

РАЗПОРЕДБИ ИЛИ ПРАВИЛА НА РИМСКАТА АДМИНИСТРАЦИЯ ЗА ЗАЩИТА НА ПРИРОДНИТЕ РЕСУРСИ, ПУБЛИЧНОТО ИМУЩЕСТВО И ОКОЛНАТА СРЕДА

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Резюме: Тази статия ще се фокусира върху краткото обобщение на административните мерки, които имат пряк или косвен ефект върху това, което днес се нарича опазване на околната среда и на природните ресурси. Ще говорим за замърсяването в различните му аспекти, а именно замърсяването в градовете, замърсяването на атмосферата, както и за прекаления шум. В тази връзка ще обърнем внимание и на проблемите, свързани с обезлесяването, превръщането на горите в обработваеми земи и експлоатацията на мините, чистотата на водата, изворите с течаща вода, публичните водоизточници в град Рим и т.н. Освен това ще анализираме правните последици, породени от специфичния римски административен опит и основните критерии във връзка с признаването на социалната функция на *res publicae* и съответстващата им интердиктна защита. Ще се спрем на становищата на юриспруденцията по отношение на публичната собственост, имащи важно значение за опазването на околната среда.

Ключови думи: околна среда, природни ресурси, замърсяване, обезлесяване, експлоатация на мини, *salubritas*, *res publicae*, реки, извори, море;

**PROVISIONS OR RULES OF THE ROMAN
ADMINISTRATION IN DEFENSE OF NATURAL
RESOURCES, RES PUBLICAE AND THE
ENVIRONMENT**

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Abstract: This contribution will focus, in summary form, on a short list of administrative provisions that, as a direct or indirect reflection effect, could have some convergence with what is now called the Environment and the protection of natural resources. We will talk, among other aspects, of the pollution in its different aspects, of the city in general, acoustic and saturnine. In relation to the field, the problems of the deforestation, the clearing of the forests and the mining. Water pollution, springs of running water, public springs in the city of Rome, etc. Also, in a somewhat more particularized way, but in a summarized way, we will analyze a set of legal reflections typical of Roman administrative experience, and the fundamental criteria in relation to the recognition of the social function of the *res publicae* and the corresponding interdictal tutelage. And jurisprudence on public places, especially if we think about the relation, convergencies, coexistence or coherence, that they can assume with respect to the Environment.

Keywords: Environment, natural resources, pollution, deforestation, mining, *salubritas*, *res publicae*, rivers, creeks, sea;

First of all, I would like to express my appreciation and thanks to the main promoter and director of studies concerning the administrative, environmental and fiscal Roman experience in Spain, Antonio Fernández de Buján, Professor of Roman Law at the Autonomous University of Madrid, Member of the Royal Academy of Jurisprudence and Legislation, and Principal Investigator for more than two decades of several shared Research Projects in which I have also participated – in which I have also participated – and director of many specific books about Historical¹ Administrative Law.

¹ FERNÁNDEZ de BUJÁN, A. Contribución al estudio de la vigilancia, seguridad ciudadana y orden interno en el marco de la administración pública romana. Especial referencia a los agentes *in rebus*. – In: *Hacia un Derecho Administrativo, Fiscal y Medioambiental romano*. Vol. 3. Dir. A. Fernández de Buján, G. Gerez Kraemer, A. Trisciuglio, (Eds.). Madrid, Dykinson, 2016, p. 17 ss.; FERNÁNDEZ de BUJÁN, A. Los arbitrajes de Derecho Público en la experiencia jurídica romana. – In: *Hacia un Derecho Administrativo y Fiscal romano*. Vol. 2. Dir. A. Fernández de Buján, G. Gerez Kraemer. (Ed.). Madrid, Dykinson, 2015, p. 17 ss.; HACIA un Derecho Administrativo y Fiscal romano. Dykinson, Fernández de Buján, A., Gerez Kraemer, G., Malvé Osuna, B. (Eds.). Madrid, 2011, p. 13 ss. See RUIZ PINO, S. Algunos precedentes históricos de protección o defensa de los recursos naturales y de la *salubritas* en Roma. Hacia un derecho administrativo medioambiental romano. – In: *Revista Digital de Derecho Administrativo, Universidad Externado de Colombia*, Vol. 17, 2017; Id., La protección de los recursos naturales y de la *salubritas* en Roma: posibles precedentes históricos del derecho administrativo medioambiental; FERNÁNDEZ de BUJÁN, A. (Dir.). GEREZ KRAEMER, Gabriel. (Ed.). Hacia un derecho administrativo y fiscal romano. Vol. 2. Madrid, Dykinson, 2013, p. 413 ss. RUIZ PINO, S. y ALBURQUERQUE, J. M. Algunas notas referentes a la experiencia administrativa romana de la protección de los recursos naturales. – In: *Hacia un Derecho Administrativo y Fiscal Romano*, p. 409 ss.; PIQUER MARI, J. M. y RUIZ PINO, S. Tres aproximaciones al derecho de aguas, medio ambiente y derecho administrativo romano. – In: *Revista General de Derecho Romano*, Vol. 21, 2013; PONTE, V. Régimen jurídico de las vías públicas en Derecho Romano. Dykinson, Madrid, 2005; Id., La regulación de las vías públicas en el seno del Derecho Administrativo Romano. – *Hacia un Derecho Administrativo y Fiscal Romano*, cit., p. 369 ss.= RGDR, Vol. 13, 2009; See BRAVO BOSCH, M. J. La relación del mundo romano con el medio ambiente. – In: *Hacia un Derecho Administrativo, Fiscal y Medioambiental romano*, Vol. 3, cit., p. 173 ss.; FERNÁNDEZ BAQUERO, M. E. Medio ambiente y lex Ursonensis: Sobre la instalación de alfarerías. – In: *Hacia un Derecho Administrativo, Fiscal y Medioambiental romano*, Vol. 3, p. 217 ss.; JIMÉNEZ SALCEDO, C. El régimen jurídico de las relaciones de vecindad en derecho romano. Córdoba, 1999, p. 36 ss.; Id., Algunas observaciones a propósito de la responsabilidad por daños causados por ruinas de edificios. – In: *RGDR*, Vol. 9, 2007; Id., Notas sobre urbanismo. – In: *RGDR*, Vol. 8, 2007; Id., Algunas reflexiones sobre urbanismo en Derecho Romano. – In: *Revista Derecho y Opinión*, Vol. 7, 1999; Id., Limitaciones urbanísticas al derecho de la propiedad privada: una reflexión sobre la responsabilidad por daños causados por ruinas de edificios. – In: *RGDR*, Vol. 17, 2011; Id., Perspectivas en torno al medioambiente urbano: especial referencia a las ruinas de edificios, incendios, basuras, inmisiones, etc. – In: *GLOSSAE. European Journal of Legal History*, Vol. 14, 2017. Estudios Homenaje Enrique Gómez Royo; 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, 2002, reimp., Madrid, 2010; Id. Concentración y ordenación urbanística del territorio romano: colonias, conventos y municipios de la bética”, Hacia un Derecho Administrativo y Fiscal Romano, cit. 77 ss.; Id. Reflexiones sobre la política jurídico-social Flavia y la consolidación urbanística municipal en la Hispania romana. – In: *Hacia un Derecho Administrativo y Fiscal Romano*, Vol. 2, cit., p. 179 ss.; Id., La interrelación de interés público, interés común e interés privado en la noción de utilitas publica. – In: *Hacia un Derecho Administrativo, Fiscal y medioambiental romano*, Vol. 3, p. 131 ss. See FISCHER, R. *Umweltschützende Bestimmungen in Römischen Recht*. Aachen, 1996.

He is also director of the prestigious Dykinson Collection: “Monografías de Derecho Romano”, “Sección Derecho Administrativo y Fiscal Romano” and “Sección Derecho Público y Privado Romano” with over a hundred monographs already published.

In addition, I would like to remind A. Fernández de Buján², that we must continue to reconstruct the concepts and dogmas of the Roman Public Administration, “con la finalidad de colmar la laguna que se produce en este sector del Ordenamiento Jurídico, dada la inexistencia, en la literatura romanística, de una obra de esta naturaleza y en atención a lo que ello supone de conexión entre la investigación histórica y la dogmática moderna, tan necesaria para el progreso de la Ciencia del Derecho”.

2. GENERAL INFORMATION ON THE LEGAL PROTECTION OF THE ENVIRONMENT AND NATURAL RESOURCES. DIRECT, INDIRECT OR SECONDARY REFLEX EFFECTS

As we have already pointed out in another previous study³ about the Roman administrative experience on the protection of natural resources, a constant preoccupation of recent times in the field of law, mainly administrative—although with notable influence in other legal branches – has been and continues to be that concerning the legal protection of the environment, although it would be a doctrinal fallacy to affirm that the legal protection that the Romans did indeed fall on natural resources was purely for filthy reasons. If these were defended and protected by the Roman legal system, it was mainly for reasons of human exploitation. This can be easily appreciated, among others, in the protection of rivers, which existed mainly due to navigation, or other minor uses such as fishing, etc.

Although in our opinion we can think that, indeed, there were in Rome situations of protection of natural resources and the environment by the Roman legal system itself, some of them constituting a reflection effect; which stands to be, in the correct

² FERNÁNDEZ de BUJÁN, A. Hacia un tratado de derecho administrativo y fiscal romano. – In: *Hacia un Derecho Administrativo y Fiscal romano*, cit., p. 13 ss.

³ RUIZ PINO, S., ALBURQUERQUE, J. M. Algunas notas referentes a la experiencia administrativa romana de la protección de los recursos naturales, cit., p. 409 ss.; PIQUER MARI, J. M. y RUIZ PINO, S. Tres aproximaciones al derecho de aguas, medio ambiente y derecho administrativo romano, cit., p. 1 ss. JIMÉNEZ SALCEDO, C. Perspectivas en torno al medioambiente urbano: especial referencia a las ruinas de edificios, incendios, basuras, inmisiones, etc., cit., p. 1 ss.

opinion of R. Fischer⁴ a secondary effect of a norm that in fact protects the environment and that originally had a different purpose. With these nuances, we could surmise that they constitute the most remote antecedent of environmental protections that today form the backbone of this branch of administrative law—and that, as we all know, the doctrine is called environmental law. Therefore, even if it is true that we cannot speak of a Roman environmental law, we can speak of the existence of a great Roman administrative experience, at least as a direct, indirect or secondary effect of protection of natural resources and environment.

The study of environmental law today represents one of the major sources of scientific concern for scholars. Numerous studies in recent decades have paid particular attention to the analysis of legal provisions aimed at protecting the environment in general. As R. Fischer⁵, in the juridical sense says, the environment is to be understood only as the natural environment, that is, the natural elements of man's life: the earth, air and water, and the biosphere, and the relationships between them and men⁶.

3. SOME MORE FREQUENT ENVIRONMENTAL PROBLEMS. DIFFERENT TYPES OF POLLUTION. IN THE CITY: AIR POLLUTION, ACOUSTIC POLLUTION AND SATURN POLLUTION. IN THE COUNTRYSIDE: DEFORESTATION OF FORESTS, OVER-EXPLOITATION OF AGRICULTURE, LIVESTOCK AND MINING. SPECIAL REFERENCE TO WATER POLLUTION IN GENERAL. SCATTERED REGULATIONS

In the Roman regulations we find numerous scattered assumptions, cases and solutions which, to some extent, could be said to converge into a systematic set of embryonic environmental postulates – with the nuances that we have previously carried out, i. e. as direct or indirect reflex effects on the preventive nature of the environment.

⁴ FISCHER, R., *Umweltschützende Bestimmungen in Römischen Recht.*, cit., S. 1 ff. See FARGNOLI, I. *Umweltschutz und Römisches recht? Das Vermächtnis der Römer. Römisches Recht und Europa.* Bern ; Stuttgart ; Wien, Haupt Verlag, 2012, S. 151 ff.

⁵ FISCHER, R. *Umweltschützende Bestimmungen in Römischen Recht*, cit., S. 1 ff.

⁶ See CARRASCO GARCÍA, C. *Atmósfera, espacio radioeléctrico, flora silvestre, ecosistemas: ¿res comunes omnium?, ¿dominio público?*, p. 1 ss.

Let us remember with R. Fischer⁷, among others, the major environmental problems in the city of Rome⁸:

- The pollution of the city, the filthiness of the streets of Rome;
- Air pollution⁹ and its suffocating effect on the city with the smoky houses of food;
- Noise contamination with the sound of the passage of goods, the clatter of the hammers and saws in the workshops, the squeaky wagons dragging the stone and wood blocks;
- Saturnine pollution, the plumbo intoxications – lead pipes, lead cookware, lead vessels, etc. – directly affecting health, and sometimes leading to death.

For the Romans, the reason for protecting immissions, as the author reminds us, was not to care for the environment. The intention of the lawyers was to protect the owners from harm caused by neighbors. For this reason, one can only think of a protective reflex effect on the environment. Perhaps even as a direct one, if we think with our scholar mind about the purpose of the action: the defense of the that pollute the air or the soil. The *actio negatoria* is mainly directed against industrial workshops, while individuals could expel immissions to a limited extent, although the substance in question was also very harmful.

As far as the countryside is concerned, we can now cite some environmental problems of special consideration: deforestation of forests, deforestation to increase agricultural areas, the abusive extraction of wood and stones, causing soil erosion; excessive agricultural use, and the growing cattle ranching; the great damage caused by mining, etc. With regard to drinking water, it is worth remembering the ancient *Lex incerta of aqueductibus urbis Romae*, which established the prohibition to contaminate water and subjected the offender to a fine of 10,000 sesterces. The water from the springs belonged to the *res publicae*, in a technical sense, which implies that it belonged to the State¹⁰.

⁷ FISCHER, R. Umweltschützende Bestimmungen in Römischen Recht., cit., S. 1 ff.

⁸ JIMÉNEZ SALCEDO, C. Perspectivas en torno al medioambiente urbano: especial referencia a las ruinas de edificios, incendios, basuras, inmisiones, etc., p. 1 ss.

⁹ See JIMÉNEZ SALCEDO, C. El régimen jurídico de las relaciones de vecindad en derecho romano, cit., p. 36 ss. See (D. 8.5.8, 5–7).

¹⁰ See FISCHER, R. Umweltschützende Bestimmungen in Römischen Recht., cit., S. 7 ss.

The main concern of the Romans was to guarantee the supply to the whole city, for this reason this indispensable good was protected by means of injunctions and penal norms with their corresponding fines – “*lex*” against “*aquam oleatam*”. On the pollution of the streams we will remember the *Lex rivi incerta* and the *Lex de magistris aquarum* about the protection of the springs and also of the water.

We will now briefly summarize some injunctions related to water pollution: The *Interdictum quod vi aut clam* (D. 43.24.11.pr.), in which Labeo confirms the responsibility that the person who spills something in the neighbor's well will have, causing the contamination of the same—with the risks that this supposes for the health – and Labeo justifies its argumentation, when considering that the water that leaves the well is considered part of the field. As is well known, it also affects other damages—throw manure on the ground, theft of a statue, etc. The purpose of the interdict, is the restoration to the previous state.

The Interdiction of daily water – *de aqua cotidiana et aestiva* (D. 43.20.1.pr.) – in which we can observe that the praetor forbids to exert any type of violence on the person who brings the water as he had been doing during the last year – *nec vi, nec clam*. In D. 43.20.1.27 Labeo extends this interdictal prohibition to anyone who does something in that farm—digging, sowing, cutting, pruning—so that it can soil, ruin, corrupt or deteriorate the water. Our jurisconsultus considers that a similar interdict – *interdictum utile* – should be given for summer water. The interpretation of R. Fischer¹¹, in this regard, is to emphasize that the ostensible purpose of the injunction is again the protection of one who actually executes a servitude—water diverted to drink or water the cattle—and that this standard serves to the protection of health, and therefore, as a direct reflection effect, also for the protection of the environment.

Through *de interdictum de rivis* (D. 43.21.1), the praetor protects the user of an aqueduct that needs cleaning or repairing the ditches, covered channels, and dams or locks. As noted by R. Fischer¹², the intentional protection of health and drinking water by the Romans, also belongs to the environment, although in this case, the water does not appear in its natural presence, but is protected by pipelines. The interdiction of fontes (D. 43.22.1.pr.), differs from the interdicts of *aqua cotidiana et aestiva* in that here it refers exclusively to collecting the water or removing the water and not to the

¹¹ FISCHER, R. Umweltschützende Bestimmungen in Römischen Recht., cit., S. 35.

¹² FISCHER, R. Umweltschützende Bestimmungen in Römischen Recht., cit., S. 36.

possible derivations of water. This interdict can be applied to deposits, wells and swimming pools. It also includes the easement of bringing the cattle to water. In D. 43.22.1.6, Ulpian affirms that this interdict has the same utility as the interdiction of repair of the *acequias*, because if it could not be repaired or cleaned, it could not be used. The protective effect of the environment that this injunction presents, when favoring the cleaning and repair of the sources, focuses on maintaining the quality of water – protection of health, and the contamination of the ground and groundwater¹³.

Likewise, we can now recall with Fischer¹⁴ the detailed analysis on the effects for the environment of the *actio aquae pluviae arcendae* (D. 39.3.pr.), *aqua spurca* (D. 39.3.3), la *actio negatoria*- the actio against the contaminated water of a fuller. Our Author carries out a deep evaluation of the precepts against the pollution of the waters, and the systematization of said precepts. Among the main observations that it gives us, we should now highlight the following reflection. From the set of precepts analyzed, it is inferred that there has been no standardized legal regulation for water pollution. In any case, the rules on fines can be framed in Public Law. However, criminal regulations protect water in its natural appearance explicitly, only when it is water located on sacred ground or when it affects the population's supply. The Romans had the intention not so much to protect the groundwater as to protect the water in its natural presence in general. As our scholar emphasizes, along with religious reasons, here plays an important role– like the protection of public water supply in the interest of the health of the population. The Romans considered punishable exclusively those behaviors that tenaciously threatened these legal rights. In the juridical practice only the purity of the water was protected, as it is clear from the particular cases referred to, and in reality, it remained fragmented despite the possible theoretical analogies.

Fiorentini¹⁵ also highlights the Roman concern about the hygienic-sanitary aspect, although it is contextualized in a casuistic way and regardless of the existence of a global criterion on the environment: “Il grande merito del diritto romano delle acque

¹³ FISCHER, R. Umweltschützende Bestimmungen in Römischen Recht., cit., S. 37 ff.

¹⁴ FISCHER, R. Umweltschützende Bestimmungen in Römischen Recht., cit., S. 45 ff.

¹⁵ See FIORENTINI, M. Diritto romano e ambiente. Corso di diritto romano; Id., Precedenti di diritto ambientale a Roma? I. La contaminazione delle acque. – In: *Index. Quaderni Camerti di Studi Romanistici*, Vol. 34, 2006, p. 353 s.; Id., Precedenti di diritto ambientale a Roma? II. La tutela boschiva. – In: *Index. Quaderni Camerti di Studi Romanistici*, Vol. 35, 2007, p. 325 ss.; Id., L'acqua da bene economico a “res communis omnium” a bene collettivo. – In: *Analisi Giuridica dell'Economia*, 2010, no. 1, p. 39 ss.

sta proprio in questa empirica, non dogmatica ricerca del bilanciamento degli interessi in conflitto, da perseguire caso per caso senza individuare soluzioni a priori, ma sempre calibrando l'adattamento dei principi alla luce delle situazioni concrete. Il tutto non in una norma rigida, ma nel processo, che per sua natura era tanto variabile nelle soluzioni quanto innumerevoli erano le situazioni che si potevano presentare." In summary, Fiorentini "si propone esattamente di dimostrare che il mondo antico è intervenuto incisivamente sull'aspetto igienico-sanitario, elaborando empiricamente regole che oggi definiremmo di sanità pubblica; ma non ha mai predisposto alcun mezzo di difesa dell'ambiente, non conoscendo neanche la relativa nozione".

It seems evident that the notion of the environment was not part of the typical Roman postulates, although there is a fairly generalized opinion supported by the sources that clearly confirm that the Roman administration drew up a list of normative provisions for the sake of extensive protection of natural resources and *res publicae* that, in our opinion, represent a grouping of the reflexive effects of the environment.

In this sense, a point of particular importance must be attributed to the statements of Bravo Bosch¹⁶, among others, in his study on "the relationship of the Roman world with the environment", from which it appears that, in relation to the search for perfect harmony with the ecosystem that we must preserve, is not a concern only of the relative present, and that the legislative environmental effort does not belong exclusively to current generations. As our author affirms, "Nada más lejos de la realidad [...] en la antigua Roma la sensibilidad con el medio ambiente ya existía". The Romans were aware of the importance of nature and its balance. They regulated the need to preserve the environment in its different manifestations. The author concentrates and completes in her study, what refers to the flora, forests, vegetation, water, mines, quarries, and, especially, in the mining activity as a reference of the ancient ecology. She also addresses numerous cases of daily life in the city – among others, the prohibition to bury or incinerate the dead within the city, the health of the thermal baths, etc. can be cited. In short, the autor addresses the problem of deforestation, the relationship between deforestation and flooding, the importance of the flora for the balance of the system – it came to be considered for common use as *res publica*, analyzes some mechanisms to avoid environmental deterioration, the

¹⁶ BRAVO BOSCH, M. J. La relación del mundo romano con el medio ambiente. – *Hacia un Derecho Administrativo, Fiscal y Medioambiental romano*, Vol. 3, cit., p. 173 ss.

protection of water, the main concern for the Romans, as an essential natural resource for civilization, with special emphasis on water pipes, cleaning, sanitation, industrial pollution—dry-cleaning and laundries—the problem to use the fermented urine as a detergent, the imposition of sanctions on the dyers who were engaged in this activity if they spilled the water of their activity in public places, the use of the *interdicto quod vi aut clam*, to allow things to return to their state pristine, the *interdicto de cloacis privatis* and that of *rives et fonte*, for the cleaning and repair of the sewers, aqueducts, pits and streams, air pollution – breathable by the sewers. He ends his research analyzing one of the most important factors for environmental impact: mining.

Likewise, similar nuances can be found in the municipal legislation of the Roman Baetica. Especially, we will remember with Fernández Baquero.¹⁷ His study on the environment and the “Lex Ursonensis: On the pottery installations”, which also deals with the legal treatment of the nature concept and the scope of the *ius naturale*, as well as its relationship with the concept of the environment that we currently use from a legal point of view. We also share the reflection of this author in which she says: “Aunque el Derecho ambiental que conocemos en la actualidad, tiene su origen a mediados del siglo pasado, sin embargo, las normas ambientales son tan antiguas como la humanidad. Probablemente, los motivos y el espíritu de las mismas sean distintos, pero siempre ha existido la preocupación por el medio ambiente.”. Fernández Baquero focuses his extensive analysis on the municipal legislation of Roman physics, also highlighting the richness in environmental references by regulating institutions that directly affect this subject: control and prevention of fires, *salubritas* – safeguarding the hygiene and public health of the colony, *aqua caduca* and artisanal activities, prohibition within the city of the burial, incineration and of building a funerary monument, prohibition of locating *ustrinae* within the radius of 500 steps of the wall, the prohibition of the unweaving, the demolition or destruction of a city building without prior authorization, and the principle we know as *ne urbs ruinis deformatur*, in order to preserve public places, as we saw when analyzing the different injunctions.

The prohibition to have in the city pottery installations above a certain dimension, as the author reminds us, appears exclusively in the *Lex Ursonensis*, and

¹⁷ FERNÁNDEZ BAQUERO, M. E. Medio ambiente y lex Ursonensis: Sobre la instalación de alfarerías, cit., p. 217.

is not included in the other municipal laws of the Baetica. The main motivation for this type of prohibition is due, in the words of Fernández Baquero “A dos causas que hoy podríamos considerar como reguladora de las cuestiones ambientales: Evitar causar incendios o excesivas actividades molestas dentro de la propia ciudad y establecer un uso racional del agua destinando a la ciudad las aguas que necesitaran para el uso personal de los particulares y de aquellos que realizaran actividades de naturaleza de carácter eminentemente urbano”.

4. SOCIAL FUNCTION OF RES PUBLICAE: INTERDICTAL AND JURISPRUDENTIAL GUARDIANSHIP ON PUBLIC PLACES. POSSIBLE RELATIONSHIP, CONVERGENCE, COEXISTENCE OR COHERENCE AND REFLECTIVE EFFECTS THAT COULD MEAN WITH PROTECTION TO THE ENVIRONMENT

In relation to the *res publicae*, we will begin with a brief observation: an in-depth analysis of all public things, the set of natural resources and their relationship with the environment undoubtedly transcends the limits of this study, although we have a dispersed information about publicly owned assets, either explicitly or indirectly depending on the source we are analyzing, the enumeration of the *res publica in publico usu* can be thus exposed in a very general way: public roads; the forum, the basilicas and the squares; public fields or lots; the public baths and theaters; the lakes of evergreen waters; intermittent water ponds and channels; the Field of Mars; rivers and ports; public Buildings. As is well known, those that acquire this condition through publication may also be included as *publicatio*¹⁸.

The perfection, foundation and organization of the Roman legal system, to meet the aims of order, defense and, ultimately, the maintenance of social peace, founded on the highest values of justice and accommodating the expression of a political, economic conscience, ethical and social, has given great importance to interdicts over time, adequately fulfilling the protective mission of the collective use of public goods – in more recent terms, public domain assets, where the wise will of the Roman town. According to this approach, it is once more truly illustrative to analyze in this contribution some of the interdictal orders of greatest interest, and of great social roots for the knowledge of the Roman administrative experience. By reviewing this pretorian

¹⁸ See Ulpiano, D. 43.8.2.21.

regulation, we will have the opportunity to broadly recognize the social function of *res publicae* in general, and in turn, to partially configure the main postulates that better justify the protection of public use of public places. Also, we will try to relate these effects to the environment¹⁹.

It is worth recalling now the following fragment – probably binding – of Pomponius: D. 43. (*Pomponius*, book XXX *ad Sabinum*): “*Cuilibet in publicum petere permittendum est id, quod ad usum omnium pertineat, veluti vias publicas, itinera publica: et ideo quolibet postulante de his interdicitur.*” In this passage, Pomponius, a contemporary of Salvius Julianus who is well versed in precedent jurisprudence and the *ius honorarium*, emphasizes that everyone should be allowed to make general use of what is public; that is, to all members of the public. the community. It should also be noted that to achieve this purpose, an injunction is granted to anyone who wants to request it. It uses Pomponius as examples of assets that include *res publicae*, public roads and public paths – although as is known, the list of public things is very broad. In our opinion it should be added that, in relation to the considerations previously made, it is unquestionable that this text of the Justinian compilation refers mainly to the interdictal defense of goods intended for public use; aspect that is clear from the content of the precept by mentioning some of the examples – *quod ad usum omnium pertineat (viae publicae, itinera publica)*.

With regards to jurisprudence – although, with some contradictions – we find testimonies in the sources with a reference that highlights the broad meaning that is given to the term *publicus*, extended – in addition to things pertaining to the Roman people – to the things of the municipalities. In short, it can be said that all the things that are not of the individuals but of a collectivity are called indiscriminately public. A list synthesized – and very general – of the *res publicae en publico usu*²⁰, according to the source that we are using, could to be thus exposed like this: the public roads; forum; the basilicas and the squares; public fields or lots; the public baths and theaters; the lakes of evergreen waters; Intermittent water ponds and channels; the Field of Mars; rivers and ports; public buildings; it is also possible to include here as public things

¹⁹ See ALBURQUERQUE, J. M. La protección o defensa del uso colectivo de las cosas de dominio público, cit., p. 10 ss.

²⁰ *Res publicae in publico usu*, See D. 43.8.2; D. 18.1.6.pr.; D. 45.1.83.5; D. 43.14.1.4–6; D. 45.1.137.6; D. 1.8.4.1; D. 43.8.2.3. *Res publicae in pecunia populi*, See D. 18.1.6; D. 18.1.72; D. 41.1.14.pr.; C. 11.31.1; C. 11.31.3. *Res publicae in publico usu y res publicae in pecunia populi*. See D. 43.8.2. 4, 5; D. 18.1.

those which man constitutes and acquire this condition through *publicatio*²¹. In the words of A. Fernández de Buján, “Se correspondería con lo que hoy se denomina afectación de una cosa al uso público. La *publicatio* era un acto administrativo, cuya competencia estaba expresamente atribuida a magistrados determinados, mediante la cual la cosa quedaba por tanto afectada o destinada al uso público.”²².

In short, with regard to our exegetical review in keeping with the current state of the sources, not without hesitation and not without great suspicion about the legitimacy of some texts, it could be said that – although it does not easily emerge from the majority of the assumptions mentioned a sufficiently explicit reference on the goods that make up the *res publicae* – there do not seem to be great difficulties that prevent us from saying that the goods assume the consideration of public – *in usu publico* – or by virtue of an act of *publicatio*, or by reason of their destination or public use or by natural causes. Even, it should not be too strange, in our opinion, that we do not find in the sources a cast and an idea with absolute character, sufficiently detailed and homogeneous, of these goods, because probably it obeys historical keys completely rooted in the custom of the *usus publicus*. Aspect that in my opinion, can oscillate – according to the political, ideological and legal climate of the moment – the different judgments of the jurists in relation to the goods considered public. We must not forget that the very idea of *utilitas publica*²³ and its evolution has been in each historical stage associated with the notion of *res publicae*, and, although there was not a general law that contemplated all the peculiarities of the *res publicae*, at least there are numerous testimonies in the sources from which it is inferred that they had a special consideration in order to capture the social function of the different public goods.

In Rome, the *res populi romani* and the goods that serve to meet the burdens of the city were publicly denominated, but as we have been able to observe when analyzing the sources, the differentiating contrast between the two categories also appears in the texts: *res publicae* in *publico usu* and *publicae* in *pecunia populi*, in *patrimonio populi* or *fiscales*. It could be said openly with the doctrine, that this diffuse reference induces to consider that it was not a separation too clear or absolute. Also,

²¹ See D. 43.8.2.21: *qui ius publicandi habuit*. See D. 41.1.16.

²² See FERNÁNDEZ de BUJÁN, A. Derecho público romano, cit., p. 226 ss.

²³ See ALBURQUERQUE, J. M. La interrelación de interés público, interés común e interés privado en la noción de utilitas publica. – In: *Hacia un Derecho Administrativo, Fiscal y medioambiental romano*, Vol. 3, cit., p. 131 ss.

despite the progressive evolution and maturation of the idea of the public, it does not seem very acceptable to deny the coexistence of the referred categories, in principle, without interruption in time; but without forgetting, of course, the tendency seen in the sources to preferably identify *res publicae* with *res quae publico usui destinatae*. A very revealing statement in this regard is transmitted to us by Ulpian in D. 43.43.5: “Así pues, este interdicto se refiere a los lugares que están destinados al uso público, de modo que si en ellos se hiciera alguna cosa que perjudica a un particular, el Pretor se opondría con su interdicto” (*Ad ea igitur loca hoc interdictum pertinet, quae publico usui destinata sunt, ut, si quid illic fiat, quod privato noceret. praetor intercederet interdicto suo*).

5. BRIEF COLLECTION OF THE ADMINISTRATIVE REGULATIONS ON GUARDIANSHIP OR PROTECTION OF THE *RES PUBLICAE*

The data that I intend to add and summarily compile now—so as not to exceed the usual limits of these contributions—correspond, fundamentally, to interdictal mandates that highlight in a special way a small part of the administrative activity developed by the Roman magistrates: interdicts *de publicis locis* (*loca, itinere, viae, flumina, ripae*).

5.1. On public places (*de publicis locis*)

Interdicts of public places (*de publicis locis*) are contained in the title VIII of the Digest, book 43, *Ne quid in loco publico vel itinere fiat* (that nothing is done in place or public road). The interdictal order is: *ne quid in loco publico vel itinere fiat* (D. 43.8). It covers several formulations, all with the purpose of preventing something from being done in a public place or way, and in general, with the aim of protecting all *locus publicus* (the lots, the buildings, the fields, the public roads and the public roads – *areae, insulae, agri, itinera publica, viae publica* – of possible unauthorized works, as well as of disturbances or emissions that cause some kind of damage to someone or damage the public way or the road.

From the casuistry emerging from the sources we can bring up the comment of the following texts: The interdiction is granted in cases where there is a hindrance or narrowing of the views or paths. D. 43.2.28, 12 refers precisely to the assumption that concerns us: *Ulpianus, book XLVIII ad edictum*: Therefore, if the views or roads are

obstructed or narrowed, the interdict is necessary. (*Proinde si cui prospectus, si cui aditussit deterior aut angustior, interdicto opus est*) The pretorian prohibition to make or put on the public road or public road something that deteriorates or deteriorates: *Interdictumne quid in via publica itinereve publico fiat, quo ea via idve iter deterius sit fiat* (D. 43.8.2.20). In D. 43.8.2.35 the praetor grants a restitutory injunction against the one who has made or introduced something in the public way that harms its functionality; Labeo in D. 43.2.26.26, where it is noticed that the interdiction will be forced to introduce a sewer on public roads, and therefore, would be less useful or practicable – causing damage to the environment²⁴ – so that it can be admitted that a greater relevance to the common good is recognized here through the unquestionable tutelage of the collective purpose.

As examples that could damage or deteriorate the road or the public road, it should be noted: if the road was flat and sloping, smooth and uneven, wide and narrow, or dry and swampy or flooded (D. 43.8.2.31, 32). It is also worth recalling the legal perspective at the time of defining the extension of the guardianship—in relation to the category of the emissions – in everything that may affect the goods of public use²⁵.

In D. 43.11 the pretorian order is collected to facilitate the repair of public roads or paths. In effect, the Praetor prohibits that the violence prevents the plaintiff from restoring or repairing the road or the public road in order not to damage them. D. 43.11.1.pr. (*Ulpianus, libro LXVIII ad edictum*): *Praetor ait: Quo minus illi viam publicam iterve publicum aperirere ficere liceat, dum ne ea via idve iter deterius fiat, vim fieri veto*. Therefore, provided that under this presumption of repairing the road or the road does not produce any type of deterioration that could alter its original functionality. The meaning of *deterius fieri*, as is known, can be very broad²⁶.

5.2. On public rivers, sea and its coasts

The successive pretorian intervention, in line with social conceptions regarding the common use that should be granted to public rivers, is reflected in the provisions introduced in titles 12–15 inclusive of book 43 of the Digest (XII, *De fluminibus, ne quid in flumine publico ripave eius fiat, quo peius navigetur* on public rivers: That is not done

²⁴ See FISCHER, R. Umweltschützende Bestimmungen im Römischen Recht, cit., S. 25 ff.

²⁵ See D. 43.8.2.29.

²⁶ See D. 43.8.2.31–32; D. 43.11.3.1.

in a public river or on its shore something that harms navigation – XIII, *Ne quid in flumine publico fiat, quod aliter aqua fluat, atque uti priore aestate fluxit* – that nothing is done in a public river that makes the water flows in a different way than in the previous summer – XIV, *Ut in flumine publico navigare liceat* – that it can be possible to sail along a river; XV, *De ripa munienda* – about the interdict to repair the shore).

It would be convenient to resume now the interdictal disposition that is the object of our analysis (D. 43.12.1.pr.), Which begins by saying: “Do not do it in a public river or on its shore [...] -*Ne quid in flumine publico ripave eius facias* [...]”.

As the first observation that can be made with the naked eye, we could ask why the magistrate separately highlights public river and its shore. When Ulpian (D. 43.12.1.5) addresses the definition of shore he seems to refer to what contains the river in its natural vigor; i.e., the natural flow of its current or the usual level of river water – in sum, to its normal course. The jurist gives an example that serves to warn how absurd it would be to establish a different reference to a possible flood by a flood of the Nile due to the rain or the sea, which subsequently retires to its usual channel, so it can be say openly (*ripas non mutat*). We know that the shore is one of the constituent elements of rivers. In this regard, it should be added that the channel of the river is an essential part of the natural conformation of the same, *ut alveum fluminis veterem populi romani*, as the *gromatici* said. In this sense, one might ask why the praetor does not expressly allude to the course of the river, and yes, simply, to its shore.

In short, one might think that the magistrate understands that the channel is one of the elements that do not allow any differentiation of the fluvial water current that runs through it, and that the shore must be expressly protected, as it is an element that also determines the river configuration. Indeed, in the analysis of the different elements of a river, in our opinion, we should not exclude the shores while accepting from the beginning that they may find themselves immersed in an ambiguous situation, but that it could easily be solved if we attend to the general use admitted; regardless of their true legal status.

Labeo grants special attention to the sea and its coasts. If the *usus publicus* is harmed by any type of work or by an immission in the sea or its coast, which obstructs the transit of the ships, the stay or the use of the port, the jurist of Augustean age does not hesitate to indicate the applicability of this interdiction (that is, the content in D.

43.12.1.pr.). Labeo points out the own modifications that must be introduced in his writing—without abrupt innovations in the substance – in a passage contained in D. 43.12.1.17 (*Ulpianus*, libro LXVIII *ad edictum*): If something is done at sea, Labeo says that the restraining order is subject to the following modifications in its wording: “[...] in the sea or on its shore, nothing [...]” and “[...] that could interfere with the use of a port, parking and transit of the navigatio.” (*Si in mari aliquid fiat, Labeo competere tale interdictum: ne quid in mari invelitore quo portus statio iterve navigio deterius fiat*). As can be seen, Labeo admits the application of our interdiction to everything concerning the sea and its shores. Before the unquestionable importance of rivers (with their banks) and seas (with their coasts), as a support and means of functional transport and as a source of wealth in themselves, it might be unnecessary to reason in terms of public or private to adapt the interdictal application, keeping in mind that they are in a situation open to all potential users. The attempt to reconcile the criteria guiding the public interest and the private one leaves no room for great doubts.

If we focus now, simply, but exclusively, on the four direct references in relation to the sea (two from Ulpian, one from Celsus and another from Scaevola), which appear in title VIII (*ne quid in loco publico [...]*), of the forty-three book of the Digest, we observe, at first sight, that the private nature of the construction in the sea can be favored, provided no one is harmed, as Ulpian notes, expressly, referring to the interdiction via useful (D. 43.2.2.8); it is possible the application of the action of insults, as Ulpian points out, for the assumptions of other uses not included in the anticipation of the interdict (D. 43.43.29); Celsus emphasizes the common use of the sea, provided that the use of the coast or the sea is not hindered (D. 43.3); Scaevola assumes the legality of construction on the coast, provided that the public use of it is not impeded (D. 43.40). Being now in title 12 (*de fluminibus*), from the same book 43, it is unquestionable that the search for the use and conservation of public rivers and seas, persevere in the jurists, as is clear from the ulpianian fragment that includes the statement of Labeo that we have commented admitting the competence of our interdiction with respect to the sea and its borders (D. 43.12.1.17).

By virtue of a provision introduced by the praetor, transmitted to us by Ulpian, in D. 43.12.1.19, we can speak of a second restorative injunction: The Praetor also says, you will retribute what you keep made in a public river or in its shore or what is placed on it or on its shore that hinders or may hinder the parking or transit of the

navigation. (*Deinde ait praetor: Quod in flumine publico ripave eius fiat, sive quid in id flumen ripamve eius immisum habes, quo statio iterve navigio deterior si fiat, restituas*). If we adjust to the literal set of the fragment, we would not have to make any observations, because as Ulpian claims, the praetor orders the restitution of all that is retained done, or has been placed, in a public river or on its shore, that hinders or may hinder, parking or transit of the ship or boat (i.e., including, therefore, large vessels (ships) and small (boats)). The situation may be similar to the sea: “You will retribute what you hold done at sea or on its coast or what is put on it [...]”. The popularity of our interdict is less discussed by the doctrine.

So, if something were done at sea, as Labeo affirms, the interdict rests. The modifications that have to be introduced in the wording, as we have indicated, are “[...] in the sea or on its shore nothing [...]” and “that could hinder the use of a port, parking or the transit of the ship or boat.”

In D. 43.13, it is stated that “*Ne quid in flumine publico fiat, quod aliter aqua fluat, atque uti priore aestate fluxit*” – that something is not done in a public river so that the water flows in a different way than in the previous summer. See 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*. This pretorian order refers, openly, to public rivers – whether navigable or not – as indicated by the Ulpianea reflection: D. 43.13.1.2 (*Ulpianus*, libro LXVIII *ad edictum*): *Pertinet autem ad flumina publica, sive navegabilia sunt sive non sunt*.

The praetor does not try to protect by this injunction all acts that may harm the river itself, but, with special character, all those activities that may cause the impairment of the same, by derivations²⁷ not allowed (which may alter its usual flow), or arbitrary mutations of the channel, causing serious damage to the neighbors.

In this sense it seems to pronounce Ulpian in D. 43.13.1.1: With this interdict, the Praetor states that the rivers do not increase by non-permitted derivations that are made to their current or that the channel moves with prejudice to the neighbors. (*Hoc interdicto prospexit praetor, ne derivationibus minus concessis flumina excrescant vel mutatus alveus vicinis iniuriam aliquam adferat*).

The fragment contained in D. 43.14 reads like this: *Ut in flumine publico navigare liceat* – that one can navigate a public river. The pretorian concern for

²⁷ See ALBURQUERQUE, J. M. La protección o defensa del uso colectivo, cit., p. 182 ss.

ensuring effective navigation in public rivers is again evident in this fragment, which does not seek to assess now the harmful consequences of *a facere* or *a immitere*, but preferably, to prevent the behavior of a third party that through violence precludes general legal use. D. 43.14.1.pr. (Ulpianus, book LXVIII ad edictum): "I prohibit violently preventing the plaintiff from passing by boat or raft on a public river and loading or unloading on the shore. I will also give an injunction so that it can be navigated by lake, dam or public pond." (*Praetor ait: Quo minus illi in flumine public navem ratem agree quove minus per ripam onerare exonerare liceat, vim fieri veto. item ut per lacum fossam stagnum publicum navigare liceat, interdicam*).

The intervention of the praetor protects both the conduction or free passage (*agere*) and of the ships and boats, as well as the loading and unloading (*onerare, exonerare*) of the freights on the shore of the public river. Also, from the interdictal drafting it is clear that the Pretoria prohibition extends to lakes (they contain water permanently), ponds (usually contain standing water, which is usually collected in winter) or public dams (water receptacle made by hand, that is, artificially constructed).

D. 43.15, *De ripa munienda* – on the injunction to repair the shore. The prohibition of *ripa munienda* proposed by the praetor has the following formulation: "The Praetor says: I forbid that the plaintiff is violently prevented from doing any work in a public river or on its shore in order to protect it or the neighboring land, provided that navigation is not hindered and promises are made, with or without guarantee – depending on the person, to compensate the feared damage according to the discretion of a righteous man, for a term of ten years, or has not left for him to give himself that promise " (D. 43.15.1).

We can end up highlighting, in general terms, that there are many data obtained in the sources that make the trend of the Roman administration and the pretorian forecasts, through administrative opportunities such as the legal proclivity to favor the broad protection and protection of everything concerning the goods of public use could frame a good part of the natural resources. Therefore, it could be said that, in the language we have analyzed above and in interdictal and jurisprudential perspective²⁸,

²⁸ FERNÁNDEZ de BUJÁN, A. Hacia un Derecho Administrativo y Fiscal romano, cit., p. 43.

converges a tendency that could suppose in part an embryonic approach²⁹ to the antecedents of the legal protection of natural resources and environment.

²⁹ See PIQUER MARI, J. M. y RUÍZ PINO, S. Tres aproximaciones al derecho de aguas, medio ambiente y derecho administrativo romano, cit., p. 1 ss.