FURTUM AND SOME RELATIONS WITH INIURIA*

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1. FAMILY, INDIVIDUAL AND THE FAMILY HOME

Each phenomenon should be studied from its source (from the beginning), as well as the institutions of Roman law. In regards to this matter, in this paper we will try to explain the connection between furtum and some aspects of iniuria. Word furtum is commonly translated as theft. Today, in all legal systems theft represents a crime. Its scope, however, differs significantly from the Roman private tort furtum. This one is much broader. In order to understand this problem it requires the strong reliance on anthropology. Precisely these theoretical insights may offer new incentives to positive law experts and it requires the teaching must be borne in mind the same. This is the only way to prove and justify universality of Roman law.

Human dignity forms the basis which separates a human life from that of an animal. Integrity of an individual, both physical and psychological, must be imbued with dignity. But dignity must also permeate a person's house otherwise it would not be a home, but an animal's den. An analysis into the available provisions on iniuria and the furtum (especially of their earliest forms) suggests that violations of the dignity of a family and of an individual constituted what the Romans called the tort of iniuria, while violation of the dignity of the family home constituted the furtum manifestum. In addition, every society saw dignity as sacred, and we still perceive it as such. This claim gains weight if we remember the early stages of the development of human society, and the associated forms of magical and religious consciousness that are characteristic of those stages.

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Early beginnings of every human community are marked with the strong predominance of absolute values (at least when it comes to the most vital social relationships that must be standardized: those of power, property and obligations). The holder of these values is the collective entity (tribe, genus, family) and wars are waged to uphold them. Any violation of the absolute triggers the absolute sanction - the death penalty. At this point in time, there were no conditions to award much significance to the purely private interests. It is only gradually that the relative value appeared and took hold as the exclusive domain of the individual. The absolute and the relative then proceeded to exist side by side. Of course, for a long time, the former had the precedence. Norms were built based on one, or the other of those values. Thus, the absolute values belonged to the sacred, while relative pertained to the secular. These spheres, however, are never immaculately separated since they can never exist in parallel, nor independently, of each other¹.

In the early developmental stages of the human society, the sacred had prevalence in the private life of individuals, since the collective outweighed the individual in all spheres of life.

2. EARLY CLASSIFICATIONS AND THE PROBLEM OF DEFINING RELATIONSHIPS BETWEEN THE TORTS OF INIURIA AND FURTUM

First to clarify the terms in use in this paper. Lévi Strauss points that the mind in primitive communities resembles that of a local craftsman: it is operated by signs rather than concepts, the letter being the tool of the scientists.² By extension, iniuria should be defined as a sign of illegality.³ Every piece in this homemade jigsaw puzzle can be used as an operator in performing any kind of action of a type, Strauss argues⁴. Iniuria, as a mark of illegality, is such a multifunctional operator.

Secondly, criterion for the classification of torts should be identified.

Lévi Strauss writes about classifications which existed in primitive communities. He argues that the structure of the so-called savage mind revolved around a vertical axis. Here, the general is coupled with the particular, the abstract with concrete, and any classification is always rounded off, carried through to its end. Lévi Strauss argued that such a classification always involved pairs of opposites, and that it only stops when it is no longer possible to find the opposite. Such a classification unfolds to its very finish, unraveling from the bottom up, and vice versa. In this process, what matters is not conforming to reality as much as subjecting that reality to this simplistic binomial classification, Strauss writes. It could be argued that such a classification resulted in the breaking down of torts, not only within the tort of *furtum*, but also between the tort of *furtum*, on the one hand, and that of *iniuria*, on the other (*iniuria vindicatio* is one of the

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5 Ibid, 279-280.

6 Kaser views the *iniuria vindicatio* as a form of ancient tort (*Urdelikt*) of *iniuria*, see KASER, M. Das Altäthnische ius, Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer, Göttingen 1949, 23-24. "Die iniuria begegnet uns im Privatrecht, außer beim Vindikationsstreit, noch als Dekret... Namren erschließen, daß sie ursprünglich e d e n privaten Rechtsbruch bezeichnet hat, also das 'Urdelikt' war, das erst durch fortschreitende Differenzierung auf seinen späteren Inhalt zurückgedrängt wurde", *ibid.*, 23. "Wäre das iniuria vindicare bereits eine Verletzung der Gottheit, dann b e d ü r f t e e s für das Streitverfahren n i c h t   n o t w e n d i g d e s   E i d s, weil der Täter schon aus seiner Tat der Gottheit sacer ware und deshalb im rituellen Zweikampf von ihr vernichtet würde...", *ibid.*, 24.

Pólay, in his analysis of *legis actio sacramento*, says: "The parties take the legal dispute with oath (*sacramentum*) before the legal court... Perjury, however, offended gods and together with them the house-community under their defence... There was expressed in this way the reprisal of the *iniuria*, suffered by the gods, the house-communities, standing under the defence of gods and – the religion being a state or established religion – the State itself, committed by means of iniuria vindicare, in the punishment of the first outward form of iniuria", PÓLAY, E. Iniuria Types in Roman Law, Akademiai Kiadó, Budapest, 1986, 5. *...penates were the gods chosen by the house-community... Lares were the glorified ghosts of the family while manes the deified souls of ancestors... In violating the family, house-community, A. Hägerström... is inclined to see the grievance of gods, as well", *ibid.*, 7 fn. 2. "The ancient case of *iniuria*-types, as proved by the ancient oral formula of the *legis actio sacramento in rem*, which already existed prior to the Twelve Tables, as well, was the behavior, named *iniuria vindicaret*", *ibid.*, 75.

Wolf views *legis actio sacramento in rem* as a process which entails the occurrence of a tort. The process itself needs to involve the tort committed against the slave, and the owner could never, by the nature of things, be the one who committed it, WOLF, J. G. Zur legis actio sacramento in rem, *Romisches Recht in der europäischen Tradition*, Symposion aus Anlaß des 75. Geburtstages von Franz Wieacker (Hrsg. Okko Behrends, Malte Desselhorst, Wulf Eckart Voss), Verlag Rolf Gremer, Ebelsbach, 1985, 28.

Watson cites Wolf's view that forbidden handling or forbidden contact occurred when one of the parties in *vindicatio* dispute unlawfully touched the slave with a stick (*vindicta*). Watson holds that, should we accept Wolf's opinion that the process of *vindicatio* is based on a tort, we would not be able to deny that such a process would then be equally applicable to claiming a slave as it is for claiming a bull, for example, WATSON, A. Slave Law in The
early forms of the latter). Here the axes of opposites include the manifest and non-manifest, clear and dubious, what can and cannot be a matter of discussion. Unlawful vindicating is yet to be proven, but this includes the categories of doubt and uncertainty. The *furtum manifestum* (as the only form of *furtum* in the beginning) is undoubtedly a tort, and therefore the punishment is executed on the spot.\(^7\) However, here we have to consider another important aspect in this classification.

The thing is that such an execution of penalty represents a sort of an ideal which is attributed to ancient legal systems. Efforts are made to annul the time gap between the committed and proven offense, argues Messuti.\(^8\) She claims that the concept of being caught in the act does not constitute a privileged evidence material. Rather, it forms a part of the very fundamental concept of criminal offense. If it had been *in flagrante*, then it was followed by the immediate enforcement of the sentence.\(^9\) Everything happens in real time. Such a unity represents an ideal criminal law, a possibility of “a seamless unit” between the criminal act and the penalty, Messuti\(^10\) underlines. She underscores that this concept of an ideal continuity between the criminal act and the sanction persist to this

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\(^7\) Stojićević suggests, before the Law of Twelve Tables, only *furtum manifestum* and ritualized searches existed. He says that it was this law that had ushered the category of *non-manifest furtum*, STOJČEVIČ, D. Roman Contractual Law, Belgrade 1960, 112. This view seems rather justified. For a more detailed discussion on this see VUJOVIĆ, O. “Roman Tort Furtum in Ancient and Classical Law”, doctoral dissertation, Belgrade 2013.

Gellius states that the death penalty was proscribed only for those thieves who were caught in the act only if it was nighttime when the theft was committed, or if it was the daytime and the thief carried a weapon. Those caught in the daytime on the site, but did not use weapons, were handed over to the victim, see Aulus Gellius, Noctes Atticae 18th XI 6-8. In case of *furtum manifestum*, the law of Twelve Tables proscribed death sentence. The reliable Gaius was very clear on this (see G. 3. 189). In this same heading (G. 3. 189), Gaius says that a free man caught in the manifest *furtum* was flogged and turned into a slave, or else was put in a similar position. Than he says that the slave was flogged and killed. From Gaius’s writings we could infer that the Law of the Twelve Tables proscribed death penalty for the *furtum* committed during daytime but without the use of weapons, and the sanction was to take place without exceptions only after slavery was established, which in turn did not lead to the selling of the perpetrator. By contrast, in the rest of the cases, the culprit was put to death on the spot.


\(^9\) Ibid., 15.

\(^10\) Ibid.,
day. She asserts that everything happens in the present moment and that this disregard for the past is best visible in the very notion of *furtum* pointing to the stolen object. If the perpetrator is caught in possession of a stolen property, there was no need to go back into the past in order to prove what happened. In the archaic law, time management goes a step further, Messuti argues. Time incorporated the very concept of a flagrant criminal act, which became obvious once the stolen item is found in a person's living quarters. Fiction makes the time gap disappear, Messuti concludes.

Thus, the archaic jurists did not care about the concept of past time, and only recognized a direct consequence. Only what directly happened could be deemed obvious. It can therefore be suggested that before the Twelve Tables, the *furtum manifestum* was the only type of *furtum* that was possible.

Therefore, in cases of *furtum*, but when the perpetrator had not been caught in the act, there was this unpleasant gap that needed to be overcome, as the archaic law regarded it. That was the purpose of the famous search with the platter and the loincloth (*perquisitio lance et licio*). Once the stolen property

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11 Ibid., 16.
12 Ibid., 15-16.
13 See G. 3. 192, and G. 3. 193. McCormack claims that the perpetrator, who had been caught in the act of stealing, was handed over to the victim. He opposes Kaser's view that this meant that the perpetrator could be killed, and instead suggests that the perpetrator fell into a kind of slavery. MacCormack, G. Revenge and Compensation in Early Law, *American Journal of Comparative Law (Am. J. Comp. L.)* 21/1973, 72–73. This author thinks it is only in two cases the thief was put to death: if he was caught in the act he committed during the nighttime or if he was caught in the act he committed during the day and used weapons to resist arrest, *Ibid.*, 73. Maxwell-Stuart mentions Wolf's attempt to explain this ritual of conducting another man's house search as a relict of the Etruscan sacrifice to placate the house gods for breaching the peace of their territory. The *lans* was a sacrificial platter, while the *licium* was the ceremonial headband, not the loincloth (Maxwell-Stuart, P. G. *Per Lancem et Licium*: A Note, *Greece & Rome* 1/1976, 1).

It is interesting to mention here that Goudy cites Leist's opinion that the purpose of the search is to hold something that the searcher would put there to redeem himself with the house gods (the Lares and Penates), for compromising their sacred grounds. Goudy rejects this view arguing that it is not substantiated in any of the sources, MUIRHEAD, J. Historical Introduction to the Private Law of Rome, revised and edited by Henry Goudy, third edition revised and edited by Alexander Grant, Clark, New Jersey 2009, 415. As to the relations between this ritualized search and the rest of *furtum*, Goudy holds that Gaius felt that the punishment for (Goudy calls it *furtum lance et licio*, as if it was a separate kind of *furtum*) *furtum lance et licio* was proscribed by the Law of Twelve Tables and that it was identical to the one for the *furtum manifestum*, *Ibid*.

Radin believes that *quaestio lance et licio* refers to the inviolability of a house and that it certainly had religious and sacral basis, despite objections made by Weiss. He suggests that the entire procedure might be of Greek origin. This claim has a certain confirmation in Aristophanes' "Clouds", and in Plato's "Laws". In Aristophanes, Radin notes the same explanation for the nudity of the searcher as the one offered by Gaius, only Radin calls it a "rationalizing explanation", RADIN, M. Symbolae ad Jus et Historiam Antiquitatis Pertinentes

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and the offender had been identified, the penalty of death followed. It can be argued that the annihilation of the perpetrator erased the tort of theft itself.\(^\text{14}\)

Now let us go back to the tort of iniuria vindicatio.

In his monumental study, The Golden Bough, anthropologist J. G. Fraser argues that magic is based on positive and negative rules. Positive rules tell us what to do, while the negative tell us what not to do. Sorcery belongs to the first group, while taboo is in the second.\(^\text{15}\)

Legal form of iniuria vindicatio does not suggest a negative rule or a rule of prohibition. Instead, it involves positive rules. The lingering trace of magic here is visible in the presence of standardized legal formula whose form is mandatory. This has something to do with magic, and includes a sort of magical face-off. There is a list of proscribed actions to be taken\(^\text{16}\), after which the contested situation\(^\text{17}\) is ritually played out before a body of a political community. Lastly, the penalty for the party which unlawfully acted in vindicatio is exacted. On the other hand, here the role of the arbiter is played by the society, instead of by a higher power. This is a pivotal element, a departure from the rules of magic. Once a society is allowed to have its say in the matter of conflicting demands, space is created for the institutions of legality and illegality. The possibility of decision


\[\text{14 For more see VUJOVIĆ, O. Roman Tort Furtum in Ancient and Classical Law, doctoral dissertation, Belgrade 2013, 34, 83 fn. 220, 85, 88}\]

\[\text{15 FRAZER, J. G. Zlatna grana, prouĉavanje magije i religije, Beograd 2003 (title of the original The Golden Bough, A Study in Magic and Religion, by James George Frazer, London 1922), 34.}\]

\[\text{16 See G. 4. 16 and G. 4. 17. For more details about the form of this ritual see WOLF, J. G. Zur legis actio sacramento in rem, Romisches Recht in der europäischen Tradition, Symposion aus Anlas des 75. Geburtstages von Franz Wieacker (Hrsg. Okko Behrends, Malte Diesselhorst, Wulf Eckart Voss), Verlag Rolf Gremer, Ebelsbach 1985, 16-17}\]

\[\text{17 Olga Tellegen-Couperus quotes Richard Mitchell who points to the clear religious character of the legis actio sacramento acts, TELLEGEN-COUPERUS, O. Pontiff, Praetor, and Jurisdictio in The Roman Republic, Tijdschrift voor Rechtsgeschiedenis (TDR) 74/2006, 32. Kasers position that in the early Roman law, during the period he calls the agricultural age, the ownership and possession were not yet as clearly separated as was the case later on. This is because ownership was viewed as merely "a better right to possession" in relation to the opposing side, KASER, M. Roman Private Law, third edition, a translation by Rolf Dannenbring University of South Africa, Pretoria, 1980, 116. He underlines that in the ancient process legis actio sacramento in rem calls for the confirmation of ownership by both sides. The judge, Kazer continues, only has to decide which party is the owner based on their better right to a thing in comparison to the other party. However, the judge could not dismiss the complaint because neither parties were the owner. Kazer therefore concludes that actual ownership is a relative right. It is the same as the possession, even in the classical right of interdict, Ibid. He maintains that in classical law, actual possession was a relative right, Ibid., 112.}\]
making by the members of a society represents the first condition for engaging in any kind of deliberation or of weighing of arguments (in order to relativize them). When it comes to the magic norms, the enforcement of a sanction may sometimes require a society, but no discussion is involved, no weighing of arguments. Not only are these actions prescribed and conclusive, but the interpretation of their consequences is also specific and mandatory (strict, conclusive). Consequently, such an action and consequence is followed by the already prescribed strict (clear, conclusive) sanction which is then applied automatically. The Law of the Twelve Tables automatically prescribes the penalty of death\(^\text{18}\) for magic (malem carmen incantassit). Mindful of the above, we can assume that the death penalty was executed on the spot. In any case, such an automatic response also applies in furtem manifestum.

Kaser argues that in the earliest times, people focused on the plainly visible acts and held accountable every offender who brought about a consequence. He says that every society believed that whoever committed the acts that typically caused damage, had in fact intended to cause harm. Therefore, he calls the strict ancient liability a typical liability for guilt. It was only later that the question of guilt needed to be resolved in every individual case, Kaser argues, and in accordance with the individual motivation of a specific offender. The only distinguishing in the early law was between the intended and unintended acts, Kaser underlines.\(^\text{19}\)

However, when Kaser formed his theory of a typical dolus, he did not realize the importance of the time distance between the committed and the proven tort. Due to the non-existence of this distance in the ancient law, dolus was not typical but manifest. Later on, the time distance was no longer annulled, but, by the force of habit, they first looked for the directly apparent dolus. If dolus was not apparent, then conditions existed for other (milder) forms of liability.

It appears that based on such conclusive (manifest) torts it could be concluded that the value dictated the form of the process — that the substantive law

\(^{18}\) As laid down in provisions in Tab. VIII 1. a and Tab. VIII 1. b.

\(^{19}\) KASER, M. Roman Private Law, third edition, a translation by Rolf Dannenbring, Pretoria, 1980, 186.
imposed the character and the form of a procedure, i.e. of the procedural law\textsuperscript{20}. However, it is evident that in the beginning there were also cases where it wasn't at all clear if there was an offence in the first place, and if so, who committed it (as for example in vindicatio inuria). It seems that this is where conditions were finally in place for the substantive law to be created by the procedural law, i.e. from the cases where the protected value becomes relative, and therefore no longer sacred. Consequently, no death penalty was required. And this is how the sacralization of the norms first started taking shape. Therefore, the origin of law and civilization did not require the invention of script. Rather, it required the invention of a human, instead of the divine or magical, procedure in administrating justice.

In a legislative process, a plaintiff claims that the defendant had unlawfully vindicated. The plaintiff does not say that the defendant had stolen (he is not accusing him of a furtum), nor does he claim that anyone had been kidnapped. Why is that? The only possible answer can be that in the beginning, furtum only included unlawful and manifest coming to contact with, i.e. seizing of a movable object or of a person alieni iuris (furtum manifestum). Such acts are self-evident and beyond doubt. Any unlawful action (illegal vindicatio) is yet to be determined. Property is not a self-evident category. It is relative, to put it in Kaser's turn of phrase but not venturing beyond the phrase. Thus, whenever there is a dispute, which cannot be resolved in a simple manner, and where a resolution is impossible without confrontation and debate, both requiring a lot of descriptions and much evidence making, is where legality and illegality come to being. There is a need to be specific about one's claims. With magic and taboos, there is no need to describe anything, to be specific about anything. In magic and taboo it is plainly apparent that the planned action and the intended result took place.

\textsuperscript{20} In his paper, which looks into the relation between the law of action and the substantive law in early Roman law, Watson builds from the position held by Main, and which, according to Watson, is also followed by Birks, that the Roman substantive law was shaped by the Roman law of action. Watson argues that this, according to Main, was the case during the times of the Law of Twelve Tables, and in the subsequent times, Watson, A. Legal Origins and Legal Change, London 1991, 3 (the subject article can also be found as Watson, A. The Law of Action and the Development of Substantive Law in the Early Roman Law, Law Quarterly Review 1973, 387-392). Watson believes that Main is right concerning the early law in general, and the Roman Law of Twelve Tables, but also that Main's claims were not substantiated by the facts from the time of the Law of Twelve Tables, and later on during the Republic, \textit{Ibid}. He holds that in Law of Twelve Tables the substantive law is the dominant one, \textit{Ibid.}, 4.
In addition, the question arises of whether the persons of aliens iuris enjoyed any protection of their dignity of person? Judging by the appearance of a legis actio sacramento in rem dispute, they did not. Here they were treated as belonging to a pater familias. Could we argue that their unauthorized appropriation injured the dignity of a pater familias? Judging by the appearance and the character of rei vindicatio dispute, it did not. These may look like clouds gathering around the attempts to make a clear-cut classification of torts into iniuria and furtum. However, that is not the case. It is certain that the first furtum represented a clear threat to the dignity and the sanctity of the family home. On the other hand, rei vindicatio iniuria certainly was not, since it was essentially directed against the dignity of the family as such (as a collective), by the very fact that its individual members could be subject to ungrounded claims. A pater familias was a member of such a collective, and in a sense, also subjected to it. 21

In any case, we should start from the Roman belief concerning the guardian deities who protected the family, on one, and the home, on the other hand.

Zamurović argues that the lares "therefore, had similar scope to that of the penates; but while penates accompanied the family when it moved, lares remained at home". 22 Therefore, lares protected the home, 23 while penates protected the family. It can be concluded that by the procedure of the naked house

21 Pólay disagrees. According to him „This house-community – as referred to, demonstratively, by Kaser – included, above all, three powers: manus, potestas and mancipium“, POLAY, E., Inuria Types in Roman Law, Akademiai Kiadó, Budapest 1986., 9. „The iniuria, as a tort, meant the personal offence of the house-community, the pater familias, whether directly – first of all bodily – or indirectly, by hurting his house-authority…“. Ibid., 75.


23 „It is not clear whether the Roman house received the protection of the secular law in the earliest times. According to one writer: "When the religious basis was still strong, the disturbance of the domestic peace was not yet regulated as a private or public offence. One brought down the anger of the gods on one's own head. No interference by the ius humanum was necessary". It does appear that the Twelve Tables probably dealt - at least indirectly - with the inviolability of the house, for Gaius, commenting on the Twelve Tables, remarks: Plerique putaverunt nullum de domo sua in ius vocari licere, quia domus tutissimum cuique refugium atque receptaculum sit, eumque qui inde in ius vocaret vim inferre videri (D.2.4.18)“, BLECHER, M. D., „Aspects of Privacy in The Civil Law", TDR 43/1975, 280.

„As the old Roman religion declined so presumably did the sanctity, in the literal sense of the word, of the home. But the idea of one's home as a refuge seems to have persisted", BLECHER, M. D. Aspects of Privacy in The Civil Law, Tijdschrift voor Rechtsgechiedenis (TDR) 43/1975, 280. For „the importance of the idea of the house as a refuge to the concept of privacy“ see Ibid., 285-286.
search (quaerere lance et licio)\textsuperscript{24}, an object that belonged to a home, a house, and which had disappeared, has now been brought back from the home, the house, where it is currently located. The ownership over a movable object does not exist without the ownership over the immovable asset. Everything belongs to the home. Mobility itself belongs to the home. Lives of the members of the household belong to the family, genus, or to the tribe. Therefore, they are guarded by the different deities, the penates. And therefore their restitution to a home requires a special procedure – the procedure of vindicatio. Pater familias holds two main groups of powers: the first are towards the members of his family, while the second pertain to the family household. If the identity and the origin of the subjugated persons are beyond doubt, the same might not be the case with the existence or non-existence of legal grounds for their presence in someone’s household. It can be argued that the charge of illegal appropriation of a slave, in the early beginnings of Rome, concerned not the issue of identity, but that of the legal grounds. That is why the term illegal, the iniuria, is used here. On the other hand, the original furtum (manifestum) clearly pertained to objects whose origin and current legal status were beyond doubt.

Lack of death penalty as a sanction in the matter of illegal vindicatio indicates that the character of this tort had not been primarily sacral to begin with. As to the management of the evidentiary procedure, it is likely that it too was

\textsuperscript{24} During the observation of search with lance et licio on first sight eye-catching the belt on the thighs (licium) as something that is the most archaic. Therefore there is a need to seek for the answer of the question about it’s background in anthropology. Speaking of the tribe Nambikwara and their origin, Claude Lévi Strauss is lightly touches on their costumes. On that occasion, he stated that the men’s clothing is very scarce and that some clothing by some kind of straw tassel that was pinned to their belt over the sexual organs. Strauss considered that culture of the Nambikwara is “the residue of the Stone Age”, LEVI STROS, K. Tužni tropi, Beograd 1999 (title of the original: LEVI-STRAUSS, Claude. Tristes tropiques, Pion, 1993), 218. Such a “clothing” does not hide the genitals, Ibid., 240. Thus, the custom of wearing the belt (licium) probably dates from the Stone Age. With regarding this matter, and perquisitio lance et licio probably comes from the Stone Age. Probably from the Palaeolithic, because undoubtedly already in that period were there moving things that were in some kind of personal property. Probably at that time one man could not have in its possession some massive and valuable things, but the bowl was more than enough to put into it what is found, or part of those things which served for her identification. It can be assumed that the term furtum was of the same age and probably provided sanction.

“\textit{All material goods of Nambikwara can easily fit into baskets that women bear at the time of nomadic life}”, \textit{Ibid.}, 218.

These baskets “can be meter and a half, standing height of women who wear them”, \textit{Ibid.}
carried out in line with the already established formalities. These probably included the already established manner of presenting evidence and of determining their formal value. There was little space here for any real judicial decision making. Everything was subjected to the category of legal technique, which, in turn, was under the decisive influence of the customs of the predecessors. These customs were dual in nature, both sacral and secular. And any judge was only performing the role of the custodian over the sacred formalities venerated by the predecessors. The rex did the same. Where did the reference to legality and illegality come from then? Well, it was not only the uncertainty of the consequences but also of the very legal grounds by which a person has found themselves in another man’s home. Thus, the game is not only made uncertain by its result, but also by the uncertain grounds for its very occurrence (the uncertain cause). In the meantime, all the stages of the procedure are entirely certain and formulated in a sufficiently precise manner. That is why this mostly concerned secular formalities.

Given the material available in sources, we could argue that originally the slaves were the subject of the tort iniuria vindicatio, and only later it also included the non-owned members of a house-community. Only smaller movable

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25 On this issue, the following position is prevalent: "Presentation of evidence was considered by the Roman jurists to be a factual question, one that did not involve them; besides, the judge in classical times decided after his own discretion, so it was up to him to decide what proof of ownership would be considered sufficient" MILOŠEVIĆ, M., Rimsko pravo, Beograd, 2005, 237.

26 "If, in the speculative sphere, the mythical thought is much like homemade tinkering in practical terms, and then if the artistic creation is at an equal distance from these two types of activities and science, then the relationship between the game and the ritual is of the same type. Every game is defined by a set of rules which allow for the practically unlimited number of matches; but the ritual, which is also "played out", seems more like a privileged match, selected among all the possibilities, since it alone restores the balance between the two camps", LEVI-STROS, Klod. Divlja misao, drugo izdanje, Nolit, Belgrade, 1978 (title of the original: LEVI-STROS, Klod. La Pensée Sauvage, Plon, Paris, 1962), 72.

27 Accordingly, Strauss’ findings on game must be supplemented.

28 "The above-cited ancient formula of lawsuit, preserved by Gaius, qualifies, at any rate, only the grievance of the head of house-community only owing to the iniuria vindicatio of the slave as iniuria but the iniuria vindicatio of a child, belonging to the house-community, was also to be judged in the same way", PÓLAY, E. Iniuria Types in Roman Law, Akadémiai Kiadó, Budapest 1986, 6.

As to this tort, the following should be specified: ....conception of “personality” could develop in no way in the age preceding the Twelve Tables resp. in that following the creation of these. In that age, in the rustic Rome, the basic unit of society was the house-community, the had of which could suffer a wrong not in his ‘personality’ but only in respect of the harms caused to people under his rule ... or to his property ... respectively through assaults, affecting him himself bodily", Ibid., 7.
objects could be subject of the original furtum, as testified by the ritualized lance et licio search. The licium, the platter, could only contain such an object. The original furtum and the original iniuria vindicatio harmoniously complement each other: one institution protects the authority over slaves and the persons of alieni iuris (members of house-community), while the other protects the authority over the rest, certainly less valuable movable objects (home belongings). The sanctity of a home is an absolute value. And absolutes cannot be a matter of theft, only a matter of war. In order to avoid a war, and ensure the execution of a death penalty, responsibility had to be manifest and plainly obvious. By extension, the absolute individual responsibility abolishes the possibility of any conflict. On the other hand, without it there is no absolute. And this is precisely why the absolute liability does not mean a dominance of the procedural over a substantive law, but rather it suggests the inferiority of a process protected by values.

A furtum violates sanctity of a person's home because a movable object was considered to be an integral part of a household. On the other hand, a member of a household was considered to be a part of his/her family. That is why a stealing of a family member was a form of iniuria (iniuria vindicatio), while any unlawful contact with a movable object constituted a furtum. Furthermore, illegal vindicatio involved uncertainty in a case. In the matter of a manifest furtum, which for a long time was the only form of furtum possible, the case was beyond doubt. In the matter of illegal vindicatio, it is uncertain if there is a legal basis, and on what grounds is someone's family member found in another's household, and therefore this matter remains to be demonstrated. There is no automatic application of the proscribed sanction. The penalty, however, will come in the shape of losing a massive bet. This bet appears to have been a way of avoiding the war between the families and clans. Perhaps such wars were a common occurrence before this procedure came to being.

On one hand, we have the family, on the other, the family home. On one hand, we have iniuria, on the other, the furtum.

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29 Blecher argues that the Roman law made an exception concerning the inviolability of another's home. This exception, according to him, was reflected in the ancient search lance et licio. He suggests that it could be argued that from the classical period onward, to enter the living quarters of a person was no longer considered a tort against the gods, but against the person, BLECHER, M. D., „Aspects of Privacy in The Civil Law“, TDR 43/1975, 281.
How did it than happen that the unauthorized appropriation of a family member could be subject to both furtum and iniuria? To be more specific, the sources are clear about the fact that the theft of a house member of a *pater familias* was treated as one of the many cases of furtum. Thus Gaius states that freemen could be subject to furtum, children who were under the authority of a *pater familias*, a woman married to manus, sive etiam iudicatus vel auctoratus meus subreptus fuerit.\(^{30}\) It could be argued that the only possible explanation could be found in the fact that originally, furtum (even when it involved a freeman, a member of a household) only pertained to a manifest theft of a household member. By contrast, iniuria only involved a non-manifest tort. Thus, this was about a manifest kidnapping of a family member. Such a kidnapping was only possible by an incursion into another person's home.\(^{31}\) The dignity and sanctity of the family home is something that, in a sense, is separate from a *pater familias* and his authority. The family home is immobile and can exist independently of a family. Families can come and go. But the spirits of a home continue to live among the walls, and must be respected.

By contrast, Jolowicz assumed that cases of kidnapping children and women are very old and date back to the time when the power of a *pater familias* still did not discern as separate the authority over objects from the authority over people. The analogy with the dominium, argues the author, is still insufficiently prominent so as to enable for it to be a *condictio furtiva*. The *actio furti* for a woman became outdated, he continues, with the disappearance of a *manus*. As for the children, this charge started losing its importance when the praetor introduced the interdict de liberis exhibendis item ducendis.\(^{32}\) However, Jalowicz suggests that it "survived perhaps on account of the economic interest that a man had in the possible acquisition of those under his potestas. This interest, it is presumed, would provide the measure of damages".\(^{33}\) However, from Gaius' paragraph (G. 3. 199.) used by Jolowiz’s to deduce the above conclusion, it is impossible to conclude that it speaks of the very ancient examples of theft. On

\(^{30}\) G. 3.199. The Latin text of Gaius “Institutions” are cited according to Gaius, “Institucije” (title of the original: *Gai Institutionum Commentarii*), translation and preface by Obrad Stanojević, Belgrade, 1982.

\(^{31}\) Gaius has nothing to say about the penalty for this theft.

\(^{32}\) JOLOWICZ, H. F. Digest XLVII.2: De furtis, 1940, xv.

\(^{33}\) Ibid., xv – xvi.
the other hand, even if those examples were old, any explanation must start from the analysis of the relation between furtum and iniuria. It is beyond doubt that only from such a wide perspective could we put a piece to its rightful place in a jigsaw puzzle.

3. DIGNITY AND TIME

In addition to the space, dignity also recognizes the time dimension. According to the primitive logic, in order to restitute dignity to the violated space of a family home, the time gap needed to be annulled. The space and time dimensions are inseparable here. The sanctity of a certain space requires preservation of its integrity in both time and space. Going back in time by cancelling the perpetrator, seemed like the only way to reinstate and preserve the impeccability and sanctity of a family home. Because, what else is sanctity if not the immaculateness and the peace emanating from purity? By annulling the time gap, the space gap is annulled, and vice versa. That is why the action of tort always takes place in the same space – where the thief had stolen the object.

Dignity implies certitude and manifestness. When there are doubts and uncertainty, problems arise. That is why men persist in cultivating their rituals, much like creating a stone cocoon, as if seeking to create a space in which to feel safe. This might also be the root of the omnipresent custom of the ritual consecration and cleansing of the physical boundaries of one’s space, and the space of a family and of a tribe. In the core of such actions is the desire to post physical guards even in the domain of the spirit, as if wishing to cure the fear of the spirit world by providing a physical remedy, to heal the spiritual uncertainty

34 “In the early Roman times the family religion was centered around the home. The sacred fire, representing a family’s ancestors, was concealed from the public view in the interior of the house. According to Fustel de Coulanges the sacred fire ‘était la providence d’une famille, et n’avait rien de commun avec le feu de la famille voisine qui était une autre providence. Chaque foyer protégeait les siens’; and elsewhere: ‘Pour tous les actes de cette religion il fallait le secret, sacrificia occulta, dit Cicéron; qu’une cérémonie fût aperçue par un étranger, elle était troublée, souillée par ce seul regard”, BLECHER, M. D. “Aspects of Privacy in The Civil Law”, TDR 43/1975, 280.

35 That was the purpose of the ritualized search (quaerere lance et licio) reported by Gaius (G. 3. 192 and 3. G. 193). It is a natural part of understanding of the furtum in the times before the Law of the Twelve Tables. It is an essential instrument for the annulment of the time gap between the committed and proven tort. Since the Law of Twelve Tables there were only two kinds of furtum: manifest and non-manifest. Before it, there was only the first, and finally, after the praetor introduced actio furti prohibiti (see G. 3. 192.), in essence, only the non-manifest furtum remained, because there was no more need to cancel the time gap.
by some sort of physical certainty. Uncertainly ushers unrest and must be promptly tackled. When it is impossible to find enough grounds to annul the uncertainty, then certain rules of the game are established, so as to ensure that the dispute is resolved as painlessly as possible. Interestingly, those rules never stray too far from a ritual. Isn’t this not most evidently obvious in legis actio sacramento in rem?