

## PROTECTING THE SEA GUARANTEEING QUALITY AND FRUITION

### ABSTRACT

The following article is the text of the speech at the “*The Individual, The Society and Sustainable Development from Globalization to Glocalization*” conference, with addition of basic bibliography. Held in Tirana on 14 April 2016 at Hena e Plote Beder University. The study has the purpose to examine the role of Roman law on protecting the marine environment. In the last decades of the Republic, and in the mid first century A.D. arose the first jurisprudential attempts conceptual definition of *litus maris* and its extension and were processed interventions of Roman praetors aimed at controlling the use of the sea and, therefore, to navigation and maritime commerce. The result was a situation articulated of what it was intended to outline some profiles.

**KEYWORDS:** *res communes omnium; sea, interdictum prohibitorium, actio popularis*

### INTRODUCTION

My aim is to examine various juridical patterns concerning navigation and matters of security in seaborne trade in the Mediterranean Sea. These topics have a relevance that goes back to ancient times and is deeply rooted in Roman law. It is essential for everyone involved with maritime security to be

aware of its origins. The starting point of this analysis must be the realisation that maritime law is closely linked to the development of trading methods and needs. These aspects are constantly changing and need a well-defined regulatory framework in order to flourish.

I will highlight how the need for regulation in seaborne trade resulted in the creation of common traditions in this field that live to this day. These traditions have made possible, both in the past and in the present, the establishing of an ancient framework that has played a main role in conceiving new concepts in law.

Examples of this process might be the *receptum nautarum* (shipowner's limitation of liability), the concept of *avaria* (ship damage), the *actio exercitoria* (the right to sue a ship's owner). Overall, I will focus on two main aspects that are connected to each other:

1. The role of Roman law on the exploitation of maritime resources, through the proper regulation of utilization, i.e. of navigation.
2. The role of Roman law and its potential impact in protecting the marine environment.

## RES COMMUNES OMNIUM

However, before I elaborate on these two aspects, I believe it is worth mentioning that the Romans had the firm belief that the sea, as well as drinking water and the air, were, according to the *ius naturale*, part of *res communes omnium*, i.e. common goods of humankind.

D. 1. 8. 2 pr-1 (Marc. l. 3 inst.): *Quaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum quae variis ex causis cuique adquiruntur. Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.*

Neither the sea nor the coasts were considered subject to property rights and therefore exclusive exploitation concessions could not be granted to any *civitas* and/or individual. Even the few texts referring to examples of appropriation of marine areas within the Roman law never included the open sea, but rather inland waterways, rivers or lakes. Furthermore, none of the examples ever mentioned any claim of sovereignty on the areas, but only the possibility of profiting from their resources.

Sea and coasts were never considered *res publicae in patrimonio*, i.e. a certain kind of property that can be given by concession by the City or any other public authority. They were considered common goods whose access to was everyone's right.

Based on the evidence currently available, the idea of sea as common heritage to humankind is believed to have been present throughout the ancient Mediterranean area for a long time, from Western Asia to Greece, from Rome to Egypt.

The Roman Sea power did not originate from ambitions of domination, but was the result of a mere need to survive. The Romans had soon had understood that their own safety was strictly dependant on their access to sea (and sailing), to guarantee the flow of vital supplies and control the coasts and the marine areas of interest. This kind of control was never meant to be an imposition of their commercial interests on other cities or peoples of the Mediterranean area.

The Roman fleets were not war weapons to be used to show off their own superiority over enemies. They were, instead, the necessary means for protecting sea routes as much as possible. It was a purely functional arrangement: the power was not to demonstrate supremacy over space (meaning ownership of marine areas) and maritime supremacy, which was never proclaimed.

The power was used or supervision of the sea to ensure safe maritime navigation. Based on these understandings, Roman jurists and magistrates designed principles and rules aimed at fostering transport and ensuring access to and shared use of sea and coast.

D. 47. 10. 13. 7 (Ulp. l. 57 *ad ed.*): ... *Conductor autem veteres interdictum dederunt, si forte publice hoc conduxit: ... Si quem tamen ante aedes meas vel ante praetorium meum piscari prohibeam, quid dicendum est? Me iniuriarum iudicio teneri annori? Et quidem mare commune omnium est et litora, sicuti aer, et est saepissime rescriptum non posse quem piscari prohiberi: sed nec aucupari, nisi quod ingredi quis agrum alienum prohiberi potest. Usurpatum tamen et hoc est, tametsi nullo iure, ut quis prohiberi possit ante aedes meas vel praetorium meum piscari: quare si quis prohibeatur, adhuc iniuriarum agi potest. In lacu tamen, qui mei domini est, utique piscari aliquem prohibere possum.*

D. 43. 8. 2. 9 (Ulp. l. 68 *ad ed.*): *Si quis in mari piscari aut navigare prohibeatur, non habebit interdictum, quemadmodum nec is, qui in campo publico ludere vel in publico balineo lavare aut in theatro spectare arceatur: sed in omnibus his casibus iniuriatum actione utendum est.*

This resulted in the protection of the freedom of navigation and the free profiting of marine resources: salt extraction, employment of salt water for medical and veterinarian use, commercial fishing, fish farming, all guaranteeing the existence of sea and of marine life.

D. 43. 8. 2. 8 (Ulp. l. 68 *ad ed.*): *Adversus eum, qui molem in mare proiecit, interdictum utile competit ei, cui forte haec res nocitura sit: si autem nemo damnum sentit, tuendus est si, qui in litore aedificat vel molem in mare iacit.*

D. 43. 12. 1. 17 (Ulp. l. 68 *ad ed.*): *Si in mari aliquid fiat, Labeo competere tale interdictum: ne quid in mari inve litore quo partus, statio iterve navigio deterius fiat.*

Even the regulations about maritime trade, whose main focus was on both the ship's and the passengers' safety, originated from this need for navigation.

## **SEA: THE FREEDOM OF NAVIGATION AND THE PREVENTION OF SHIPWRECKS**

To encourage maritime transport, the *Lex Rhodia* provided that, in case it was needed to jettison cargo to save the ship or in case of ship damage, the loss would be split among all the owners of the goods being transported apportioning loss in this way could encourage people to engage in maritime transport (e.g. the ship owner or the captain).

D. 14. 2. 1 (Paul. l. 2 *sentent.*): *Lege Rhodia cavetur, ut, si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.; Paul. Sent. 2.7.1: Levandae navis gratia iactus cum mercium factus est, omnium intributione sarciatur, quod pro omnibus iactum est.*

It was laid down that in the event of shipwreck neither taxation nor property rights (acquisitive prescription) were allowed on the goods that ended up overboard.

D. 41. 2. 21. 1-2 (Iavol. l. 7 *ex Cassio*): *Quod ex naufragio expulsum est, usucapi non potest, quoniam non est in derelicto, sed in deperdito. Idem iuris*

*esse existimo in his rebus, quae iactae sunt: quoniam non potest videri id pro derelicto habitum, quod salutis causa interim dimissum est.*

However, an ancient tradition established that wreckage could become property of whoever took possession of it and jurists promoted a limitation of such a privilege to prevent abuse. The practice of taking possession of wreckage from fraudulent shipwrecks had become very lucrative. Apparently, fishermen would light fires at night on the coast near areas of shallow water to trick ships into thinking there was a port nearby where they could dock at, thus deliberately causing shipwrecks, so as to take possession of the vessels and steal the cargo.

D. 47. 9. 10 (Ulp. l. 1 op.): *Ne piscatores nocte lumine ostenso fallant navigantes, quasi in portum aliquem delaturi, eoque modo in periculum naves et qui in eis sunt deducant sibi que execrandam praedam parent, praesidis provinciae religiosa constantia efficiat.*

Jurists proposed that there should be a sanction of a sum four times higher than the value of the stolen goods or even to introduce criminal penalty for the thieves with punishments like birching, exile or penal labour in mines (basically a death sentence).

D. 47. 9. 1. pr. (Ulp. l. 56 ad ed.): *Praetor ait: 'In eum, qui ex incendio ruina naufragio rate nave expugnata quid rapuisse recepisse dolo malo damnive quid in his rebus dedisse dicitur: in quadruplum in anno, quo primum de ea re experiundi potestas fuerit, post annum in simplum iudicium dabo. Item in servum et in familiam iudicium dabo.'*

D. 47. 9. 4. 1 (Paul. l. 54 ad ed.): *Divus Antoninus de his, qui praedam ex naufragio diripuissent, ita rescripsit: 'Quod de naufragiis navis et ratis scripsisti mihi, eo pertinet, ut explores, qua poena adficiendos eos putem, qui diripuisse aliqua ex illo probantur. Et facile, ut opinor, constitui potest: nam plurimum interest, peritura collegerint an quae servari possint flagitiose invaserint. Ideoque si gravior praeda vi adpetita videbitur, liberos quidem fustibus caesos in triennium relegabis aut, si sordidiores erunt, in opus publicum eiusdem temporis dabis: servos flagellis caesos in metallum damnabis. Si non magnae pecuniae res fuerint, liberos fustibus, servos flagellis caesos dimittere poteris.'*

It was settled that the ship owner would guarantee in full for cargo on board in order to protect those asking to be transported (i.e. passengers)

and look after the expectations of those consigning their goods to the charterer (*exercitor navis*).

D. 4. 9. 3. 1 (Ulp. 14. *ad ed.*): *Ait praetor: 'nisi restituent, in eos iudicium dabo'. Ex hoc edicto in factum actio proficiscitur, sed an sit necessaria, videndum, quia agi civili actione ex hac causa poterit: si quidem merces intervenerit, ex locato vel conducto: scilicet si tota navis locata sit, qui conduxit ex conducto etiam de rebus quae desunt agere potest: si vero res perferendas nauta conduxit, ex locato convenietur: sed si gratis res susceptae sint, ait Pomponius depositi agi potuisse. Miratur igitur, cur honoraria actio sit inducta, cum sint civiles: nisi forte, inquit, ideo, ut innotesceret praetor curam agere reprimendae improbitatis hoc genus hominum: et quia in locato conducto culpa, in deposito dolus dumtaxat praestatur, at hoc edicto omnimodo qui recepit tenetur, etiamsi sine culpa eius res perierit vel damnum datum est, nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari. Idem erit dicendum et si in stabulo aut in caupona, vis maior contigerit.*

Because the sea and the coasts were common heritage to humankind, all people had not only the substantive right to use them without appropriating them, but also the procedural right to enforcement of this substantive right regardless of having a personal and specific interest in using them.

## ACTIO POPULARIS

In this respect the combination of two sets of regulations typical of Roman law is particularly interesting: the *actio popularis* given to the citizen (to *quivis de populo*) to defend the common interest of the people.

D. 47. 23. 2 (Paul. 1 *ad ed.*): *Si plures simul agant populares actione, praetor e ligat idoneiorem;*

D. 47. 23. 3. 1 (Ulp. 1 *ad ed.*): *Eam popularem actionem dicimus, qua suum ius populi tuetur;*

D. 47. 23. 4 (Paul 3 *ad ed.*): *Popularis actione integrae personae permittitur, hoc est cui per edictum postulare licet.*

There are also the interdicts, orders to do or not to do something, given by a magistrate and directed to a private individual upon request of another private individual, which would become popular in case the object protected by the interdict were directly public.

An example of this practice could be the interdict *prohibitorium*, with which the magistrate (usually the *praetor*) would pre-emptively forbid the completion of actions (such as *moles* or other buildings) that could take a portion of sea, thus becoming an obstacle to maritime navigation (passage or access to ports) or to fishing. The two actions were later merged together, due to the sea's characteristics of being common and of allowing access to anyone.

D. 43. 8. 2. 8 (Ulp. l. 68 *ad ed.*): *Adversus eum, qui molem in mare proi[e]cit, interdictum utile <competit> ei, cui forte haec res nocitura sit. Si autem nemo damnum sentit, tuendus est is, qui in litore aedificat vel molem in mare iacit.*

D. 43. 8. 2. 9 (Ulp. l. 68 *ad ed.*): *si quis in mari piscari aut navigare prohibeatur, non habebit interdictum, quemadmodum nec is, qui in campo publico ludere vel in publico balineo lavare aut in theatro spectare arceatur: sed in omnibus his casibus iniuriarum actione utendum est.*

D. 43. 12. 1. 17 (Ulp. l. 68 *ad ed.*): *Si in mari aliquid fiat, Labeo <ait> competere tale interdictum: 'ne quid in mari in litore' 'quo portus, statio interve navigio deterius fiat'.*

D. 47. 10. 14 (Paul. 13 *ad Plaut.*): *Sane si maris proprium ius ad aliquem pertinebat, uti possidetis interdictum ei competit, si prohibeatur ius suum exercere, quoniam ad privatam iam causam pertinet, non ad publicam haec res, utpote cum de iure fruendo agatur, quod ex privata causa contingat, non ex publica. Ad privatas enim causas accommodata interdicta sunt, non ad publicas.*

D. 47. 10. 13. 7 (Ulp. LVII *ad ed.*): *Si quis me prohibeat in mari piscari vel everriculum (quod graece σαγήνη) ducere, an iniuriarum iudicio possim eum convenire? Sunt qui putent iniuriarum me posse agere: et ita Pomponius et plerique esse huic similem eum, qui in publicum lavare vel in cavea publica sedere vel in quo alio loco agere sedere conversari non patiatur, aut si quis re mea uti non permittat: nam et hic iniuriarum conveniri potest. Conductor autem veteres interdictum dederunt, si forte publice hoc conduxit: nam ei vis prohibenda est, quo minus conductione sua fuatur. Si quem autem ante aedes meas vel ante praetorium meum piscari prohibeam, quid dicendum est? Me iniuriarum iudicio teneri an non? Et quidem mare commune omnium est et litora, sicut aer, et est saepissime rescriptum non posse quem piscari prohiberi: sed nec aucupari, nisi quod ingredi quis agrum alienum prohiberi potest.*

*Usurpatum tamen et hoc est, tametsi nullo iure, ut quis prohiberi possit ante aedes meas vel praetorium meum piscari: quare si quis prohibeatur, adhuc iniuriarum agi potest. In lacu tamen, qui mei dominii est, utique piscari aliquem prohiberi possum.*

The popular action allowed control over the fair use of power. Whoever had the obligation to act in a certain situation was, in fact, liable to being replaced by someone else in case they failed to do so. The power of popular action went far beyond the ability to replace a person in charge: it was the direct application of popular sovereignty, usually given to the *magistratus*, that is to whoever was in charge in the *Respublica*, but whose power reverted to every citizen once whoever was in charge was proved to be negligent in their administration.

This practice demonstrates the influence of the principle of whole-part especially in the Roman republic period. The principle of whole-part is a concept, entrenched in Roman juridical thinking, for which the *civis* (citizen) owes his status to being part of the *Populus* (people) and acts simultaneously in his own interests as well as in the interests of the entire community, of all Romans.

It is well known from the rise of nineteenth century philosophy that this concept of the state as a legal person influenced Roman law studies, causing a certain kind of interpretation of *populus* and *actio popularis*. These influences explain why it was attempted to find within the Roman republic some sort of “*Populus Romanus als Staat*”, that is the condition of the state being a legal entity separate from the physical persons that constitute it and a holder of private and public rights. To which is linked the interpretation of the popular agent as some sort of “*Staatsanwalt*” that could pursue the state’s interests *procuratorio nomine*, i.e. as if they were a representative with power of attorney, with the role of substitute in a sector of public administration still suffering from a shortage of officials (Sitek, 2005, p. 111 n.).

The popular agent, in their position of “Defender of the State”, a state that was able, close to Mommsen thought, to absorb the individual, is thought of as the body in charge of some functions that for their nature would constitute a higher ethical sphere. This interpretation was misguided by the erroneous application of the modern concept of the State-person *ficta*. starting with



Rudolf von Jhering, it was contested by the abovementioned claim that the State in Rome and in particular the *Populus*, “chiamato in causa dalla definizione dell’*actio popularis* in D. 47. 23. 1, fosse lo Stato- molteplicità dei *cives*”, rather than that of “lo Stato- unità, distinto dai *cives*” (Casavola, 1958, p. 5), e dunque un “popolo-società” (Sanna, 2006, p. 3), “a struttura orizzontale e volontaristica” (Lobrano, 1996, p. 115).

This approach, suggesting that the interests of the individual correspond to those of the community, highlights three possible underlying elements of the popular action *stricto sensu*. One is that of a personal initiative of an individual without a power of attorney from the community, therefore based on a personal right, but done, nonetheless, in the interests of the community, that is of the State. Another one is that of the protection of certain “diritti pubblici diffusi”, enforced by single members of the community, instead of being condensed in the entirety of the community and subject to being used by its bodies or by individual citizens that could occasionally act as the State’s instruments. Lastly, the enforcement of a public subjective right to which the citizen is entitled “come parte della comunione, *quasi unus ex populo*” (Fadda, 1894, p. 319) and therefore “almeno in una certa fase iniziale (...) compartecipe della sovranità” (Tigano, 2010, p. 34), nevertheless aiming at merging individual and common interests, converting the popularity of active legal capacity into popularity of interests (Kaniewska, 2014, p. 473 n.).

This interpretation too was criticised, together with the *Weltanschauung* within which it was conceived.

The leader in popular action, in fact, was neither a representative of the people as those following Mommsen’s thought would want, nor an immediate exponent of every member of the *populus*, as Bruns and Fadda claimed. He was the *unus ex populo*, that is “ciascun individuo in mezzo a questa folla d’individui” granting prosperity to the common space. The actor has a personal interest in fighting against crimes that could threaten him in his position, believing that “quel che è accaduto ad uno può accadere ad altri, che come quell’uno vive nel medesimo ambiente di pericolo” (Casavola, 1958, p. 17–19).

This digression briefly shows how the peculiar way in which these tools were constructed has created numerous problems. Their solution has had

interesting consequences in various areas concerning both procedural law (and in particular concerning active legal capacity and the active role of the citizen) and matters of substantive law. Through the analysis of conduct banned from a magistrate, it was possible to eventually recreate a branch within the substantive law that dealt with protection of marine environment (Kaniewska, 2015, p. 129 n.).

It is clear how the combination of these two elements could help overcome the impasse at which modern law finds itself now, because of the sole custody of waters given over to the inefficient supervision of states.

## CONCLUSIONS

Ultimately I believe that it is important to point out the ancients' and especially the Romans' remarkable dedication to the sea, by giving stability to those involved in the sailing and sharing fairly the risks of navigation, they granted both security at sea and ease of sea transport. The solutions adopted by the Romans and the principles that inspired them, especially when it comes to transactions, deserve to be analysed thoroughly and can work as important prompts for the creation of a new *ius commune*. The times we are living in require us to find this common system and the European Union to adopt one as it is clearly in everyone's interests to facilitate and strengthen maritime trade too.

This is particularly compelling now, considering that in the general framework of maritime law, the sea and especially the Mediterranean are living a difficult moment of extreme tension where the control of every state on marine areas could become more and more territorial. The importance of maritime routes for political stability and global development was discussed recently by the Council of the European Union through the adoption of a Strategy for maritime safety (*European Union Maritime Security Strategy*). This strategy recognizes the different security interests and threats, and provides a comprehensive approach to dealing with interests ranging from freedom of navigation and economic interests to border security and conservation of biodiversity. The strategy lists direct threats such as conventional military challenges, piracy and terrorism, as well as indirect threats stemming from illegal fishing and climate change.

In order to give solid foundation to this project of social harmony and cooperation, we will need to change our mindsets and get rid of prejudice. This is why we need to retrace our common history, using it as a starting point to find collective and fruitful solutions.

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