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Iniuria Suffered by a Slave?

Iniuria doznana przez niewolnika?

SUMMARY

The dissonance between the perception of *edictum de iniuriis quae servis fiunt* on Ulpian's and Gaius' part is so significant that it can lead to a conclusion that a deed done to a slave – even if not always, what seems the most probable, certainly in most cases – qualified only as an insult harming the slave's owner, whereas a would-be *actio servi nomine* was *de facto* not in use. As an infringement of a slave could additionally give rise to an owner's entitlement to plead for damages according to the Aquilian regime, it seems that practical use of the edictal clause with regard to *actio servi nomine*, even if possible to take place at a certain level of legal development of the delict, was of minor importance. However, recognizing the main role of the edict in providing a modern and flexible basis for bringing praetorial *actio iniuriarum suo nomine* in a case of *iniuria* suffered through one's slave, not limited to decemviral instances of *os fractum* and *membrum ruptum*, appears to be the most probable interpretation.

Keywords: *iniuria*; *actio servi nomine*; edictal clause; a slave

The issue of aiming a conduct realising the features of injurious behaviour against or, especially, violating the corporeal integrity of a slave has gained significant interest among authors[1], providing such a restricted question. In the Polish

[1] See J.H. van Meurs, *Iniuria Ipsi Servo Facta*, "TvR" 1923, vol. 4(3), DOI: https://doi.org/10.1163/157181923X00139, passim; M. Fernández Prieto, *El esclavo en el delito de «iniuriae»*, [in:] *Actas del III Congreso Iberoamericano de Derecho Romano*, León 1998, passim; S. Fusco, *De iniuriis quae servis fiunt. Un caso di relevanza giuridica della persona servi?*, [in:] *Homo, caput, persona: la costruzione giuridica dell'identità nell'esperienza romana: dall'epoca di Plauto a Ulpiano*, eds. A. Corbino, M. Humbert, G. Negri, Pavia 2010, passim; M. Guerrero Lebrón, *En torno a la injuria cometida contra el esclavo dado en usufructo*, "Anuario da Facultade de Dereito da Universidade da Coruña" 2007, vol. 11, passim; eadem, *La injuria indirecta en derecho romano*, Madrid 2005,

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context, an important article on this subject was written by M. Kuryłowicz, who focused on the circumstances of committing the delict by persuading a slave or a son under control into dicing, framing the issue in a broader, moral perspective[2].

In the area of liability for *iniuria* done directly to a slave, there are two issues of essential significance: the problem of distinction between a delict against the owner and – possibly – against a slave him- or herself, and a question of conditions under which an action or actions could have been granted.

Already the first issue can lead to doubts, as according to Gaius, a slave himself cannot be considered a victim of the delict; only his master can become a subject of *iniuria*, which was directly done to his slave.

Gai Institutiones 3, 222: *Seruo autem ipsi quidem nulla iniuria intellegitur fieri, sed domino per eum fieri uidetur; non tamen iisdem modis, quibus etiam per liberos nostros uel uxores iniuriam pati uidemur, sed ita, cum quid atrocius commissum fuerit, quod aperte in contumeliam domini fieri uidetur, ueluti si quis alienum seruum uerberauerit, et in hunc casum formula proponitur; at si quis seruo conuicium fecerit uel pugno eum percusserit, non proponitur ulla formula nec temere petenti datur*[3].

Accordingly, the jurist claims that an action would not be granted on account of a slave himself. The liability of the doer depends on whether his behaviour offended the slave's owner and, generally, on how serious the violation was. On the basis of the analysis of the above text, the possibility of committing a delict against a slave is unquestionably excluded. Furthermore, this statement corresponds to a general concept of *iniuria* as a delict aimed against the honour of a free person.

However, Ulpian's commentaries seem to deny this, as a jurist explicitly differentiates an action for injury granted to an owner on account of a behaviour to a slave because of his own, namely the owner's *iniuria* and the one that would be given to him *servi nomine*.

Ulpianus, D. 47, 10, 15, 35: *Si quis sic fecit iniuriam servo, ut domino faceret, video dominum iniuriarum agere posse suo nomine: si vero non ad suggillationem domini id fecit, ipsi servo facta*

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pp. 101–117, 157–167, 186–189; D. Nowicka, *Zniesławienie w prawie rzymskim*, Wrocław 2013, pp. 237–242. The issue of sexual abuses against slaves, which could have also entitled an owner to *actio iniuriarum*, is not analyzed in this article. On the subject, see e.g. M. Guerrero Lebrón, *La injuria indirecta…*, pp. 163–167; F. Raber, *Frauentracht und "iniuria" durch "appellare": D. 47.10.15.15*, [in:] *Studi in onore di Edoardo Volterra*, vol. 3, Milano 1971, passim; M. Perry, *Sexual Damage to Slaves in Roman Law*, "Journal of Ancient History" 2015, vol. 3(1), DOI: https://doi.org/10.1515/jah-2015-0016, pp. 55–75.

[2] M. Kuryłowicz, *Paul. D. 47, 10, 26 i obyczajowo-prawne zagadnienia rzymskiej iniurii*, „Annales UMCS sectio G (Ius)" 1984, vol. 31, passim. See also idem, *Paul. D. 47.10.26 und die Tatbestände der römischen „iniuria"*, "Labeo" 1987, vol. 33, passim.

[3] Cf., e.g., M. Guerrero Lebrón, *La injuria indirecta…*, pp. 103–104; M.F. Cursi, *Pati iniuriam per alios (Gai. 3,221–3,222)*, "BIDR" 2012, vol. 106, pp. 267–269.

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iniuria inulta a praetore relinqui non debuit, maxime si verberibus vel quaestione fieret: hanc enim et servum sentire palam est[4].

What seems essential, Ulpian gives the above interpretation in the context of commented edictal regulation, i.e. *edictum de iniuriis quae servis fiunt*[5]. The jurist's commentary is preceded by quotation of the edict's provision as follows:

Ulpianus, D. 47, 10, 15, 34: *Praetor ait: "Qui servum alienum adversus bonos mores verberavisse deve eo iniussu domini quaestionem habuisse dicetur, in eum iudicium dabo. Item si quid aliud factum esse dicetur, causa cognita iudicium dabo".*

The tenor of the edict clearly denotes a focus on determining the forbidden conducts, not giving an independent basis for assuming the possibility of recognition of two different actions: *suo* and *servi nomine*[6]. The question arises regarding which of these actions the praetorial regulation refers to. In accordance with the above-cited Gaian text, it should be accepted that it was an *actio iniuriarum suo nomine*, brought by the slave's owner on account of the harm done to his own reputation. Moreover, apart from the unequivocal tenor of Gaius' text, denying the possibility of *iniuria* done to a slave, a far-going similarity of situations giving rise to an action, pleads for admitting this interpretation. In both cases, it is about the most severe violations, boiling down to thrashing (*verberatio*[7]), present in both sources, and – included in Ulpian's attestation – submitting a slave to torture (*quaestio*) without his owner's consent[8], which can, without doubt, be classified as fulfilling the Gaian prerequisite of *atrocitas*[9]. Consequently, both texts (i.e. the

[4] See also R. Wittmann, *Die Entwicklungslinien der klassischen Injurienklage*, "ZSS" 1974, vol. 91(1), DOI: https://doi.org/10.7767/zrgra.1974.91.1.285, pp. 339–340; M.F. Cursi, *Pati iniuriam…*, p. 270; M. Guerrero Lebrón, *En torno a la injuria…*, pp. 343–344.

[5] The edict, as M. Hagemann (*Iniuria. Von den XII-Tafeln bis zur Justinianischen Kodifikation*, Köln 1998, p. 81) notices, is the only one among the so-called "special edicts", in which a praetor refers to violation of corporeal integrity. The author claims that the regulation provides the protection of a slave belonging to another, and thus the range of protection needs to be narrower than in the case of free people. On doubts concerning the existence of the edictal clause of this kind, see E. Pólay, *Iniuria Types in Roman law*, Budapest 1986, p. 108 footnote 30.

[6] Apart from no sources that could have been considered as supporting Ulpian's view by other jurists, it is highly meaningful that Ulpian does not mention other jurists' opinions when interpreting the edict as providing an action *servi nomine*, while widely invoking their views when analyzing *actio iniuriarum* of the owner, acting *suo nomine*.

[7] See M. Guerrero Lebrón, *La injuria indirecta…*, p. 106.

[8] See Ulpianus, D. 47, 10, 15, 40. On *verberare*, see especially F. Raber, *Grundlagen Klassischer Injurienanspruche*, Wien 1969, pp. 77–83; M. Guerrero Lebrón, *La injuria indirecta…*, pp. 160–161.

[9] On *quaestio per tormenta* see especially A.W. Zumpt, *Der Criminalproceß der Römischen Republik*, Leipzig 1871, pp. 310–328; A. Brunt, *Evidence given under Torture in the Principate*, "ZSS" 1980, vol. 97(1), DOI: https://doi.org/10.7767/zrgra.1980.97.1.256, pp. 256–265; M. Brutti, *La tortura e il giudizio*, "Index" 2010, no. 38, especially pp. 54–59; A. Nogrady, *Römisches Stra-*

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Gaian one and the one citing the tenor of the edict by Ulpian) can be considered to concern the same regulation and be quite coherent.

If so, how can we explain a second action – in a slave's name and on account of his own suffering from Ulpian's commentary? It appears that, taking into account a progressive recognition of slaves' human condition[10], we can venture an assumption that also in this case we deal with Ulpian's viewpoint[11] or a possible extension of the range of application of action for insult, which took place within jurisprudential interpretation[12]. Despite an undoubtful influence of Stoic philosophy on the perception of slaves[13], accepting the latter hypothesis is inadmissible, as such a major extension, allowing acceptance of a slave him- or herself as able to suffer a wrong rising from a delict aimed at harming the corporeal integrity, dignity, and good name of a freeman, could not have been introduced without an explicit praetorial intervention. This interpretation does not seem convincing because of too far-reaching turnover in perceiving an *iniuria*-delict as against a traditional trend[14]. Moreover, nothing suggests that other jurists' perception converged with Ulpian's view[15]. Thus, it should be accepted that for introducing elements of protection of a slave, even strictly limited, against *iniuria*-delict, it would have been necessary

frecht nach Ulpian: Buch 7 bis 9 De officio proconsulis, Berlin 2006, pp. 235–255; K. Amielańczyk, *'Quaestio per tormenta'. O wartości dowodowej zeznań uzyskanych za pomocą tortur w rzymskim procesie karnym okresu pryncypatu*, [in:] *O prawie i jego dziejach księgi dwie. Studia ofiarowane Prof. Adamowi Lityńskiemu w 45-lecie pracy naukowej i 70-lecie urodzin*, ed. M. Mikołajczyk, Białystok 2010, pp. 51–62. See also B. Sitek, *"Quaestionem" intellegere debemus tormenta et corporis dolorem ad eruendam veritatem*, [in:] *Crimina et mores. Prawo karne i obyczaje w starożytnym Rzymie*, ed. M. Kuryłowicz, Lublin 2001, pp. 164–166.

[10] See F. Raber, *Grundlagen Klassischer*…, pp. 84–85.

[11] See, e.g., T. Honoré, *Ulpian*, Oxford 1982, pp. 85–87.

[12] As in K.Z. Méhész, *La injuria en Derecho Penal Romano*, Buenos Aires 1969, p. 19. See M. Guerrero Lebrón, *En torno a la injuria*…, p. 344; eadem, *La injuria indirecta*…, pp. 107–108 (the author underlines here that it was Gaius who expressed the *communis opinio*, and Ulpian was the one to contradict it).

[13] Cf. J.H. van Meurs, *op. cit.*, pp. 278–298.

[14] See, e.g., M.F. Cursi, *Pati iniuriam*…, pp. 272–274. On "humanity" of slaves, see especially A. Donati, *Homo e persona. Inherent Dignity e Menschenwürde*, [in:] *Atti dell'Accademia Romanistica Costantiniana, XVII Convegno Internazionale*, Roma 2010, pp. 73–236; L. Maganzani, *La dignità humana negli scritti degli giuristi romani*, [in:] *Dignità e diritto: prospettive interdisciplinari. Quaderni del Dipartimento di Scienze Giuridiche dell Università Cattolica del S. Cuore di Piacenza*, ed. A. Sciarrone, Tricase 2010, pp. 85–97; Por. R. Gamauf, *Zur Frage 'Sklaverei und Humanität' anhand von Quellen des römischen Rechts*, [in:] *Fünfzig Jahre Forschungen zur antiken Sklaverei an der mainzer Akademie 1950–2000*, eds. H. Bellen, H. Heinen, Stuttgart 2001, pp. 51–72; R.A. Bauman, *Human Rights in Ancient Rome*, London 2000, pp. 115–120.

[15] It is also hardly possible that conceiving this interpretation could be the result of the decemviral perception of – beside considering slaves as things – the human nature of slaves, manifested *inter alia* in a legal norm concerning *os fractum*, which treated on a penalty for breaking a bone of freemen as well as – appreciating their inferior value and status – slaves.

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to establish an edict, which would *de iure* create a brand-new interest protected by law: a slave's honour. However, not only an ultimate disregard of the issue of an injury suffered by slaves in Gaius' Institutes[16], but also Gaius' statement contrary to the presumed gist of *iniuria* in such case, make even the mere existence of a regulation of that kind questionable.

It seems advisable here to stop for a while to briefly analyze a manner of presenting *iniuria* by Gaius. The jurist describes the delict as a coherent concept beginning from tha Law of the Twelve Tables, and thus even treating the three decemviral behaviours as aspects of *iniuria* already at this stage of legal development[17]. The so-called special edicts[18] perfectly fit into this picture, providing additional examples[19] for possible application of action for a delict aimed not only against a corporeal integrity, but also each behaviour conducted to harm the honour inherent to a freeman. *Ipso facto*, arguments based on a presumption, according to which Gaius was a follower of decemviral logic and thus in his Institutes there was no place for a "modern" approach towards the issue of slaves in the context of *iniuria*[20], need to be considered misconceived. What is especially interesting is that the problem of indirect injury, which is quite amply analyzed by Gaius, who devoted a spacious fragment of his considerations on *iniuria* to this question, is not – when considering free *alieni iuris* – connected with any edict. The liability of the perpetrator of an *iniuria* directly aimed at the honour of a married woman

[16] It needs to be underlined that traces of other praetorial interventions introducing "novelties" to the decemviral regime of *iniuria* are present in the Institutes as Gaius uses typical behaviours particular edicts dealt with as examples of conducts realizing the delict of *iniuria*.

[17] On the relation between the decemviral behaviours see, e.g., P. Huvelin, *La notion de l'iniuria dans le très ancien droit romain*, Lyon 1903, pp. 15–18; G. Pugliese, *Studi sull'iniuria*, Milano 1941, p. 5; B. Albanese, *Una congettura sul significato di iniuria in XII tab. 8.4*, "Ivra" 1980, vol. 31, p. 24; S. di Paola, *La genesi storica del delito de «iniuria»*, "Annali del Seminario giuridico dell'Università di Catania" 1947, vol. 1, pp. 271–276; M. Kaser, *Das altrömische Ius*, Göttingen 1949, p. 208; V. Da Nóbrega, *L'iniuria dans la loi des XII Tables*, "Romanitas" 1967, vol. 8, p. 269.

[18] See especially O. Lenel, *Edictum Perpetuum*, Leipzig 1927, pp. 400–403; J. Plescia, *The development of iniuria*, "Labeo" 1977, vol. 23, pp. 271–289; U. von Lübtow, *Zum römischen Injurienrecht*, "Labeo" 1969, vol. 15, pp. 131–167; M. Marrone, *Consierazioni in tema di "iniuria"*, [in:] *Synteleia V. Arangio-Ruiz*, vol. 1, Napoli 1964, pp. 475–485; M. Hagemann, *op. cit.*, pp. 58–61; D. de Lapuerta Montoya, *Estudio sobre el «edictum de adtemptata pudicitia»*, Valencia 1999, pp. 36–49; M.J. Bravo Bosch, *La injuria verbal colectiva*, Madrid 2007, pp. 71–77; M. Fernández Prieto, *La difamación en el Derecho Romano*, Valencia 2002, pp. 98–101; R. Wittmann, *Die Entwicklungslinien der klassischen…*, passim; A. D'Ors, J. Santa Cruz Teijeiro, *A proposito de los edictos especiales "de iniuriis"*, "AHDE" 1979, vol. 49, passim; D. Nowicka, *Zniesławienie w prawie…*, pp. 61–79.

[19] Cf. *Gai Institutiones* 3.220.

[20] As in M.F. Cursi, *Pati iniuriam…*, p. 267. On a concept of *persona* in Gaius' texts, see, e.g., R. Quadrato, *La persona in Gaio. Il problema dello schiavo*, "Ivra" 1986, vol. 37, pp. 1–33; U. Agnati, *«Persona iuris vocabulum» Per un'interpretazione giuridica di «persona» nelle opere di Gaio*, "Rivista di Diritto Romano" 2009, no. 9, pp. 1–41.

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in regard to her husband and father (*pater familias*) does not stem from *edictum de adtemptata pudicitia* and is not restricted to forbidden behaviours determined there[21], just as mentions included in the Digest concerning *iniuria* done to a son under control[22] are not joined with any particular regulation, both being inscribed into a concept of full protection of the honour of a father, husband (fiancé), or the head of the household. What would possibly have been the goal of introducing a separate praetorial regulation for providing the slave's owner with the possibility of bringing an action for an insult suffered by him through a slave, as there was no need to establish such a solution by a particular legal intervention when considering free *alieni iuris*? It does not seem to be acceptable that the *ratio legis* would have boiled down to defining the limits of liability for abuses concerning a slave belonging to another by introducing a restriction to the most severe misconducts and employment of a *contra bonos mores* criterion[23], as it would consequently result in admitting that there had been a possibility of suing a perpetrator of minor injuries to a slave belonging to another before *edictum de iniuriis quae servis fiunt*. Not only would such a hypothesis not find confirmation in the available sources, but it would also contradict a general path of development of the delict, which led towards extension, not limitation of protection.

[21] On the content of *edictum de adtemptata pudicitia*, see M.J. Bravo Bosch, *Algunas consideraciones sobre el Edictum de adtemptata pudicitia*, "Revista xuridica da Universidade de Santiago de Compostela" 1996, vol. 5(2), pp. 41–53; M. Guerrero Lebrón, *La idea de materfamilias en el Edictum de adtemptata pudicitia*, [in:] *El Derecho de familia. De Rome al Derecho actual*, Huelva 2004, pp. 297–310; D. de Lapuerta Montoya, *El elemento subjetivo en el edictum de adtemptata pudicitia: la contravención de los boni mores como réquisito esencial para la existencia de responsabilidad*, "Anuario da Facultade de Dereito da Universidade da Coruña" 1998, vol. 2, pp. 237–252; eadem, *Estudio sobre…*, passim; eadem, *La contumelia indirecta en los ataques a la buena reputacion de la mujer e hios*, [in:] *El Derecho de familia…*, pp. 355–372; F. Raber, *Frauentracht…*, pp. 633–646; idem, *Grundlagen Klassischer…*, pp. 39–56; A. Guarino, *Le matrone e i pappagalli*, [in:] *Inezie di Giuriconsulti*, Napoli 1978, pp. 165–188; R. Wittmann, *Die Entwicklungslinien der klassischen…*, pp. 314–320; D. Nowicka, *Ochrona skromności materfamilias w Edictum de adtemptata pudicitia*, [in:] *Pozycja prawna kobiet w dziejach*, ed. S. Rogowski, Wrocław 2010, pp. 41–55; eadem, *Zniesławienie w prawie…*, pp. 63–68, 127–140.

[22] See especially M. Guerrero Lebrón, *La injuria indirecta…*, pp. 145–157; D. Nowicka, *Family relations in cases concerning iniuria*, [in:] *Mater Familias: scritti romanistici per Maria Zabłocka*, eds. Z. Benincasa, J. Urbanik, with participation of P. Niczyporuk and M. Nowak, Warszawa 2016, pp. 619–637.

[23] J. de Koschembahr-Lyskowski, *Conventiones contra bonos mores dans le droit romain*, [in:] *Mélanges de Droit romain dédiés à G. Cornil*, Paris 1926, pp. 15–35; T. Mayer-Maly, *Contra bonos mores*, [in:] *Iuris Professio, Festgabe für Max Kaser zum 80. Geburtstag*, ed. H.-P. Benöhr, Wien 1986, pp. 151–167; H.R. Mezger, *Stipulationen und letztwillige Verfügung „contra bonos mores" im klassisch-römischen und nachklassischen Recht*, Göttingen 1930, passim; M. Kaser, *Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht*, "ZSS" 1940, vol. 60(1), DOI: https://doi.org/10.7767/zrgra.1940.60.1.95, pp. 95–150.

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The only known antecedent regulation on the issue of liability for infringement on the corporeal integrity of a slave in the context of a later development of *iniuria*-delict is a decemviral norm on *os fractum*[24], obviously creating legitimation of the slave's owner to bring a compensation claim on account of his slave's broken bone. It appears advisable to accept the suggested extension of liability to include also the gravest violations of bodily integrity of a slave, inscribed in the range of *membrum ruptum*[25]. However, it seems improbable that it was about a harm suffered by a slave him- or herself and an *actio servi nomine* on the ground of decemviral regulation[26], but about an owner's right to claim compensation in his own name. Accordingly, an introduction of an edict creating liability at a level of *contra bonos mores verberare* and subjecting to torture without an owner's consent should rather be perceived as an extension of the decemviral regime through additional admission of different behaviours than breaking a bone or – probably – *membrum ruptum* as constituting liability for injury suffered by the slave's owner. Similarly to the other "special edicts", the *ratio legis* would boil down to introducing an extension of the previous range of protection by defining new conducts resulting automatically in liability built on the basis of *actio iniuriarum*, with a simultaneous introduction of a possibility of granting an action and providing some flexibility in other well-grounded situations[27].

Following this line of reasoning, it should be admitted that the edict defined circumstances in which a slave's owner was entitled to act *suo nomine*, just as it appears in Gaius' text. What then would the need to introduce the edict stem from, since the extension of liability for other deeds of a similar nature could have taken place, similarly as in other cases of *iniuria*, through the jurisprudential interpretation? How is this situation different from indirect injury suffered by free *alieni*

[24] See P. Huvelin, *op. cit.*, pp. 7–9; P. Birks, *The early history of iniuria*, "TvR" 1969, vol. 37(2), DOI: https://doi.org/10.1163/157181969X00157, pp. 185–191; M. Hagemann, *op. cit.*, pp. 11–12, 41–42. On Ulpian retrieving "personal" concept of a slave, already present in the norm on *os fractum*, see M.F. Cursi, *Pati iniuriam…*, p. 271. On the norm dealing with a slave as a man of inferior status and mediocre value, see M. Perry, *op. cit.*, p. 59.

[25] As in G. Pugliese, *op. cit.*, pp. 10–12; M.F. Cursi, *Pati iniuriam…*, p. 269; M. Fernández Prieto, *La difamación…*, pp. 286–287; eadem, *El esclavo…*, p. 151. See also M. Guerrero Lebrón, *La injuria indirecta…*, pp. 101–103. On *membrum ruptum*, see especially P. Huvelin, *op. cit.*, pp. 9–15; G. Pugliese, *op. cit.*, pp. 29–30; S. di Paola, *op. cit.*, pp. 271–281; P. Birks, *op. cit.*, pp. 179–185; A. Watson, *Personal Injuries in the XII Tables*, "TvR" 1975, vol. 43(2), DOI: https://doi.org/10.1163/157181975X00024, pp. 216–220; R. Wittmann, *Die Körperverletzung an Freien im klassischen römischen Recht*, München 1972, pp. 3–9; A. Völkl, *Die Verfolgung der Körperverletzung im frühen römischen Recht. Studien zum Verhältnis von Totungsverberechen und Injuriensdelikt*, Wien–Köln–Graz 1984, pp. 40–82; M. Hagemann, *op. cit.*, pp. 10–11, 40–41.

[26] As in M.F. Cursi, *Iniuria cum damno: antigiuridicità e colpevolezza nella storia del danno aquiliano*, Milano 2002, p. 273.

[27] See Ulpianus, D. 47, 10, 15, 43; M. Guerrero Lebrón, *En torno a la injuria…*, p. 341; A. D'Ors, J. Santa Cruz Teijeiro, *op. cit.*, p. 658.

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iuris?[28] It seems that even more than by the gravity or seriousness of an insult/injury, explicitly displayed in the text, by the fact that the doer's behaviour against a free person under a control constituted – or could possibly have constituted (e.g., not in the consent of the one in power[29]) – a delict. The range of protection of free *alieni iuris* and the head of household was identical. In the case of a conduct directly aimed at a slave, this element is missing, as under no circumstances can a slave be considered a subject of *iniuria*, as he or she lacks honour (i.e., both dignity and good name)[30]. Every extension of the protection of slave owners against indirect *iniuria* suffered through the slaves required an unequivocal definition of situations that could have led to liability, as there was neither an original liability for a harm done to a slave as such nor the interest protected by law in such a case.

According to Ulpian's commentary, indicating a differentiation between an *iniuria*, which insults the good name of a slave's owner and the one that does not affect it, it was a doer's intent that decided the right to bringing an *actio suo nomine*. When it was impossible to ascribe the awareness of the person of the owner to a doer, the deed generally remained unpunished. In an analogous situation, when a direct victim was a free person under control, an *actio alieno nomine* was at the head of a household's disposal. Therefore, it is probable that the interpretation of the edict presented by Ulpian or the introduction of the edict itself reflected an attempt to complement the range of protection of the owner in such cases[31].

Such interpretation can also speak of a conclusion from Ulpian's commentary on the issue of not bringing both actions (i.e., *suo* and *servi nomine*) at the same time, although it does not stem from the tenor of the edictal clause as quoted by the jurist. Ulpian attests the possibility of bringing an *actio servi nomine* when there are no grounds to bring one *suo nomine*, so that the deed against a slave would not remain unpunished. It can therefore be assumed that according to Ulpian, *actio iniuriarum servi nomine* is of a secondary, quasi subsidiary nature, becoming accessible for an owner only in the case of a lack of premises enabling recognition of indirect injury against him.

Such a peculiar character of *actio iniuriarum* seems essential for interpretation of the meaning of an *actio servi nomine* in Ulpian's terms. Admitting the existence

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[28] Cf. M.F. Cursi, *Pati iniuriam…*, p. 270.

[29] See Paulus, D. 47, 10, 26.

[30] Cf. M. Fernández Prieto, *La difamación…*, p. 289. Differently, e.g., B. Biondi, *Actiones noxales*, Cortona 1925, p. 172, 237; B. Albanese, *Le persone nel Diritto Privato Romano*, Palermo 1979, p. 137; M. Guerrero Lebrón, *En torno a la injuria…*, p. 344.

[31] Cf. R. Wittmann, *Die Entwicklungslinien der klassischen…*, p. 345. Similarly M. Perry, *op. cit.*, p. 65, although in reference to the doer's intent and not their awareness of the slave's owner's identity. A lack of intent in this case is also underlined by A. Katančević (*A Tort Protection of the Ownership Title to a Slave*, [in:] *Possessio ac iura in re. Z dziejów prawa rzeczowego*, eds. M. Mikuła, W. Pęksa, K. Stolarski, Kraków 2012, p. 44).

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of – just beside the slave's owner's *actio suo nomine* – a typical *actio alieno nomine*, taking the form of *servi nomine* in our case, would require accepting that the latter stemmed only from a harm done to a slave, and as such should be treated as originating from a separate delict. Then the situation would have been analogous to the one of *alieni iuris*. Accepting this interpretation would involve acknowledgement – at least in a very limited range – of the honour of a slave, who would therefore gain a status of a subject of *iniuria*, which is not attested in available sources. If we accepted this hypothesis nonetheless, there would be no ground to assume that the action *servi nomine* was at an owner's hand only when his own legitimation to act *suo nomine* was lacking, as between actions *suo* and *servi nomine*, originating from two different delicts, an alternative concurrence would not occur (one would not preclude the other)[32]. The latter could only possibly take place when there was a case of identity of interest protected by law. Consequently, it would be necessary to admit the possibility of cumulation of actions in a situation fulfilling the prerequisites for bringing an *actio servi nomine*, with simultaneous presence of the doer's awareness of the identity of the slave's owner[33]. This kind of situation is not attested by known sources either.

Is Ulpian's "subsidiarity" of *actio iniuriarum servi nomine* really to be understood as an attempt to find a medium solution, which would be apt to reconcile recognition of a slave's suffering within *iniuria* delict, which would imply considering him or her a subject deserving limited protection, on the one hand, and granting a slave with full subjectivity in the area of the delict, which was aimed at an individual's honour – a quality which a slave, not only not being a Roman citizen, but also a *persona* – was lacking, on the other? Even Ulpian's interpretation was not as far-reaching as to accept the existence of a fully independent action for an injury on account of harm done to a slave. Is it advisable then to percept a *ratio legis* of the edict in a willingness to provide slaves with a sort of legal protection?[34]

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[32] However, an interpretation, according to which Ulpian considers a concurrence between actions alternative, is presented by M.F. Cursi (*Pati iniuriam…*, p. 274).

[33] Cf. W.W. Buckland, *The Roman Law of Slavery*, Cambridge 1908, p. 80. See also M. Guerrero Lebrón, *La injuria indirecta…*, pp. 112–113.

[34] A line of interpretation connecting the analyzed edictal regulations with a series of provisions aimed at improving the situation of slaves by limiting allowable severity of their owners needs to be mentioned here. See J.H. van Meurs, *op. cit.*, passim, especially p. 285 and 288; F. Raber, *Grundlagen Klassischer…*, p. 84. Cf. G. Giliberti, *Beneficium e iniuria nei rapporti col servo: Etica e prassi giuridica in Seneca*, [in:] *Sodalitas: scritti in onore di Antonio Guarino*, ed. V. Giuffrè, vol. 4, Napoli 1984, p. 1853. See M. Fernández Prieto, *La difamación…*, p. 296. However, I would like to strongly underline the inadequacy of discerning similarity of the latter to *edictum de iniuriis quae servis fiunt*, as the edict handled only behaviours against a slave belonging to another – i.e., conducts that *de facto* boiled down to arrogation of an owner's prerogatives according to enslaved members of his household – as rightly suggested by E. Pólay (*op. cit.*, p. 109, 151–153), R. Wittmann (*Die Entwicklungslinien der klassischen…*) and M. Hagemann (*op. cit.*, p. 87). See Ulpianus, D. 47, 10, 15, 36 and D. 47, 10, 15, 37. Not even Ulpian in his highly humanitarian interpretation of the edict

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It seems that the answer to the above question does not have to lie in a vague sphere of assumptions concerning approaches to slaves' condition in the times of introducing the edict or according to the classical jurists' views; it can indirectly arise from a presentation of conditions under which an action can be granted/brought in the previously cited sources.

Gaius' testimony could not be plainer regarding this question, as according to it *iniuria atrox* was a ground for granting an owner with an action on account of *iniuria* suffered by him through his slave – the only action that could arise in a situation of deeds constituting a violation of a slave. What seems crucial here is that a prerequisite of a serious gravity of the infringement was by the jurist inherently joint with his interpretation of it openly insulting the owner's good name. This indicates a sort of automatism in qualifying the gravest attacks on the bodily integrity of someone's slave as affecting the honour of his/her owner[35] without a need to prove the doer's intent to insult the latter. A subjective element, if claiming its existence at all, which seems eminently doubtful, is then *a priori* inscribed in a determined behaviour of the wrongdoer. It needs underlining here that Gaius, defining the most severe cases of violation which built a basis for bringing an action by the owner, does not exclude granting him with action also in other situations – the jurist only attests that an action in such cases would not be given *temere* – without earlier consideration or reflection.

Ulpian's testimony on the *edictum de iniuriis quae servis fiunt* specifies, in turn, two situations in which an action would be granted in each case: thrashing a slave belonging to another when done contrary to good morals, and subjecting him or her to torture without his or her owner's consent. Additionally, an open catalogue of behaviours is mentioned that could have been recognized by a praetor as deserving an action. However, in this latter case, Ulpian claims that a character of a slave should be evaluated[36]. An examination of this text with Gaius' statements allows to note a far-reaching similarity in the area of gravity of deeds required for automatic liability of the doer – in both cases *verberatio* is mentioned – and subjecting a slave to a *quaestio* can be, without doubt, considered as fulfilling the prerequisite of *atrocitas*, declared in Institutes. With regard to the edict, a premise of contrariness to good morals in reference to thrashing is added[37]. According to Ulpian's commentary, the above prerequisites do not concern an action brought by the slave's owner *suo nomine*, but *servi nomine*.

refers to slaves generally, but only to those against whom a given deed was undertaken by a person other than their owner. See also M. Fernández Prieto, *La difamación*…, pp. 292–293; A. Katančević, *op. cit.*, pp. 44–46.

[35] See A.D. Manfredini, *Contributi allo studio dell'iniuria in età repubblicana*, Milano 1977, p. 193.

[36] See Ulpianus, D. 47, 10, 15, 44; M.F. Cursi, *Pati iniuriam*…, p. 271; M. Guerrero Lebrón, *La injuria indirecta*…, pp. 107–110.

[37] See Ulpianus, D. 47, 10, 15, 38 and D. 47, 10, 15, 39. Cf. F. Raber, *Grundlagen Klassischer*…, pp. 82–83; R. Wittmann, *Die Entwicklungslinien der klassischen*…, pp. 343–345.

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What seems particularly interesting is that Ulpian also analyzes an issue of an indirect *iniuria* suffered in result of a behaviour aimed directly against a slave. Although this aspect of the delict, by its nature not connected with any particular praetorial regulation, does not require an *a priori* determined range of conducts that could result in constituting the doer's liability to a house or household, the cases of indirect *iniuria* suffered through a slave analyzed by Ulpian generally concern violations of a considerable gravity (*caedere*, *verberare*, *quaestio*). It is rather an awareness of the owner's identity assumed a *conditio sine qua non* of qualification a behaviour as a case of indirect injury than the intent to insult him, although here it seems to be inscribed in the gravest violations defined in the edict as those that always entitled an owner to bring an action. Only unawareness of a slave's true status or misconception of the identity of his or her owner results in the incapacity to bring *actio iniuriarum* by his or her master.

Ulpianus, D. 47, 10, 15, 45: *Interdum iniuria servo facta ad dominum redundat, interdum non: nam si pro libero se gerentem aut cum eum alterius potius quam meum existimat quis, non caesurus eum, si meum scisset, non posse eum, quasi mihi iniuriam fecerit, sic conveniri Mela scribit.*

A contrario, cognisance of the identity of the owner sufficed for the conduct against a slave to be considered as aimed at his honour.

It is also a context of indirect injury in a situation analyzed by Ulpian in a following fragment, which refers to thrashing or submitting to torture of a slave in usufruct or held in possession in good faith[38]. As in these cases, there could have occurred a legal doubt concerning the person entitled to bring an action for injury sustained through a slave, and Ulpian claimed that it was an owner who should rather be granted with the action. From such a tenor of the text in question, we can draw a conclusion that it was a kind of general rule, according to which in a lack of explicit data, enabling to assume that it was about insulting an usufructuary, an owner could legitimately sue with *actio iniuriarum*[39]. This conclusion is further confirmed by the last sentence of a fragment dealing with an issue of a free person or a slave belonging to another, who served in good faith as one's slaves[40].

Given the above briefly discussed similarities between the testimonies of Gaius and Ulpian, it would be hardly conceivable to assume that they concern different regulations, a provision other than *edictum de iniuriis quae servis fiunt*, or two different actions. Thus, it needs to be deduced that the exact meaning of the edictal regulation was not univocal to the classical jurists, as they interpreted it differently. The dissonance between its perception on Gaius' and Ulpian's part is so significant

[38] Ulpianus, D. 47, 10, 15, 47. See also M. Fernández Prieto, *La difamación*…, p. 292.

[39] See M. Fernández Prieto, *El esclavo*…, p. 154.

[40] Ulpianus, D. 47, 10, 15, 48. As in M. Guerrero Lebrón, *En torno a la injuria*…, p. 340. See also R. Wittmann, *Die Entwicklungslinien der klassischen*…, pp. 296–297.

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that it can lead to a conclusion that a deed done to a slave – even if not always, what seems the most probable[41], certainly in most cases – qualified only as an insult harming the slave's owner, whereas a would-be *actio servi nomine* was *de facto* not in use[42]. If we accepted, as shown above, that pure awareness of a slave's owner's identity was sufficient for treating *adversus bonos mores verberatio* or *quaestio iniussu domini* as a case of indirect *iniuria*, it is more than probable that a great majority of situations of this kind complied with these criteria. As an infringement of a slave could additionally give rise to an owner's entitlement to plead for damages according to the Aquilian regime[43], it seems that practical use of the edictal clause with regard to *actio servi nomine*, even if possible to take place at a certain level of legal development of the delict, was of minor importance.

This conclusion may also explain, given a considerable timespan from the introduction of the edict to classical jurists' commentaries, the above-analyzed discord in the provision's interpretation between Gaius and Ulpian. If we had hypothetically assumed that the edict in reality provided an *actio servi nomine*, it would certainly not have been motivated by a desire to protect – *de iure* non-existing – the honour of a slave, but to supply his or her owner with additional protection[44] in cases of absolute unawareness of his identity on the doer's part. With a sole exception of Ulpian's statement concerning presumed grounds for introducing a new basis for action, namely a slave's suffering, irrefutably being but a manifestation of the jurist's perception of slaves' human condition, nothing can speak for interpretation, according to which it was in fact about improving their situation. However, in the light of the above analysis, accepting a view of the edict's *ratio legis* boiling down to supplement the slave's owners' protection, doubts arise on the basis of a possible (rather minor) scale of the phenomenon that would have provoked praetorial intervention. Therefore, recognizing the main role of the edict in providing a modern and flexible basis for bringing praetorial *actio iniuriarum suo nomine* in a case of *iniuria* suffered through one's slave, not limited to decemviral instances of *os fractum* and *membrum ruptum*, appears to be the most probable interpretation[45].

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[41] See O. Lenel, *op. cit.*, p. 401; A. Katančević, *op. cit.*, p. 41.

[42] A view of M.F. Cursi (*Pati iniuriam…*, p. 288), according to which an autonomous *iniuria* of a slave was a result of transformation of indirect *iniuria*, needs to be mentioned here.

[43] On a cumulation of actions, see, e.g., Ulpianus, D. 47, 10, 15, 46. Cf. Ulpianus, D. 9, 2, 5, 1; Paulus, D. 44, 7, 34 pr.; R. Wittmann, *Die Entwicklungslinien der klassischen…*, pp. 293–296; A. Watson, *op. cit.*, pp. 220–222; M.F. Cursi, *Iniuria cum damno…*, pp. 271–284; eadem, *Pati iniuriam…*, pp. 274–287; M. Fernández Prieto, *La difamación…*, pp. 293. See also D. Daube, *On the third chapter of the lex Aquilia*, "Law Quarterly Review" 1936, vol. 52, pp. 253–268; P. du Plessis, *Damaging a Slave*, [in:] *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry*, eds. A. Burrows, D. Johnson, R. Zimmermann, Oxford 2013, pp. 157–165.

[44] Cf. R. Wittmann, *Die Entwicklungslinien der klassischen…*, p. 297 footnote 26 and p. 340; W.W. Buckland, *op. cit.*, p. 82; and especially S. Fusco, *op. cit.*, pp. 427–433.

[45] See M.F. Cursi, *Iniuria cum damno…*, p. 268.

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STRESZCZENIE

Rozdźwięk między postrzeganiem *edictum de iniuriis quae servis fiunt* u Ulpiana i Gaiusa jest tak głęboki, że może świadczyć o tym, iż czyn wyrządzony niewolnikowi był jeśli nie zawsze, co wydaje się najbardziej prawdopodobne, to przynajmniej zazwyczaj kwalifikowany jedynie jako *iniuria* wyrządzona jego właścicielowi, a z ewentualnej skargi *servi nomine* w praktyce nie korzystano. Jako że uszkodzenie niewolnika dodatkowo uprawniało właściciela do otrzymania odszkodowania na gruncie reżimu akwiliańskiego, wydaje się, że praktyczne zastosowanie edyktu w zakresie skargi *servi nomine*, jeśli nawet na jakimś etapie rozwoju deliktu rzeczywiście funkcjonowało lub potencjalnie mogło mieć miejsce, miało znikome znaczenie. Z tego względu za najbardziej prawdopodobną interpretację uznać należy, że edykt miał po prostu zapewnić nowoczesną i elastyczną podstawę działania za pomocą pretorskiej *actio iniuriarum suo nomine* w sytuacji *iniuria* doznanej za pośrednictwem niewolnika, nieograniczoną do decemwiralnych przypadków *os fractum* i *membrum ruptum*.

Słowa kluczowe: *iniuria*; skarga *servi nomine*; edykt; niewolnik