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ИСТОРИЧЕСКИ РИМСКИ ПРЕЦЕДЕНТ НА ПРАВНАТА ЗАЩИТА НА ПРИРОДНИТЕ ВОДНИ РЕСУРСИ (НА АНГЛИЙСКИ ЕЗИК)

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Резюме: Това изследване разглежда определени ситуации, включващи опазването от римското право на природните ресурси, като някои от тях представляват най-отдалечения предшественик на опазването на околната среда, които днес съставляват този клон на административното право, който доктрината нарича екологично право.

Ключови думи: римско право; римско административно право; природни ресурси; околна среда; забрани; популарни искове.

THE HISTORICAL ROMAN PRECEDENT OF THE LEGAL PROTECTION OF NATURAL WATER RESOURCES (ENGLISH LANGUAGE)

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Abstract: This study discusses certain situations involving the protection of natural resources by the Roman Law, some of them constituting the most remote antecedent of environmental protections that today constitute this branch of administrative law which the doctrine calls environmental law.

Keywords: Roman Law; Roman Administrative Law; Natural Resources; Environment; Interdicts; Popular Actions.

I. Introduction

A main question about the importance of any romanistic study, also this one, consists in emphasizing the greatest possible understanding about the historical reality of legal institutions. Indeed, understanding the Law as a historical product is the only way to know it in its integral perspective, which is what is intended, not only to verify the height of Roman legal reasoning, but to extract the necessary lessons to develop, apply and fairly perfect the current legal systems, the starting point of which, as a common substratum, is found precisely in Roman Law. This interest in Roman Law, which has always predominated in regard to the iusprivatist side, has been increasingly awakening in recent times also in regard to all Public Law. In the words of Fernández de Buján, A.[1], „son múltiples y variadas las enseñanzas de contenido y de análisis que depara el estudio de los principios y normas constitucionales, administrativas, penales, fiscales o internacionales, a lo largo de la historia de la comunidad política romana“, whose influence on the history of Europe is perpetuated over time. Precisely the continuous effort of this distinguished Romanist, who has directed more than twenty doctoral theses in the field of Roman Administrative Law and Roman administrative and fiscal experience, has made it possible to reopen this line of research that tries to demonstrate the vital influence exercised by Roman Law in the development and evolution of modern Administrative Law, a line in which a large research team of spanish romanists is immersed today and which owes Prof. Fernández de Buján its impulse and coordination[2].

[1] *Derecho Público Romano.* Thomson-Civitas. 20ª ed. Madrid, 2017, p. 34 ss. Vid. ALBURQUERQUE, J. M. *La protección o defensa del uso colectivo de las cosas de dominio público: Especial referencia a los interdictos de publicis locis (loca, itinere, viae, flumina, ripae).* Madrid: Dykinson, 2002, reimpresión 2010, p. 27 ss; ID. *Algunos fundamentos y convergencias de la experiencia administrativa romana sobre el medio ambiente, los recursos naturales y res publicae*. *Glossae. - European Journal of Legal History, №* 14, 2017, p. 27 ss.; ID. *Reconocimiento pretorio y jurisprudencial de la función social de los bienes destinados al uso público -res publicae in publico usu*. - *Revista Digital de Derecho Administrativo*, № 17, 2017, p. 141 ss.; ID. *The idea of ius, ratio, aequitas and iustitia would be associated with the idea of the useful and the convenient: Common Utility*. - *IUS ROMANUM*, *Revista de Derecho de la Universidad St. Kliment Ohridski de Sofia (Bulgaria)*, 2/2018; ID. *Substantial differences between "De penu legata and De alimentis vel cibariis legatis*". - *IUS ROMANUM*, 1/2020.

[2] Vid. FERNÁNDEZ DE BUJÁN, A. (Director), R. ESCUTIA ROMERO, G. GEREZ KRAEMER (Editores). *Hacia un derecho administrativo, fiscal y medioambiental Romano IV*. Dykinson, 2020; FERNÁNDEZ DE BUJÁN, A. (Director), G. GEREZ KRAEMER (Co-editor), A.

Indeed, in every legal system, even the simplest ones, by which a political community is governed, there is an underlying administrative structure that orders it with its own administrative institutions, acts and events.

García de Enterría, E.[3], expresses this in these same terms when he affirms that „es la administrativa la primera función histórica de cualquier Estado o forma Política“, so that „la Historia prueba no sólo la existencia permanente de un Derecho Administrativo, sino también la continuidad de buena parte de sus técnicas“. If this is the case for any political community, however small it may be, as we have stated, the largest legal-political entity that the ancient world has known cannot be left out: Rome. Indeed, if we focus our attention on Roman administrative practice, we can observe how its Administration grows and develops in a manner proportional to its historical importance and the degree of expansion of the political community[4].

The studies that we have cited have concluded that although on a strictly technical level there is no autonomous, special and distinct regulatory body from others, this does not detract from the legitimacy of the use of the modern expression Administrative Law, which even when it does not belong to the Roman legal tradition is present in the Roman tradition to refer to the field of Roman administrative experience. In this sense, it cannot be denied in Rome the existence of a complex administrative apparatus that is made up of institutions, events and activities of an administrative nature in various spheres (state, provincial and municipal) that try to solve the different problems generated by Roman society, asking questions that are still valid today[5]. Even though there is no science of Administrative Law in Rome or in Roman Law, since the pragmatic character of the

TRISCIUOGLIO (Co-editor). *Hacia un derecho administrativo, fiscal y medioambiental Romano III*. Dykinson, 2016; FERNÁNDEZ DE BUJÁN, A. (Director), G. GEREZ KRAEMER (Editor). *Hacia un derecho administrativo y fiscal romano II*. Dykinson, 2013; FERNÁNDEZ DE BUJÁN, A., G GEREZ KRAEMER, B. MALAVÉ OSUNA (Co-Editores). *Hacia un derecho administrativo y fiscal romano*. Dykinson, 2011.

[3] Dos estudios sobre la usucapión en Derecho Administrativo, Tecnos, 1974, p. 19 ss. Citado por FERNÁNDEZ DE BUJÁN, A. *Instituciones, hechos y actividad de orden administrativo en la experiencia jurídica romana*. – In: *Derecho administrativo histórico, cit*., p. 125.

[4] Cfr. PONTE, V. *Régimen jurídico de las vías públicas en Derecho Romano.* Madrid: Dykinson-Servicio de Publicaciones de la Universidad de Córdoba, 2007, p. 23.

[5] Cfr. FERNÁNDEZ DE BUJÁN, A. *Instituciones, hechos y actividad de orden administrativo en la experiencia jurídica romana*, *op. cit*., p. 125.

Roman jurists prevented a general theoretical or technical-scientific speculation of administrative experience, that does not mean that we cannot speak of Roman Administrative Law. For the rest, it seems clear that until the principles of the French Revolution triumph, there will not exist in a technical sense an Administrative Law accompanied by an administrative legal science, for which we will have to wait until the 19th century.

II. The legal protection of water resources

We can affirm, as Alburquerque, J.M.[6], has done that one of the great successes of the Roman legal genius is contained in the treatment that the water receives, where it can also be appreciated that "los romanos pusieron mucho énfasis a la hora de organizar y conceptuar las mismas por considerarlas como una exigencia vital". This author emphasizes the importance that the Romans gave to the protection of water, and the establishment of a system of legal-administrative norms that led to an effective use of water reserves, also protecting both the common use of rivers as the different aspects that affected hygiene and health[7]. Paraphrasing Fischer[8], our jurist tells us that this consideration was not only originally based on a more or less pragmatic weighing, but

[6] *La protección o defensa del uso colectivo de las cosas de dominio público*, *cit*., p. 199 ss.

[7] Cfr. FISCHER. *Umwelschützende Bestimmungen im Römischen Recht*. Aachen, 1996, p. 157; VIGANO. *Sull'edictum de fluminibus retandis.- LABEO*, 1969, p. 168-177*;* RUDORFF. *Edicti perpetui quae reliquia sunt.* Lipsiae, 1869, p. 212 ss.; GELLIO, N. A. 11.17*: Quid significet in veteribus praetorum edictis: qui flumina retanda publice redempta habent. Edicta veterum praetorum sedentibus forte nobis in bibliotheca templi Traiani et aliud quid requirentibus cum in manus incidessent, legere atque cognoscere libitum est. Tun in quodam edicto antiquiore ita scriptum invenimus; Qui flumina retanda publice redempta habent, si quis eorum ad me eductus fuerit, qui dicatur, quod eum ex lege locationis facere oportuerit, non fecisse. Retanda igitur quid esset, quaerebatur. Dixit ibi quispiam nobiscum sedens amicus meus in libro se Gaui de origine vocabularum VII legisse retas vocari arbores, quae aut ex ripis fluminunt eminerent aut in alveis eorum exstarent, appelatasque esse a retibus, quod praeteruntes naves impiderent et quasi inretirent; idcircoque sese arbitrari retanda flumina locari solita esse, id est purganda, ne quid aut morae aut periculi navibus in ea virgulta incidentibus fieret.* Citados por ALBURQUERQUE, J. M. *La protección o defensa del uso colectivo de las cosas de dominio público*, *loc. cit*.

[8] FISCHER. *Umwelschützende Bestimmungen im Römischen Recht*, *cit*., p. 157 ss.

also on the religious veneration of water that most ancient peoples had. The study of Alburquerque demonstrates, among other conclusions, the significance of Roman sensitivity to current legislation. In this sense, our author echoes the writings of Gallego Anabitarte[9] on water law in Spain, where it is emphasized that "es un hecho extraordinario, pero el derecho romano de las aguas ha estado y está presente en todos los estudios de aguas del derecho occidental. El *tronco común* del que salen el actual Derecho francés, anglosajón, alemán y español es el Derecho Romano y muy en concreto determinadas y específicas regulaciones de la *Instituta* de Justiniano y del *Digesto*".

Natural water resources traditionally appear in the list of res publica in publico usu. Waters as a natural resource come to be considered by the Roman legal system as public property, thus enjoying the special legal protection that Roman law granted to these things. Alburquerque, J. M.[10], tells us how, in this regard, the sources allude to the *actio iniuriarum* in order to protect citizens who are disturbed in the normal use of public things. This was the solution offered by ULPIANUS, in the passage contained in D. 43.8.2.9., where it is affirmed that it is the actio iniurirarum, (and not the interdictum ne quid in loco publico) that must be exercised when someone is prevented from fishing or sailing in the sea, playing in a public field, washing in a public bathroom or entering in a theater (*in mari piscari aut navigare prohiberi, in campo publico ludere, in publico balineo lavare aut in theatro spectare arceri*). Our author interprets, with good criteria in our opinion, that, although the list cited by this jurist does not cover all things considered as public, it could be thought with Branca[11], that the list referred to by Ulpiano is merely exemplary, or if the analogical criterion, it should be easily admitted that the *actio iniuriarum* would serve to protect every person against any disturbance in the use of any *res publica*. It is interesting to observe that it is a logical consequence when referring, this assumption, to something framed by the Roman legal doctrine among the *res communes omnium*[12] on which the

[9] GALLEGO ANABITARTE, A, A. MENÉNDEZ REXACH, J. DÍAZ LEMA. *El derecho de aguas en España*. Madrid, 1986, p. 16.

[10] *La protección o defensa del uso colectivo de las cosas de dominio público*, *cit*., p. 96 ss.

[11] BRANCA. *Le cose extra patrimonium humani iuris.* Trieste, 1940, p. 159.

[12] Cfr. D. 1.8.2. (*Marcianus*, 3 *Inst.* =Inst. 2.1.18); D. 11.8.4. (*Ulpianus*, libro LXVIII *ad edictum*); D. 1.8.10. (*Pomponius*,libro VI *ex Plautio*); D. 41.1.14. (*Neratius*, libro V *Membranarum)*; D. 41.1.30.4. (*Pomponius*, libro XXXIV *ad Sabinum*); D. 41.1.50. (*Pomponius*, libro VI *ex Plautio)*; D. 43.8.2.8 (*Ulpianus*, libro LXVIII *ad edictum*); D. 43.8.3. (*Celsus*, libro XXXIX *Digestorum*); Inst.

use cannot be denied to anyone. If we remember the list of common things that appear to us in the sources, we see how it is included in this hybrid modality of things as Bonfante would define it, the air, running water and the sea and its coastline:

I. 2.1.1.: *Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis abstineat, quia non sunt iuris gentium, sicut et mare.*

D. 1.8.2. (*Marcianus libro tertio institutionum*): pr. *Quaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur.* 1. *Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.*

Without trying to enter into the multiple disquisitions that the cataloging of the *res communes omnium* raises, of their true classicity or of their possible Justinian interpolation, we must agree with Carrasco Gacía, C.[13], that the opinion of those authors who affirm that the *res communes omnium* is nothing more than a speculative product stemming from more ethical-philosophical than legal approaches, so it should not be taken into account for the law. According to this author, whose assertion seems very correct to us, the *res communes omnium* constitute an ideal category to serve as a template for things whose peculiar characteristics required a differentiated legal qualification and regulation[14].

2.1.1 y 2.

[13] *Res communes omnium: categoría jurídica del Derecho romano con vigencia en la actualidad*, *cit*., p. 26.

[14] CARRASCO GACÍA, C., *op. cit*., *loc. cit*.: „el hecho de que en la actualidad se recurra a esta categoría jurídica de base romana, aun cuando sea para incluir en ella un contenido distinto, no sería más que otro de los muchos ejemplos que jalonan la historia de la cultura jurídica europea en los que las fuentes romanas han sido aprehendidas y reinterpretadas de acuerdo con la mentalidad y el espíritu de la época del interprete, determinando una resurrección del Ordenamiento jurídico romano, en la medida en que éste dejaba de ser Derecho Romano“.

The rivers that are not privately owned, as well as the ports, however, are not classified as common things but, as the sources indicate, as *res publicae*:

D. 1.8.4.1 (*Marcianus libro tertio institutionum*): *Sed flumina paene omnia et portus publica sunt.*

I. 2.1.2.: *Flumina autem omnia et portus publica sunt: ideoque ius piscandi omnibus commune est in portibus fluminibusque.*

However, both in one case and in the other, that is, both the natural resources that are classified as *res communes omnium* and those that are considered *res publicae*, have recognized, by the right of peoples, a very broad *usus publicus*, which ranged from the the right to fish or sail up to the possibility of mooring the ship in the river or its banks, tying ropes from the trees born there, tending to dry the nets, as well as placing a hut on the seashore to take shelter. This even in cases where private ownership of rivers or their banks is recognized, in which the owners would have no choice but to bear the burden of public use:

D.1.8.4. (*Marcianus libro tertio institutionum*): pr. *Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen ullius et aedificiis et monumentis abstineatur, quia non sunt iuris gentium sicut et mare: idque et divus pius piscatoribus formianis et capenatis rescripsit.* 1. *Sed flumina paene omnia et portus publica sunt.*

D.1.8.5. (*Gaius libro secundo rerum cottidianarum sive* aureorum): pr. *Riparum usus publicus est iure gentium sicut ipsius fluminis. Itaque navem ad eas appellere, funes ex arboribus ibi natis religare, retia siccare et ex mare reducere, onus aliquid in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare. Sed proprietas illorum est, quorum praediis haerent: qua de causa arbores quoque in his natae eorundem sunt.* 1. *In mare piscantibus liberum est casam in litore ponere, in qua se recipiant,*

We must therefore admit the recognition and legal protection that certain natural resources enjoyed due to their consideration as res publicae in publico uso (rivers and their banks, lakes ...) or as res communes omnium (the sea, its shores, the air, running waters…).

We must look at a text attributed to Paulo in D. 47.11.1.1. in which, when dealing with extraordinary crimes, a clear example of an environmental crime appears that is classified as *iniuria contra bonos mores*. Indeed, Paulo qualifies as *iniuria*, in addition to those cases in which someone had soiled another with corrupted manure or stained it with silt or mud, those other cases in which a person has clogged water, pipes or lakes or contaminated something else to the public's insult. The jurist also points out that serious penalties should correspond to those who are considered guilty of these *iniurias*. As we can see, in what we could call "criminal offense" of this type of *iniuria*, the term "contaminaverit" appears literally:

D. 47.11.1.1. (*Paulus libro quinto* sententiarum): *Fit iniuria contra bonos mores, veluti si quis fimo corrupto aliquem perfuderit, caeno luto oblinierit, aquas spurcaverit, fistulas lacus quidve aliud ad iniuriam publicam contaminaverit: in quos graviter animadverti solet.*

There are many assumptions included in the sources in which natural water resources are subject to legal protection. We find, for example, how in a text by Ulpiano, collected in D. 43.24.11.pr., reference is made to Labeon's opinion by which the *interdictum quod vi aut clam* is considered applicable in the event that someone had poured some substance into a well to corrupt the water[15]:

D. 43.24.11.pr. (*Ulpianus libro 71 ad* edictum): *Is qui in puteum vicini aliquid effuderit, ut hoc facto aquam corrumperet, ait Labeo interdicto quod vi aut clam eum teneri: portio enim agri videtur aqua viva, quemadmodum si quid operis in aqua fecisset.*

[15] Vid. DI PORTO, A. *La tutela de la "salubritas" fra editto e giurisprudenza*. I. Milano: A. Giuffrè, 1989, p. 5 ss. También en *Bullettino dell'Istituto di Diritto Romano* "*Vittorio Scialoja*" (*BIDR*), vol. XXX, 1988, XXXI, 1989.

The *interdictum quod vi aut clam*[16] is one that requires restitution to its initial state against those works that have been carried out with violence or clandestinely. In the opinion of Zamora Manzano, J.L.[17], the fragment of the Digest does not indicate to us either the substance that is poured into the well or the way in which this discharge is carried out. It does specify, however, that the result of it must be corruption or contamination of the water. In the words of this author, "es evidente que la preocupación de los romanos por la degradación de las aguas públicas y privadas por vertidos contaminantes se reflejó de forma casuística dando mecanismos procesales según los casos, no en vano estaban en juego el abastecimiento de los recursos hídricos", so "para la organización de las ciudades era imprescindible el abastecimiento de aguas"[18].

In the same way, let us remember that fragment from D.39.3.3.pr. in which we are referred to the doctrinal opinion of Trebacio according to which the owner of a farm adjoining another where a sink (*fullonicae*) has been installed next to a fountain cannot take action against it to contain the water rainy. But it establishes two exceptions, in the cases in which the water is channeled to a neighbor and, which in our study is most interesting, in the cases in which water *spurcam* is introduced into the neighboring property, that is, dirty or polluted:

D. 39.3.3.pr. (*Ulpianus libro 53 ad edictum*): *Apud Trebatium relatum est eum, in cuius fundo aqua oritur, fullonicas circa fontem instituisse et ex his aquam in fundum vicini immittere coepisse: ait ergo non teneri eum aquae pluviae arcendae actione. Si tamen aquam conrivat vel si spurcam quis immittat, posse eum impediri plerisque placuit.*

[16] Vid. ALBURQUERQUE, J. M. *La protección o defensa del uso colectivo de las cosas de dominio público*, *cit*., p. 60 ss. Cfr. también, ID. *Algunos fundamentos y convergencias de la experiencia administrativa romana sobre el medio ambiente, los recursos naturales y res publicae. Glossae. - European Journal of Legal History*, *cit*., 14, 2017, p. 27 ss.; ID. *Reconocimiento pretorio y jurisprudencial de la función social de los bienes destinados al uso público -res publicae in publico usu*. *- Revista Digital de Derecho Administrativo*, № 17, 2017, p. 141 ss.

[17] *Precedentes romanos sobre el Derecho Ambiental*, *cit*., p. 30.

[18] *Ibíd*., p. 31, *cit*. 70.

We observe, therefore, that even when the law protects the private use of water, including the industrial use, as is the case of the establishment of laundries, any neighbor who could damage these waters reaches their property dirty or contaminated.

Labeon interprets the interdictum (D.43.20.1.pr.) indicating that it is forbidden to do in a ground "dig, plant, cut, prune or build something", so that the water becomes contaminated ("dirty, stained, altered or deteriorated"), so that the concern of the law about the quality, hygiene and health of the water is evident. This is expressed in D.43.20.1.27:

D.43.20.1.27 (*Ulpianus libro 70 ad edictum*): *Labeo putat per hoc interdictum prohiberi quem, ne quid in illo fundo faciat fodiat serat succidat putet aedificet, quare ex re ea aqua, quam ille hoc anno per fundum tuum sine vitio duxit, inquinetur vitietur corrumpatur deteriorve fiat: et similiter de aestiva aqua debere interdici ait.*

We must also consider the provisions contained in the *Digesta*, in which the *interdictum* for the protection of sources appears, which is extensible, as Ulpiano himself points out, to lakes, wells or swimming pools. It includes not only the *interdictum* that protects the right to use this water, but also an *interdictum* that allows cleaning and restoring fountains, lakes, wells and swimming pools.:

D.43.22.1 (Ulpianus libro 70 ad edictum): *pr. Praetor ait: "Uti de eo fonte, quo de agitur, hoc anno aqua nec vi nec clam nec precario ab illo usus es, quo minus ita utaris, vim fieri veto. De lacu puteo piscina item interdicam".* (...) *6. Deinde ait praetor: "Quo minus fontem, quo de agitur, purges reficias, ut aquam coercere utique ea possis, dum ne aliter utaris, atque uti hoc anno non vi non clam non precario ab illo usus es, vim fieri veto". (...) 10. Sed et de lacu puteo piscina reficiendis purgandis interdictum competit.*

The studies of Alburquerque, J.M., about the protection or defense of things in the public domain, show us in the same way multiple references to the Roman regulation for the safeguarding of natural water resources. Particular mention in this sense would deserve the legal regulation on the diversions of water from a public river (D. 43.12.2) and

the one referring to the edict *interdictum* "*ne quid in flumine publico fiat, quo aliter aqua fluat, atque uti priore aestate fluxuit*" (D. 43.13.1.pr.)[19], which prohibits doing anything in a public river or on its shore that harms or prevents the water from flowing with the same normality as the previous summer, which is formulated as follows, along with its corresponding *interdictum* for restitution:

D. 43,13,1 pr. (*Ulpianus*, libro LXVIII *ad edictum*): *Ait praetor: In flumine publico inve ripa eius facere aut in id flumen ripamve eius immittere, quo aliter aqua fluat, quam priore aestate fluxit, veto.*

D. 43,13,1,11 (*Ulpianus*, libro LXVIII *ad edictum*): *Deinde ait praetor: Quod in flumine publico ripave eius factum sive quid in flumen ripamve eius immissum habes, si ob id aliter aqua fluit atque uti priore aestate fluxit, restituas*

Our author reminds us that the praetor in this *interdictum* does not try to protect by means of all the acts that may harm the river itself, but, with a special character, all those activities that may produce the impairment of them, due to non-permitted derivations (which can alter its usual current), or arbitrary mutations of the channel, causing serious damage to neighbors[20]. We can observe here a remote legal protection of public rivers, whether or not they are navigable (which is of interest if we consider that the legally protected asset was primarily navigation) against any work or immission carried out in them that makes their flow decrease or flow abnormally with respect to the previous summer. Therefore, at this point we find another indication of protection of public waters, particularly rivers, against the impairments that these could suffer by reason of human work, ordering their restoration to their original state in all that (illegally) has already been made or introduced in a public river or on its shore, which has caused the alteration of the natural flow, the reference point of which is the previous summer.

[19] *La protección o defensa del uso colectivo de las cosas de dominio público*, *cit*., p. 291 ss.

[20] Vid. D. 43.13.1.1.

Following these and many other examples, we can conclude that there is an administrative legal experience in the protection of natural resources in Rome, not separated from other public functions, but also made up of institutions, events and administrative acts, which we can call Roman environmental law.