notion that it served to vindicate a right to feelings. In time, they also revealed the implications of this legal interiorisation for the relationship between the *actio iniuriarum* and its social context.

(a) Seduction and breach of promise to marry

Like Grotius, South African lawyers were deeply uncomfortable with treating consensual sex as an *iniuria*. Hence, the courts were assiduous in requiring seductive efforts on the defendant's part, an element of 'leading astray', capable of interfering with the claimant's capacity to make a cool and reasoned decision.[189] Commentators adopted one of four responses to the presence of consent. Some insisted that seduction could not be an *iniuria* and must therefore be regarded as a liability *sui generis*;[190] or that the wrong lies in the seductive attempts rather than the sexual

[187] Note the reference to Bentham's influence in Wessels (n 148). Jeremy Bentham *Rights, Representation, and Reform: Nonsense upon Stilts and other Writings on the French Revolution (The Collected Works of Jeremy Bentham)* edited by P Schofield, C Pease-Watkin & C Blamires (2002) 317.

[188] For South Africa, see C Van Onselen *New Babylon, New Nineveh. Everyday Life on the Witwatersrand 1886-1914* (1982).

[189] *Bull v Taylor* 1965 (4) SA 29 (AD) 34 (also making clear that there is a presumption that the efforts succeeded); *Card v Sparg* 1984 (4) 667 (E). This can include deceiving the claimant into a bigamous marriage: *Arendse v Roode* 1989 (1) SA 763 (C).

[190] Maasdorp (n 163) 122; M Nathan *The South African Law of Torts* (1921) 187; McKerron (n 167) 105. Also, *Arendse* (n 189).

intercourse;[191] others treated it as an instance where the law invalidates the consent;[192] and yet others regarded this as a reason for rejecting liability for seduction altogether.[193] The discussion was further complicated by the demise of the erstwhile Dutch remedy to marry or endow.[194] Specific performance of a promise to marry was abolished by statute across South Africa over the course of the nineteenth century,[195] leaving only the possibility of a monetary claim for loss of virginity and the consequent impairment of marriage prospects as well as the costs associated with a resulting pregnancy.[196]

The impact of this change in legal remedies is clear in De Villiers's rejection of three well-established limitations on the claim for seduction in Roman-Dutch law: that the claim could not be brought by someone who had subsequently had sexual intercourse with other men, or someone who had knowingly had sexual intercourse with a married man, or by a widow or a married woman. De Villiers denied that there was good reason for any of this: 'If a man has been successful in making a virtuous girl an immodest one', he wrote, 'his success is the more apparent when she subsequently also yields to other men, and should not tell in his favour'.[197] As to the relevance of knowledge of the seducer's married state, he responded that 'to attempt the chastity of a modest girl by solicitations ... is in itself an injury, and a delict; and if such an attempt is successful, the consent obtained by means of the delicts should hardly be counted as valid consent'.[198] And he simply disagreed that there was any reason why a widow or even a married woman should not be entitled to sue, if 'overcome by the seductive arts of a man'.[199] But there was, of course, good reason — or at least a perfectly intelligible reason — for these limitations in Roman-Dutch law. Denying an obligation to marry or endow made sense in all

[191] PJ Conradie 'Seduksie en die leerstuk van volenti non fit injuria' (1974) 37 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 372; Neethling, Potgieter & Roos (n 153) 199 see here 'an infringement of her feelings of justity' alongside 'infringement of the woman's body'.
[192] De Villiers (n 94) 57; Van den Heever (n 89) 45 ('providence had designed women to be mothers and had to that end limited their inhibitions'); W Joubert 'Om der vrouwen zwackheid …' (1961) 24 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 279; C Hoexter (updated by L Harms) 'Seduction' in W Joubert (founding ed) *The Law of South Africa* Vol 24 2 ed (2010) 393.
[193] Van der Merwe & Olivier (n 181); N Bohler-Muller 'Of victims and virgins: seduction law in South Africa' (2000) 41 *Codicillus* 2.
[194] According to P Bekker *Die Aksie Weens Seduksie* (1978) 395 there is no reported case in South Africa expressly affirming these remedies, although the earliest reported case on seduction (*Heckroodt v Breda* (1828) 1 M 337) involved a claim in the alternative for marriage or for damages for pregnancy expenses.
[195] Cape: Marriage Order in Council, 1838; Natal: Marriage Order in Council, 1846; Transvaal: Law 3 of 1871; Orange Free State: Wetboek, Ch 90, Art 17.
[196] *Bull* (n 189); *Card v Sparg,* (n 189). Notwithstanding its modern association with the *actio iniriarum*, this claim is passively transmissible, as was already the case in Roman-Dutch law: *Spies' Executors v Beyers* 1908 TS 473.
[197] De Villiers (n 94) 56–7.
[198] De Villiers (n 94) 57.
[199] De Villiers (n 94) 57.

three cases: in the first, no one would have thought him compelled to marry her, sexual relations with another constituting a valid ground at the time for refusing to honour a promise to marry;[200] in the second, the seducer was to the knowledge of the woman unable to fulfil his primary obligation to marry her; and in the third case, the seducer had not been the cause of the woman's loss of the advantages a virgin enjoyed at the time when it came to marital prospects.

In the Netherlands of the Roman-Dutch period, sex and marriage were closely connected, with marriage laws and customs such that sexual intercourse between betrothed parties was often part of the marriage process.[201] This facilitated both the idea that a wrong was committed where sex took place without subsequent marriage, and acceptance of marriage or its economic equivalent as the appropriate remedial response. But in South Africa, where the remedy was no longer connected to marriage, the gist of the wrong had to be found elsewhere. De Villiers and the courts found it in 'making a virtuous girl an immodest one', ie the deprivation of chastity.[202] It is, therefore, not surprising that the courts should have taken the same line as De Villiers regarding the Roman-Dutch restrictions on the availability of the remedy, holding that a woman does not lose her entitlement thereto because of sex subsequently with others,[203] or her knowledge that the seducer was already married,[204] or indeed her refusal to marry the seducer.[205] The last of these decisions, in particular, exemplifies the transformation of this claim, because it is only once the woman's monetary claim is seen as providing her with compensation for wrongful sexual conduct towards her rather than for a failure to marry her that one would say that the 'man who has seduced a girl ... [seeks] to avoid liability by offering to marry her' and should not be allowed to do so.[206]

These arguments appear no less archaic and suffused with patriarchal morality than the writings of the Roman-Dutch authors. Why, for example, is it taken for granted that the claim should be available to women but not to men? Why should (female) chastity be seen as worthy of protection? Little wonder that many have argued that the action is incompatible with South

[200] See Voet 21.1.13; L Van Apeldoorn *Geschiedenis van het Nederlandse Huwelijksrecht* (1925).
[201] Van den Heever (n 89) 44. See also Van Apeldoorn (n 200).
[202] One can see the same in Van den Heever's argument (n 89) 46–7 against the common-law rule that a widow has no claim for seduction, virginity being a requirement. His insistence that there is no difference between a virgin and a chaste widow, shows that for him, too, the claim revolves around deprivation of chastity.
[203] *De Stadler v Cramer* 1922 CPD 16.
[204] *Bensimon v Barton* 1919 AD 38.
[205] *Delport v Ah Yee* 1913 EDL 374.
[206] McKerron (n 167) 144, who regards such a prospect as 'repugnant to modern ideas'.

Africa's constitutional Bill of Rights.[207] Particularly pertinent to our current discussion, however, are the attempts to identify the harm that is to be repaired by this application of the *actio iniuriarum*. For Van den Heever, the law is here concerned with harm 'to the reputation and morals of the victim'.[208] De Villiers's focus on protection of tranquil enjoyment of one's peace of mind as the essence of the *actio iniuriarum*, however, opened the door to another explanation: according to Neethling, 'a woman's feelings of chastity are … protected' here, although this is 'unjustifiably made dependent upon the protection of dignity'.[209] Significantly, this is put forward, along with liability for breach of promise and for adultery, as proof of the protection in South African law of a 'right to feelings', existing independently of the right to dignity in the traditional triad.[210]

As seduction may well take the form of a false promise of marriage, these two causes of action often occurred together in practice.[211] In Roman-Dutch law there was a particularly close relationship between the wrong of seduction and the breach of a promise to marry. They gave rise to similar remedies, and both sets of liabilities were rooted in the interaction of Germanic customs and Canon law, rather than in Roman law.[212] There were, nevertheless, two differences. First, the defendant in a breach of promise suit did not, like the mere seducer, have a choice between marriage and payment. Here, damages was only a surrogate if marriage was impossible, the law going so far as to use a proxy to conclude the marriage if the jilter should be unwilling to comply with a court order. Secondly, breach of promise was not classified as a form of *iniuria* by the Roman-Dutch writers but was discussed as part of the law relating to marriage. It seems plausible that this was connected to the denial of a free choice between marriage and damages, which contrasted with the pairing of *amende profitable* and *amende honorable* in the Roman-Dutch *actio iniuriarum*, and made the remedy for breach of promise, in essence, one of the means whereby marriages could come into being.

South African law took a different approach in both respects. The right to sue for specific performance of a promise to marry having been abolished by statute,[213] damages was

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[207] P Visser 'Enkele gedagtes oor die moontlike invloed van fundamentele regte ten aansien van fisies-psigiese integriteit of deliktuele remedies' (1997) 60 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 495, 502; J Labuschagne 'Seduksie en geslagsdiskriminasie: opmerkinge oor die deliktuele beskerming van seksuele integriteit' (1994) 19 *Tydskrif vir Regswetenskap* 162; Bohler-Muller (n 193); Neethling, Potgieter & Roos (n 153) 199; Hoexter (n 192) 392.
[208] Van den Heever (n 89) 46, 65.
[209] Neethling, Potgieter & Roos (n 153) 199.
[210] Neethling, Potgieter & Roos (n 153) ch 7.
[211] Unsurprisingly, liability for breach of promise is also rejected as inconsistent with contemporary values: J Labuschagne 'Deinjuriëring van verlowingsbreuk' 1993 *De Jure* 126. See further Section III below.
[212] See Van den Heever (n 89) 3–10 for the position described in this paragraph.
[213] (n 195).

left the only remedy, as in cases of seduction. Secondly, claims for breach of promise came to be associated with the *actio iniuriarum*. This had a significant impact on the development and conceptualisation of this part of the claim. Given the nature of the remedies, it is clear that in Roman-Dutch law an action was available as a matter of course whenever a promise to marry was breached and that damages would be awarded whenever specific performance was excluded.[214] In that sense, the remedy was automatic: it would be awarded whenever the breach took place without a legally recognised valid reason. The reconceptualisation of the claim in South Africa led to a very different approach, one which drew attention to whether the claimant had suffered some form of non-economic loss.

Apparently under the influence of the English action for breach of promise,[215] courts analysed the claim as a single one with two elements, triggered by the cancellation of an engagement without just cause:[216] a contractual element covering economic loss sustained by the plaintiff[217] and a delictual/tortious element, the latter consisting of 'the ordinary measure for *injuria* arising out of the *contumelia* suffered by the plaintiff'.[218] To be sure, the fact that it had both contractual and delictual dimensions led to the remedy's being described as *sui generis*, but it was no longer seen as a special regulation belonging to family law, and its delictual aspect was firmly classified as a manifestation of the *actio iniuriarum*. Early on, the courts awarded delictual damages in all cases of unjustified breach of promise, arguing that 'in civilized society in South Africa the wrongful putting an end to a betrothal contract by one party is, in ordinary cases, regarded as an impairment of the personal dignity or reputation of the other party and thus an *injuria*'.[219] But decisions which appeared to imply that delictual damages were available automatically for breach of promise to marry came to appear anomalous. These seemed, Van den Heever wrote in his influential monograph, to be 'unconsciously based on English principles' of punitive or exemplary damages 'and have no support in Roman-Dutch law'.[220] Since, '[i]n this age and this society a woman does not lose

[214] Apeldoorn (n 200) 82–4; Van den Heever (n 89) 11.
[215] See the detailed discussion by P M Bekker 'Die Aksie Op Grond Van Troubreuk' (1974) 37 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 402.
[216] A just cause would be furnished by any event or condition or actions of the other party which would jeopardise a long and happy marriage and which can induce any right-minded member of society to rescind the engagement: L Shafer 'Law of Marriage' in *Family Law Service* (Durban: LexisNexis, looseleaf) 13. This definition can be traced back to Roman-Dutch law: see Voet 21.1.13; Apeldoorn (n 200) 80–1.
[217] Giving rise, like any breach of contract, to liability for both losses actually incurred (eg expenditure on wedding preparations, termination of income-earning activities) and lost financial expectations (anticipated share in spouse's wealth): See Van den Heever (n 89) 37–40.
[218] *McCalman v Thorne* 1934 NPD 86. See also *Triegaardt v Van der Vyver* 1910 EDL 44.
[219] *McCalman* (n 218) 91.
[220] Van den Heever (n 89) 30

esteem because she has been but is no longer engaged' it had to be shown that the engagement had been 'broken off under such humiliating circumstances as to constitute a grave injury'.[221] The courts came to adopt Van den Heever's approach.[222] 'Purifying' South African law from this English influence,[223] they held that two separate actions were involved, so that breach of promise did not automatically constitute an *iniuria* and a plaintiff wishing to recover for the latter had to establish 'not merely that the breach was wrongful but also that it was injurious or contumelious'.[224] To obtain damages for *iniuria*, it was therefore neither necessary nor sufficient that the engagement had been broken off without valid reason.[225] It had to be insulting or humiliating.

The treatment in South African law of both seduction and breach of promise as *iniuriae* thus came to focus on whether the claimant's non-pecuniary interests had been set back. Strikingly, this harks back to Grotius (and authors who followed him, like Van Leeuwen and Van der Linden) rather than to Voet, for the latter had replicated the Roman law treatment of seduction as a public crime rather than a private wrong. In this way, the migration of the claim from criminal law (in Voet) to private law (in South Africa) shifted attention from the defendant's conduct to the claimant's interests. Similarly, in the case of breach of promise, the insistence on proof that the engagement had been broken off in a humiliating or insulting manner reflects a concern with identifying a harm that could be repaired by the legal remedy. True, it was the defendant's behaviour that had to be humiliating and insulting, but this merely reflects the means by which the result was brought about; what became decisive for an *iniuria* claim arising from seduction or breach of promise was whether the claimant reasonably felt humiliated or insulted.

The extent, and significance, of this development was brought home in the new constitutional dispensation in *Van Jaarsveld v Bridges*, in which the Supreme Court of Appeal emphatically disapproved of the contractual element of claims for breach of promise, but, strikingly, not of the delictual element.[226] On an appeal against the substantial amounts awarded under both heads — R110 000 for *iniuria* and R172 413 as contractual damages — the SCA requested the parties also to address the questions whether the breach was contumacious and whether the courts should continue to recognise the contractual action for breach of promise.

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[221] Van den Heever (n 89) 31.
[222] See *Bull* (n 189); *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W).
[223] See generally on the relationship between Roman-Dutch and English law in South Africa, Zimmermann & Visser *Southern Cross* (n 7).
[224] *Guggenheim* (n 222).
[225] *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) paras 4 and 19.
[226] *Van Jaarsveld* (n 225) paras 4 and 19.

Speaking for a unanimous SCA, Harms DP expressed the belief that 'that the time has arrived to recognise that engagements are outdated and do not recognise the *mores* of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise.'[227] The court rejected both the requirement that there be a just cause for cancellation, in order to escape contractual liability, and the 'rigid contractual footing' of the claim, which enables recovery of not only actual losses but also prospective losses in the form of disappointed financial expectations.[228]

Regarding the delictual claim, the court held that the SMS by which the defendant had broken off the engagement was, objectively, neither insulting nor contumacious, and the claim should have been dismissed.[229] The court's reasoning is worth quoting:

> A breach of promise can only lead to sentimental damages if the breach was wrongful in the delictual sense. This means that the fact that the breach of contract itself was wrongful and without just cause does not mean that it was wrongful in the delictual sense, ie, that it was injurious. Logically one should commence by enquiring whether there has been a wrongful overt act. A wrongful act, in relation to a verbal or written communication, would be one of an offensive or insulting nature. In determining whether or not the act complained of is wrongful the Court applies the criterion of reasonableness. This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society. To address words to another which might wound the self-esteem of the addressee but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for *injuria*. Importantly, the character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby.[230]

Thus, the (partial) assimilation of claims for breach of promise into the *actio iniuriarum*, firmly depenalised in South African law, focused attention on the question whether the claimant had suffered some form of non-economic harm. The final four sentences deserve particular emphasis, as they reveal the convergence of the court's conceptualisation of the claim with the ideal type of a fully differentiated private law liability. According to Weinrib, because private law remedies are bilateral, the wrongfulness of the acts they are meant to repair are not determined by reference to the interests and concerns of only one of the parties; the determination must be justifiable to both of them.[231] Precisely this is ensured by the objective criterion of reasonableness the court refers to here, 'the prevailing norms of society', since it provides a perspective which privileges neither party, yet engages both. Finally, it is

[227] *Van Jaarsveld* (n 225) para 3.
[228] *Van Jaarsveld* (n 225) paras 7–11.
[229] *Van Jaarsveld* (n 225) paras 20–2.
[230] *Van Jaarsveld* (n 225) para 19 (footnote omitted).
[231] See Weinrib *The Idea of Private Law* (n 20).

noteworthy that the court did not disapprove in principle of the delictual claim as it did of the contractual claim — the separation of the two claims, inspired by a desire to return to Roman-Dutch law yet, as we saw, not entirely true to it — led to their different treatment. The contractual claim was seen by the court as restricting the freedom to break off an engagement, which could no longer be countenanced as '[t]he world has moved on and morals have changed',[232] whereas the claim based on the *actio iniuriarum* was regarded as protecting claimants from wrongful harm rather than safeguarding moral convictions no longer endorsed by society.

(b) Adultery

South African law followed Grotius, and the other Roman-Dutch writers referred to in Part II above, in treating the claim by a deceived spouse against a third-party adulterer as a manifestation of the *actio iniuriarum*.[233] English legal influence played a role here as well, through both reference to the action for criminal conversation and recognition of claims for enticement ('alienation of affection') and harbouring, but the Roman-Dutch pedigree of the South African approach is plain from Part II above.[234] The law relating to adultery nevertheless underwent two fundamental changes. First, adultery was decriminalised in the nineteenth century, with the result that the liability of the third-party adulterer became entirely a matter for private law.[235] This exemplified and affirmed the autonomy of criminal and civil *iniuria* from each other, and completed the movement of liability for adultery from criminal to private law. Secondly, and subsequently, not only deceived husbands, but wives as well, were allowed to institute such claims.[236] The latter provides a telling instance of how differences between the social mores of the times of the Roman-Dutch writers and 20th century South Africa interacted with the foregrounding of feelings in the new legal conception of the *actio iniuriarum* as purely private law.

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[232] *Van Jaarsveld* (n 225) para 6.

[233] Applied in the colonial courts during the nineteenth century (e.g. *Biccard v Biccard and Fryer* 1892 (9) SC 473), the Appellate Division recognised the claim for the first time in *Viviers v Kilian* 1927 AD 449. See further *Foulds v Smith* 1950 (1) SA 1 (A) and *Bruwer v Joubert* 1966 (3) SA 334 (A) 337.

[234] See also A Barratt 'Teleological pragmatism, ahistorical History and ignoring the Constitution — recent examples from the Supreme Court of Appeal' (2016) 133 *SALJ* 189. On harbouring and enticement, see C Amerasinghe *Aspects of the* Actio Iniuriarum *in Roman-Dutch Law* (1965).

[235] *Green v Fitzgerald and Others* 1914 AD 88.

[236] As T Barlow 'A wife's claim to damages against a female co-respondent' (1940) 57 *SALJ* 6 points out, earlier cases maintained the restriction, but it was abandoned in *Tutt v Tutt* 1929 CPD 51; the latter approach was followed in subsequent decisions. See especially *Foulds* (n 233).

Although Roman-Dutch law already accepted that adultery could be committed by either spouse and thus also that either spouse could be victim, a claim for damages against the third party was available only to the husband.[237] South African courts stuck to this at first,[238] but the restriction was unpopular with some judges[239] and commentators[240] and was eventually abolished in 1950 by the Appellate Division of the Supreme Court.[241] This change clearly manifests the transformed conception of what is protected by the *actio iniuriarum*.

The reason why Roman-Dutch law restricted the claim to husbands can be seen in the justification for this claim put forward by legal writers of the time, especially in the following passage from Huber:

> Adultery (*overspel* or *echtbreuk*) is committed ... against the honour of the husband, not only because he usually thereby becomes the object of contempt, and is tauntingly addressed by the name of 'cuckold' and the like, but because it is an act by which a person is injured and distressed in the very dearest and holiest relation found in human affairs. That is why, in the case of the wife too, it is considered a violation of honour; though in her case the taunt is not so serious, no name being known as is known in the case of men by which this wrong is cast up to her; since it is supposed to be a man's duty to prevent adultery being practised upon him, a thing which is not in the power of the wife.[242]

That is, husbands were thought to suffer an injury that went beyond that inflicted on wives because they were subject to different social expectations. A husband whose wife had committed adultery was himself seen as having failed to live up to his role, a social judgement that was not extended to wives when their husbands deceived them.[243] This reflects a very specific understanding of the respective roles of spouses, one that was closely tied up with the idea that the husband, being head of the household, was as responsible for its moral wellbeing as he was for its material welfare.[244] The different role-expectations of husbands and wives meant that the former could be harmed in ways the latter could not. Huber highlights that the husband's claim for adultery existed because, in addition to suffering the distress and

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[237] Van Leeuwen (n 52) 4.36.7, 8 emphasises that both can be guilty thereof and reports that husbands too can be fined. Only claims by the husband are recognised in Grotius *Inleidinge* 3.35.9; Huber (n 109) 6.11.1; see also Nathan (n 190) 178.

[238] See *Wait v Wait* 1913 EDL 519 and also *De Bruin v De Bruin & Raynor* 1916 OPD 221.

[239] See the dissent of Maasdorp JP in *De Bruin* (n 238); *Tutt* (n 236) 51; *Gair v Gair & Another* 1932 CPD 38; *Rosenbaum v Margolis* 1944 WLD 147; *Valken v Berger* 1948 (3) SA 532 (W); *Strydom v Saayman* 1949 (2) SA 736 (T).

[240] Eg Barlow (n 236).

[241] *Foulds* (n 233)

[242] Huber (n 109) 6.11.1.

[243] A different explanation was given in England, basing the liability in a proprietary interest of husbands in wives — see *Pritchard v Pritchard and Sims* 1966 3 All ER 601 (CA) 607–10 (per Diplock LJ).

[244] This idea can be traced to religious roots — see R Rusconi 'San Bernardino of Sienna, the wife, and possessions' in D Bornstein & R Rusconi (eds) *Women and Religion in Medieval and Renaissance Italy* (1996) 186.

humiliation that any spouse would feel, his standing as someone acting as a husband should had also been interfered with.

The disappearance of this restriction in South Africa took place once adultery was no longer seen as an incursion on the husband's role, but as infringing an entitlement to conjugal fidelity, an obligation both parties owed each other.[245] Another consequence of the changed perspective on adultery was puzzlement at the clearly established legal position, so obvious to Roman-Dutch writers that they did not bother to comment on it, that the claim was only available against a third party, not the spouse.[246] Attention came to be focused on what is common to husbands and wives — their feelings. This is evident from the justification put forward by Van den Heever JA for granting the claim to deceived wives: 'If adultery committed with a wife is contumelious towards the husband, it is difficult to see why in the converse situation the wife should not experience the same infringement of her rights as contumely'.[247] Importantly, Van den Heever JA rejected as irrelevant the defendant's argument that she did 'not intend to scandalise or to insult the wife, but simply to gratify her own lust'. Such an argument, he suggested, 'place[s] too much emphasis on the *contumelia* element of the *actio iniuriarum*'.[248] This insistence that insult was not of the essence of the *actio iniuriarum* reinforced the attention to the defendant's feelings, being picked up by writers who subsequently grounded the claim for adultery in loss of love and friendship or one spouse's 'feelings of piety' towards the other.[249] The attention to injured feelings became sufficiently prominent that for one author liability for adultery is, along with seduction and breach of promise of marriage, proof of the recognition of an independent right to feelings.[250] However that may be, Van den Heever's observation is again evidence of how the South African *actio iniuriarum* was being shaped by its conceptualisation as a private law liability: just like the delictual liability for contumacious breach of promise could not, as we saw above, depend only on how the claimant felt, so here liability could not depend only on how the defendant interpreted her actions. The ideal type of private law liability being purely bilateral, neither

[245] McKerron (n 167) 167; J Church '*Consortium omnis vitae*' (1979) 42 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 376, 381. *Wiese v Moolman* 2009 (3) SA 122 (T).
[246] *Asinovsky v Asinovsky* 1943 CPD 131 at 132–3; Church (n 245) at 381–3; Neethling, Potgieter & Roos (n 153) 207.
[247] *Foulds* (n 233) (translation by Burchell).
[248] *Foulds* (n 233) (translation by Burchell).
[249] See, respectively, Van der Merwe & Olivier (n 181) 402 and Neethling, Potgieter & Roos (n 153) 208. Neethling became a lone voice in support of the survival of liability for adultery: see his J Neethling 'Owerspel as onregmatige daad — die Suid-Afrikaanse reg in lynregte teenstelling met die Nederlandse reg' (2010) 73 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 343, 346
[250] Neethling, Potgieter & Roos (n 153) ch 7.

party's perspective enjoys a privileged position: the assessment of their interaction must encompass both perspectives.[251]

Here, too, the Supreme Court of Appeal of its own accord raised the question whether the action should continue as part of South African law in the new constitutional dispensation. This time, however, it concluded that, 'in the light of the changing mores of our society, the delictual action based on adultery … has become outdated and can no longer be sustained; that the time for its abolition has come'.[252] The reason was that 'in this day and age the reasonable observer would rarely think that the innocent spouse was humiliated or insulted by the adultery of his or her spouse.'[253] In other words: because the harm has disappeared, so must the liability. Significantly, to the extent that harm could still be identified, the court was willing to contemplate ongoing liability: it left open the continued existence of both the action for abduction, enticement and harbouring of someone's spouse, which require actual loss of a spouse's company and/or affection,[254] and the claim for 'the patrimonial harm suffered by the innocent spouse through the loss of consortium of the adulterous spouse, which would include, for example, the loss of supervision over the household and children'[255] the latter being a claim under the *lex Aquillia*, not the *actio iniuriarum*.[256]

The SCA's reasoning was endorsed by the Constitutional Court, which observed that '[t]he origins of the claim are deeply rooted in patriarchy'.[257] Three features of the CC's approach are especially pertinent to the theme of this article. The first of these is the role played by the Constitution. Although the Court does have regard to what one could call the public policy dimension of the Constitution — in this context, its support of marriage and the family — it does so only in response to the arguments presented to it, and endorsed in lower court judgments which had upheld liability for adultery. The primary focus of its reasoning is instead on the interaction of the rights of the parties affected: 'The answer lies in the relevant constitutional norms: those in favour of the non-adulterous spouse and those in favour of the

[251] See Weinrib *The Idea of Private Law* (n 20). As pointed out in (n 184) above, this approach nevertheless represents a turn to the inner life of individuals.
[252] *RH v DE* 2014 (6) SA 436 (SCA).
[253] *RH* (n 252) para 35. This follows a wide-ranging comparative survey of the fate of liability for adultery.
[254] *Wassenaar v Jameson* 1969 (2) SA 349 (W) 352: the defendant must also have coaxed the spouse away.
[255] *RH* (n 252) para 41, referring to *Viviers* (n 233) 455.
[256] *RH* (n 252) relying for the distinction on *Media 24* (n 150).
[257] *DE v RH* 2015 (5) SA 83 (CC) para 14. The CC's conclusions are expressed in terms that are broad enough also to cover the possibility of Aquilian liability, which the SCA had left open. This is however not directly addressed by the CC; nor are claims based on enticement and harbouring (see especially para 63). As these were not the subject matter of the appeal to the CC (see para 1) they not covered by the decision strictly speaking, but it is doubtful that they can survive the logic of both courts' reasoning: see M Carnelly 'The impact of the abolition of the third party delictual claim for adultery by the Constitutional Court in *DE v RH* (2016) 30 *Speculum Juris* 1.

adulterous spouse and the third party', in addition to 'the softening and current trends and attitudes towards adultery'.[258] Although the Court looks at a wide range of rights on both sides, this fits structurally with the bilateral nature of private law. The second is that the CC goes further than the SCA in abolishing liability for adultery: it also rejects claims for loss of *consortium*.[259] Together, these two aspects of the Court's reasoning suggest that the horizontal application of constitutional rights serves to expand private law's concerns rather than to displace them.[260] Third, the CC states emphatically that 'reprehensibility is immaterial'.[261] It is simply irrelevant whether 'the third party's conduct … is less reprehensible or not reprehensible at all' than that of either spouse. With this, the *lex Julia* has finally — and completely — been left in the past and the movement from penal to reparative law completed.

IV CONCLUSION

South African law has retained more of the Roman *actio iniuriarum* than the husk of its name. As the Supreme Court of Appeal insisted in the cases grappling with liability for breach of promise and for adultery, whether the defendant's behaviour amounts to an *iniuria* still depends on whether it was *contra bonos mores*, that is, on whether it was 'objectively unreasonable'.[262] Yet the meaning of *contumelia* today is the exact opposite of Birks's description of the Roman position. Today, it signifies the violation of an interest in emotional calm rather than denial of proper respect. Subjective feelings of humiliation and insult stand at the forefront of judicial and academic accounts of the modern *actio iniuriarum*; the role of the *boni mores* is to determine their reasonableness and hence their actionability. Whereas in Roman law hubristic behaviour was the core of the wrong and any impact on the victim the means whereby it took place, the South African law of delict treats the impact as the gist of the wrong, and the defendant's behaviour as the means brining it about. It is this change, along with the associated

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[258] *DE* (n 257) para 52. The Court weighs the 'potential infringement of the claimant's dignity … against the infringement of the fundamental rights of the adulterous spouse and the third party to privacy, freedom of association and freedom and security of the person' (para 62).

[259] *DE* (n 257) para 63.

[260] This assists in understanding the nature and significance of the post-Constitutional insistence, reiterated here by the CC as well as critics of the SCA's approach (E Zitzke '*RH v DE* 2014 (6) SA 436 (SCA): a case of anti-Constitutional common-law development' (2015) 48 *De Jure* 467; J Barnard-Naudé 'The pedigree of the common law and the "unnecessary" Constitution: a discussion of the Supreme Court of Appeal's Decision in *RH v DE*' (2016) 133 *SALJ* 16) that in delict the wrongfulness enquiry is now infused with constitutional values and rights: see *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 34; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 28–9; *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) para 56; and *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 91 of the concurring judgment by Cameron JA.

[261] *DE* (n 257) para 59.

[262] *Delange v Costa* (n 179) 861–2; *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as* amici curiae*)* 2011 (3) SA 274 (CC) para 122, paras 177–80; *Van Jaarsveld* (n 225) para 19.

separation of criminal and civil liability, that has enabled the *actio iniuriarum* to survive into a fundamentally changed world.

This pattern of continuity and change does appear to track a route of social change which can in very rough terms be described as moving along the spectrum from a position closer to the conditions of mechanical solidarity to one closer to those of organic solidarity. Without Rome's comparatively clear and stable role expectations and associated behavioural conventions, South African law directed its concern at individuals' interest in their inner lives. And in line with Durkeim's theory, it turned from punishment to reparation, not only clearing out penal vestiges from delictual liability, but also shifting instances of liability from the realm of criminal law to that of private law. With the benefit of hindsight, the changes which the *actio iniurarum* went through in Holland during the Roman Dutch period can be seen as lying somewhere along this journey of legal change: Grotius' reliance on natural rights and freedom already took a step away from the Roman foregrounding of social conventions, and legal writers not only expanded the concept of *iniuria* to include what had been public crimes in Rome, but were already working with a clear division between criminal and private law, albeit one which, as they acknowledged, was not yet fully realised in legal practice. The Netherlands of the Roman-Dutch period's being at the cusp of modernity, this can again be related to the direction of travel from mechanical to organic social solidarity.

Yet, it is clear that the law was not simply adapting itself to changes in the social world. There is much evidence of the Luhmannian operational closure of the law. That the *actio iniuriarum* outlasted the social conditions of its origins affirms the impact of the doctrinalisation and systematisation that have been hallmarks of legal method since the days of Roman law, and arguably its main legacy to contemporary legal systems. As is shown by the significant shifts that this field of liability has undergone while maintaining conceptual consistency over centuries — especially the move from respect to feelings — legal doctrines have their own capacity for innovation. Moreover, the innovations adopted do not reflect social changes and social needs in a straightforward way, but often prioritise the law's internal coherence, remaining at least partially out of sync with their environment. Sometimes, as in the case of the Spanish scholastics and Grotius, the result is that legal thought moves ahead of social change; sometimes it means that the law lags behind, as happened with the survival in South Africa of civil liability for adultery after the abolition of criminal liability, and, more recently, when the Supreme Court of Appeal rejected contractual liability for breach of promise but not liability under the *actio iniuriarum*. Still, as the eventual disappearance of at least some features of the marital sexual wrongs shows, this does not immunise private law from social

change, even in the absence of legislative invention. Private law has the innate ability to respond because it is structurally coupled to its environment: although the law alone determines what counts as harm for legal purposes, whether individuals actually suffer such harm, and therefore qualify for legal protection, are questions of fact and often, as in the case of breach of promise and adultery, products of their social setting. When that factual basis falls away as a result of social change, the law has no choice but to adapt. As Luhmann puts, it, law is 'cognitively open' even as it is 'operationally closed'.[263]

Perhaps the most significant example of the how the law's internal concerns shape its interaction with the world is provided by the evolution of the concept of private law over the course of the history of the *actio iniuriarum*. The developments surveyed in this paper show how the growing differentiation of private law as a distinctive field drove forward conceptual and procedural innovations which with increasing intensity focused attention on the nature of the individual entitlements at play, and tended to a bilateral form of justice in which liability is imposed only when, and only to the extent that, it is justified to hold one person liable to another. Importantly, this is also visible in aspects of the *actio iniuriarum* that could not be examined within the confines of this paper, such as the fate of the requirement of *animus iniuriandi*. For example, in a case arising from a schoolboy prank which humiliated a headmaster,[264] the Supreme Court of Appeal held that *iniuria* no longer requires consciousness of the wrongfulness of the act — a clear divergence from South African criminal law.[265] This development fits comfortably into the reconceptualization of *iniuria* described in this article, which makes at least this aspect of the decision defensible notwithstanding Helen Scott's convincing criticism of the court's use of Roman law.[266]

By bringing us to these conclusions, the interdisciplinary methodology adopted in this paper has enabled us to trace the evolution of the *animus iniuriandi* in a changing world in a way that sheds new light on its current incarnation and on how this came to be, as well as on the trajectory of private law as a distinct legal domain. Importantly, a law-and-society approach allows us both to respect and to contextualise the autonomy of legal doctrine, thus avoiding treating the law either as insulated from its environment or as a mere instrument of external

[263] Luhmann (n 10) and associated text.
[264] *Le Roux* (n 261).
[265] This point can be extended to encompass comparable developments in other areas of *iniuria* — defamation (first in *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A) then in the latter's replacement, *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA)) and privacy (*NM and Others v Smith and Others (Freedom of Expression Institute as amicus curiae)* 2007 (5) SA 250 (CC)). These decisions make sense when the question of liability is conceptualised as concerned with conflicting private rights.
[266] H Scott '*Contumelia* and the South African law of defamation' in Descheemaeker & Scott (n 25).

purposes. This is particularly significant for South African legal historiography, which, notwithstanding our honorand's shining example, is still struggling to find a way through the pitfalls of both decontextualised and instrumentalising approaches. But it is also of value to the understanding of private law elsewhere and universally, as its subject is always facing both inward and outward, towards its own doctrines and to the persons it regulates.