

ДЕЙНОСТ НА РИМСКАТА АДМИНИСТРАЦИЯ ПО ОТНОШЕНИЕ ГРАДСКАТА СРЕДА

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Резюме: Още от римско време има тенденция за опазване на околната сред и за създаването на специфична правна регулация в тази връзка. *Salubritas* и градоустройството са концепции, които играят ключова роля за организацията на обществения живот. В статията се изследва понятието „градоустройство“ в римското право и се определя правното естество на ограниченията на собствеността от съображения от обществен интерес. Разглежда се проблема за руините на сгради и тяхното въздействие върху околната среда. Тази работа има за цел да обобщи глобалната визия за загрижеността на римските юристи за опазването на градската среда, имаща като последица превръщането на градовете в обитаеми места, подложени на една правна регулация от изключително високо ниво. От друга страна са отбелязани правните последици, причинени от сгради, които не са добре поддържани като е обърнато внимание и на отговорността на собствениците при тази ситуация.

Ключови думи: римско право, околна среда, собственост, устройство на територията, отговорност;

INITIATIVES OF THE ROMAN ADMINISTRATION AND URBAN ENVIRONMENT*

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Abstract: Without having ecological awareness and environmental protection, from the Roman law there is concern about the salubritas public of the living spaces. Salubritas and urbanism are concepts that are linked to this end and have served as a key category for the organization , policy analysis, case law and legal practice in relation to the organization of life in society. Study of the concept of urbanism in Roman law and the definition and legal nature of the limitations of property for reasons of public interest. Ruins of buildings and their environmental impact: they are the objective of this work that aims to summarize a global vision of the concern of the Roman jurists for the preservation of the urban environment, making their cities habitable places subject to a high level of development regulations. Likewise, it is outlined the analysis of the legal consequences of the damages produced by buildings in bad state of conservation, determining the legal nature of the responsibility in which the owners and their consequences incur in these cases.

Keywords: Roman law; Environment; Property; Town planning; Responsibility;

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1. NEED FOR URBAN PLANNING FOR ENVIRONMENTAL PROTECTION

The environment is not a concept considered by the Romans, who lacked absolutely ecological conscience and concern for preserving the resources of their habitat – unless we soften this radical affirmation considering environmental protection the measures adopted to maintain the public *salubritas* of inhabited places as well as natural means necessary for life such as air and water. Not in vain, we find in the sources references to the word *salubritas* referring to cities and considered as a quality of the land, as well as the concern of jurists for the use of interdicts for air protection and even urban provisions that seek the separation of the cities of the industrial spaces and of the cemeteries¹.

In this sense, urban planning has also constituted a key category for organization, political analysis, jurisprudence and legal practice in relation to the organization of life in society. Essential subjects such as the health or education of the citizenship as well as the way of living of the human being and its integration in cities and settlements respectful with the natural environment, have a direct relationship with the two concepts referred to: urbanism and protection of the environment. No doubt the so-called environmental impact is one of the issues of our century in which pollution, global warming, deforestation and water scarcity are a cause for global concern. However, as we have pointed out in our exordium, this interest goes back to

¹ See D. 43.23.1, 2 (Ulpian lib. 71 ad ed.) and D. 50.16.86 (Celsius, lib. 5 Dig.). We can also refer in this headquarters to the provision of the Law of the XII Tables and later abrogated by the Emperor Leo IV (Nov. 53) by which established the prohibition of burning or burying corpses within the city. See also FERNÁNDEZ de BUJÁN, A. Derecho Público Romano. 19. ed. Madrid, 2016, p. 100 ss.; Id., Derecho Privado Romano, 19. ed. Madrid, 2016, p. 182 ss. 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; id., Concentración y ordenación urbanística del territorio romano: colonias, conventos y municipios de la Bética. – In: *RGDR*, Vol. 13, 2009; Id., Reconocimiento pretorio y jurisprudencial de la función social de los bienes destinados al uso público – Res publicae in *publico usu*. – In: *RDDA*, Vol. 17, p. 141–161 (Universidad Externado de Colombia, Revista Digital de Derecho Administrativo); Id., Правната сделка: въведение, научен и теоретичен преглед със специална препратка към съчиненията на Emilio Betti. – *Ius Romanum*, 2016, № 1 (Commercium); Id., Размисли относно iurisdictio irritana. – *Ius Romanum*, 2015, № 2 (Iurisdictium); 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. – *Revista Digital de Derecho Administrativo*, Vol. 17, 2017, p. 91–109; Jiménez Salcedo, C. El régimen jurídico de las relaciones de vecindad en Derecho Romano. Córdoba, 1999, p. 54 ss., PONTE ARREBOLA, V. Régimen jurídico de las vías públicas en Derecho Romano. Dikynson, 2007. Id., Bases jurídico romanas del ordenamiento jurídico moderno en sede de vías públicas: financiación, construcción y mantenimiento. – In: *RGDR*, Vol. 20, 2013; MALAVÉ OSUNA, B. La preceptiva intervención del Emperador en la ejecución de obras públicas de nueva planta, según el Código Teodosiano. – In: *RGDR*, Vol. 24, 2015; Id. El abandono de las obras ya comenzadas y su regularización en el Derecho urbanístico romano. – In: *Revista Estudios Jurídicos*, Vol. 30, 2008.

the first centuries of our era, being in the minds of the Roman jurists to ensure the conservation of the environment and direct legislation on urban planning for this purpose. It is the magistrates in the Republic and the imperial *curatores* from the Principality who take the initiative in this respect and those in charge of ensuring compliance with the legislative provisions issued with this objective. Measures that will even later adopt repressive penal forms for those behaviors that seriously threaten public health². Thus, for example, Seneca notes that the ediles had among their powers to verify that the hygienic conditions established for public restrooms were met and on the other hand, the maintenance of the aqueducts and sewers although it was attributed to private contractors was supervised by the magistrates for Avoid the possible problems of water pollution³.

Indeed, yesterday and today life in cities depends on the management of resources such as territory, water, crops and the quality of housing, its lights, views, disposition in an environment with green areas, parks, amplitude of the streets, quality of the materials to avoid unhealthy deterioration, humidity and other types of emissions that affect the development and welfare very different from one type of housing to another in Rome (*domus et insulae*).

In this concern for the environmental context urbanism and things directly related to it play a fundamental role, the evolution of urban property right from its absolutely liberal conformation representing the firmest expression of individualism, to its social function and coordination of respective rights for the improvement of social relations. The germ of this transformation is found in the Law of the XII Tables, then in

² See also FERNÁNDEZ de BUJÁN, A. Derecho Público Romano, cit. p. 121 ss. ALBURQUERQUE, J. M. Algunos fundamentos y convergencias de la experiencia administrativa romana sobre medio ambiente, los recursos naturales y res publicae. – In: *GLOSSAE*. European Journal of Legal History, Vol. 14, 2017, p. 27 ss. See and RUIZ PINO, S. Aspectos de la protección de los recursos naturales en la experiencia administrativa romana. – In: *RGDR*, Vol. 20, 2013, p. 1–16; PIQUER MARÍ, J. M. Tres aproximaciones al derecho de aguas, medioambiente y derecho administrativo romano. – In: *RGDR*, Vol. 21, 2013, p. 1–44; Id., El régimen jurídico de las aguas caducas en Roma a propósito de un mandatum de Nerva. – In: *Iura*, Vol. 62, 1914; 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 (Some historical precedents of protection or defense of natural resources and “salubritas” in Rome. Towards an Administrative-environmental Roman Law). – In: *Revista Digital de Derecho Administrativo*. Universidad Externado de Colombia, Vol. 17, 2017; TRISCIUOGLIO, A. Sarta tecta, ultrotributa, opus publicum faciendum locare. Sugli appalti relativi alle opere pubbliche nell’età repubblicana augustea. Napoli, 1998, p. 27 ss., GERÉZ KRAEMER, G. El Derecho de Aguas en Roma. Dykinson, 2008.

³ Sen., Ep. ad Luc. 11.86.10. See also TRISCIUOGLIO, A. Tutela del medioambiente. Roma, Europa, América Latina. – In: *Diccionario Analítico de Derechos Humanos e Integración Jurídica* (coord. M. I. Álvarez Ledesma y R. Cippitani). Roma ; Perugia ; México, ISEG, 2013, p. 691–699.

the Edict of the Praetor and especially in the decisions of the jurists of the late Republic and the classical period, as society acquires a greater degree of development is also becoming greater the level of interdependence of individuals and consequently the need to impose limits on rights in general and the right of property in particular; all in the interest of public health, safety and hygiene and good use of public spaces and natural and urban resources.

The social function is therefore a duty that the property right must fulfill – it must be effective both for the satisfaction of the interests of the same owner, as well as for those of the community. Individual utility and social function define in an essential way the content of the right of ownership over each category or type of goods and immediate consequence is its ecological or environmental function. This character is recognized today by Article 45 of the Spanish Constitution, which imposes the rational use of natural resources introducing in our Organization the idea of sustainability to achieve the right of every citizen to enjoy a decent environment. This ecological function imposes burdens and encumbrances on the concrete subjective rights of real estate property, to achieve the final objective of a sustainable development in Roman Law and nowadays.

In this regard, it is appropriate to review the existence of a more than verifiable Roman urban law on which we find very interesting scientific contributions which are aimed at a possible systematic arrangement of the set of legal references and jurisprudential Romans whose elaboration is imposed as a need for from a current perspective we can acquire the knowledge of that legacy. This is what has been demanded by Fernández de Buján, A., who has proven – with unquestionable authority on the matter – the need for a reconstruction of Roman Administrative Law in general and Urban Law in particular⁴.

⁴ Antonio Fernández de Buján leads a large research group on the reconstruction of Roman Administrative Law. We highlight some of his works in this matter: *Derecho Público romano*. 16. ed. Pamplona, 2014, p. 275, 276 ss., 282 ss., 323 ss. Id., *Le rôle structurant des villes dans l'expérience juridique romain*. – In: *RGDR*, Vol. 13, 2009, no. 1; Id., *Ciudadanía y universalismo en la experiencia jurídica romana*. – In: *RGDR*, Vol. 11, 2008; *HACIA un derecho administrativo y fiscal romano*. Coed. G. Gerez Kraemer y B. Malavé. Madrid ; Valencia, 2011, p. 13; *HACIA un derecho administrativo y fiscal romano*. Vol. 2. G. Gerez Kraemer, Ed. Madrid ; Valencia, 2013. *Los arbitrajes de Derecho Público en la experiencia jurídica romana*, p. 17 ss.; Id., *Instituciones, hechos y actividad de orden administrativo en la experiencia jurídica romana*. – In: *Derecho administrativo histórico*. Santiago de Compostela, 2005, p. 119 ss.; Id., *De la Iberia Griega a la Hispania Romana*. – In: *Homenaje a Díez Picazo*, Madrid, 2004; Id., *Administración Provincial*

A first approach to the idea of urbanism shows us that its main function is to set the general criteria on the basis of which the organization and disposition of the zones

Romana. – In: *IURA*, Napoli, 2004, and Prólogo a RODRÍGUEZ ENNES, L. Gallaecia: Romanización y organización del territorio; FERNÁNDEZ de BUJÁN, F. Roma conforma España. – In: *HACIA un derecho administrativo y fiscal romano*. Vol. 2. Madrid, 2012, p. 191 ss.; Id., La Betica, cornice privilegiata della legislazione municipale e coloniale dell'Hispania romana. – In: *RGDR*, Vol. 13, 2009, p. 1 ss.; RODRÍGUEZ ENNES, L. Gallaecia: romanización e ordenación do territorio. – In: *Derecho administrativo histórico*, cit., p. 355 ss.; Id., La continuidad del modelo minero romano en la América colonial hispano. – In: *Hacia un derecho administrativo y fiscal romano*, cit., p. 53 ss.; Id., Las divisiones provinciales de la Hispania romana con especial referencia a Gallaecia. – In: *Hacia un derecho administrativo y fiscal romano*, Vol. 2., cit., p. 275 ss.; AGUDO RUIZ, A. La abolición de la "collatio lustralis". – In: *Hacia un derecho administrativo y fiscal romano*, Vol. 2, cit., p. 487; BLANCH NOUGUÉS, J. M. Reflexiones en torno al interés jurídico del tributo y del Derecho Fiscal romano. – In: *Hacia un derecho administrativo y fiscal romano*, Vol. 2, cit., p. 115 ss.; LÓPEZ HUGUET, L. Clasificación general de los munera locales y exposición de las principales causas de su exención. – In: *Hacia un derecho administrativo y fiscal romano*, Vol. 2, cit., p. 565 ss.; JIMÉNEZ SALCEDO, C. El régimen jurídico de las relaciones de vecindad en Derecho Romano cit., p. 28 ss.; Id., Limitaciones urbanísticas al derecho de la propiedad privada. una reflexión sobre la responsabilidad por daños causados por ruina de edificios. – In: *RGDR*, Vol. 20, 2013; Algunas observaciones a propósito de la responsabilidad por daños causados por ruina de edificios. – In: *RGDR*, Vol. 9, 2007; PONTE, V. La regulación de las vías públicas en el seno del Derecho Administrativo Romano. – In: *Hacia un derecho administrativo y fiscal romano*, cit., p. 369 ss.; ALBURQUERQUE, J. M. Algunas notas referentes a la experiencia administrativa romana de protección de los recursos naturales. – In: *Hacia un derecho administrativo y fiscal romano*, Vol. 2, cit., p. 409 ss.; Id., Concentración y ordenación urbanística del territorio romano: colonias, conventos y municipios de la bética. – In: *Hacia un derecho administrativo y fiscal romano*. Dir. Antonio Fernández de Buján. Madrid ; Valencia, Dykinson, 2011, p. 77–113; ALBURQUERQUE, J. M. Dimensión social del ius latii de Vespasiano y observaciones sobre la política municipal flavia. – In: *Capogrossi Colognesi, L. Tassi Scandone, E., a cura di. Vespasiano e l'impero dei Flavi*. – In: *Atti del Convegno* (Roma, 18–20 novembre 2009), 1 ottobre 2012, p. 239–247. Id., Размисли относно административния опит в древния Рим и някои инструменти за преторска защита, прилагани към res publicae. – In: *Юридическото списание на Нов български университет* (Law Journal of New Bulgarian University), 2013, № 4, p. 1–20; Id., La administración provincial, colonial y municipal y la justicia en la Hispania Romana (1). – In: *RGDR*, Vol. 7, 2006; Id., 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). Dykinson, 2002; Id., Fundamentos, evolución y aspectos más significativos de la quaestio perpetua de repetundis. concusión y corrupción. revista general de derecho romano. – In: *RGDR*, Vol. 24, junio 2015, p. 1–20; Id., La prestación de alimentos en derecho romano y su proyección en el derecho actual. Colección: Monografías de Derecho Romano y Cultura Clásica. Madrid, Dykinson, 2010, p. 343; RUIZ PINO, S. La protección de los recursos naturales y de la "salubritas" en Roma: posibles precedentes históricos del Derecho Administrativo Medioambiental. – In: *Hacia un derecho administrativo y fiscal romano*, Vol. 2, cit., p. 413 ss. MALAVÉ OSUNA, B. Código Teodosiano 15,1 y la interdicción de la obra nueva respecto a los edificios públicos. – In: *Cuadernos informativos de Derecho Histórico Público, Procesal y de la Navegación*, Vol. 19–20, 1996; Id., Legislación urbanística en la Roma Imperial, a propósito de una constitución de Zenón. Málaga, 2000; PENDÓN, E. Régimen jurídico de la prestación de servicios en Derecho Romano. Dykinson 2002; Id., Afectación y titularidad del dominio público en Roma. – In: *Problemática de Derecho Romano ante la implantación de los nuevos planes de Estudio*. Jaén, 1999; Id., Consideraciones sobre la naturaleza de algunos tipos de aguas. – In: *El Derecho de Familia y Los derechos reales en la Romanística Española*. Huelva, 2000. OBARRIO MORENO, J. A. y PIQUER MARÍ, J. M. Un caso de expropiación forzosa en época República. Libros de Numa. – In: *RGDR*, Vol. 19, 2012; SALAZAR, M. Evolución Histórico Jurídica del Condominio en el Derecho Romano. Jaén, 2003; RODRÍGUEZ LÓPEZ, R. Las obligaciones indemnizatorias en Derecho Público Romano. Almería, 1996; Id., Problemática urbanística y agraria del huerto (s. III y II a.C.). – In: *RGDR*, Vol. 9, 2007.

of demographic settlement must take place in order to obtain the best conditions of existence for Individuals, as well as determine the directives concerned in a strict sense, the way of lifting and modification of buildings, coordinating the integration of private buildings with public places (streets, squares, bridges, schools, markets, public lighting, hospitals , etc.). The urban legislation, therefore, seeks to create an ideal habitat for living together for human beings, a spatial unit in which values such as safety, hygiene and aesthetics are guaranteed⁵.

This is how Vitrubio Polion, the official architect of the Emperor Augustus, expressed himself when he affirmed that in Rome the norms referring to urban planning are based on three fundamental principles: la *firmitas*, la *utilitas*⁶ y la *venustas*: *Haec antemitta fieri debent, ut habeatur ratio firmitatis, utilitatis, venustatis. Firmitatis erit habita ratio, cum fuerit fundamentorum ad solidum depressio, quaque e materia, copiarum sine avaritia diligens electio; utilitatis autem <cum fuerit> emendata et sine impeditioe usus locorum dispositio et ad regiones sui cuiusque generis apta et commoda distributio; venustatis vero, cum fuerit operis species grata et elegans membrorumque commensus iustas*⁷.

The word *firmitas* refers to the strength of construction materials and the monitoring of rigorous building survey techniques. *Utilitas* implies comfort and logic in the arrangement of the places for an optimal use and use of them. And finally, with the word *venustas*, Vitruvius, wants to express its desire for beauty, for compliance with a series of aesthetic guidelines such as the orientation to light or the coordination and symmetry of the facades, the height of the buildings, etc. Ideal of beauty that is separated from the way of understanding of the Greeks, in which the building itself was considered a great monument. In fact, *venustas* derives from Venus, love for the beautiful things, wanting to express a more elegant and concrete beauty concept from the set of built buildings, always thinking about its aesthetic and practical integration in the place where they will be located.⁸

⁵ See VIRGILIO TESTA, voz "Edilizia". – In: *NNDI*, Vol. 6, p. 381 ss.; MURGA GENER, J. L. Un enigmático edicto del emperador Vespasiano sobre materia urbanística. – In: *AHDE*, Vol. 47, 1977, p. 45, 46.

⁶ See also FERNÁNDEZ de BUJÁN, A. Derecho Público Romano. ALBURQUERQUE, J. M. Notas acerca de la utilitas publica. – In: *RGDR*, Vol. 5, Madrid, 2005, p. 1 ss.

⁷ VITRUVIUS Pollio. De architectura, 1.3.2.

⁸ Cicero (De Orat. 3.46.18).

However, this sumptuary and sublime vision of architecture and urban planning refers mainly to public areas and buildings that contrast considerably with the urban reality of the rest of the city. Indeed, the features that determine the appearance of imperial Rome show us a city of violent contrasts in which the opulence and marble wealth of its public buildings (palaces, hot springs, temples, amphitheatres, etc.), faces the most lamentable misery of inextricable and tangled narrow streets full of *insulae* where the plebeians lived crowded⁹. In fact, one of the dangers that continually threatened the integrity of the city was the constant collapse of buildings, even the demolitions voluntarily carried out by their owners. Lets remember the case of the landowner Crassus, who in the last years of the Republic, was buying land at a very low price from the desperate owners of a destroyed building, to build it again and get great benefits with the collection of the rents of the new *insula*, undoubtedly much higher than the paid capital.¹⁰

On the other hand, the houses in Rome burned in a usual and daily way. As Ulpianus shows, *Plurimis uno die incendiis exortis* – that is, sometimes several fires were declared in the same day¹¹. The lack of consistency of building materials, the lack of water in homes, and the common use of portable stoves to heat them and torches or oil lamps with which they lit at night, all together with the narrowness of the streets, facilitated the ease of propagation of fires, some very serious as the one produced in the year 64 in the time of Nero that destroyed practically all Rome (in apocryphal letters of Seneca and St. Paul, the destruction is estimated at 132 *domus* and 4 000 *insulae*, in addition to palaces, temples, etc.) before which it was necessary to adopt urban planning measures and city organization¹².

Regarding the Roman road network¹³, it could be said that this is determined by two essential factors: The spontaneous formation of the city and the extraordinary

⁹ See VARELA MATEOS, E. La reconstrucción de los edificios privados en la Roma Clásica y un discutido Senadoconsulto de la época de Marco Aurelio. – In: *Estudios Homenaje al Profesor Francisco Rodríguez-Tejero*, p. 539; CARCOPINO, J. La vida cotidiana en Roma en el apogeo del imperio, traducción española de Mercedes Fernández Cuesta. Madrid, 1989, p. 19; HOMO, L. Nueva historia de Roma. Traducción española de J. Farrán y Mayoral. Barcelona, 1971, p. 286.

¹⁰ See MALAVÉ OSUNA, Belén. El abandono de las obras ya comenzadas y su regularización en el Derecho urbanístico romano, cit.; VARELA MATEOS, E. Conservación de los edificios, p. 849, and CARCOPINO, J. La vida cotidiana..., cit., p. 56.

¹¹ D. 1.15.2 (Ulpian, lib. singulari de officio Praefecti vigilum).

¹² See also Tacitus, Ann. 38–44; Suetonius, Nero 38; Dion Cassius, LXII, 16–18.

¹³ 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).

accident of the land. For these reasons the layout is generally irregular, the amplitude limited and the slope or inclination quite strong, many streets were so inclined that they were replaced by stairs (*clivi*)¹⁴.

Regarding its amplitude, the average width was approximately four to six meters¹⁵ and its zigzagging and irregular disposition made the road network a jumble of narrow streets full of towering buildings from which the neighbors threw – with alarming normality – the rubbish and garbage of their homes, so that they were not even clean streets, because they were not foreseen either. cleaning services that guarantee minimum hygienic conditions. Carcopino mentions a text engraved in bronze in the Table of Heraclius, in which Caesar obliges the owners of the buildings adjoining the public road to keep the area corresponding to its façade and the mayor in charge of the jurisdiction of the neighborhood clean. To ensure that this was the case, the threatening of serious sanctions in case of non-compliance with the ordinance was very popular. However, in most cases this procedure must have been ineffective, especially due to the delays that it entailed. As this author states, it would have been better to directly entrust the cleaning work to the mayor, who should recruit and supervise the sweepers and rubbish crews that would have been necessary, but it seems unthinkable that a Roman, even if he were gifted with talent like Julius Caesar, would assume the idea that the State should take on the responsibilities of individuals¹⁶.

Regarding the width of the streets, we must remember that these, from the beginning, were divided into three categories: itinerary or narrow passages for pedestrians, *actus* or roads in which you could walk in a car and travel where it was possible to circulation in a car in two directions. However, within the walled city, they only received the name of *via* two streets that crossed the Forum, *via Sacra* and *via Nova* – in addition to the streets that linked Rome with the different regions of Italy,

Madrid, 2002, p. 107 ss.; Id., Consideraciones en materia de protección vial: El *interdictum ne quid in via publica itinereve publico fiat, quo ea via idve iter deterius sit fiat* (D. 43.8.2.20). – In: *Derecho y Opinión*: Revista del Departamento de Disciplinas Histórico-Jurídicas y Económico Sociales de la Facultad de Derecho de la UCO, Vol. 6, 1998, p. 185 ss. PONTE, V. Régimen jurídico de las vías públicas en Derecho Romano. Madrid, 2007.

¹⁴ See TOPOGRAFIA e urbanistica di Roma antica. Auth.: F. Castagnoli, C. Cecchelli, G. Giovannoni e M. Zocca. Bologna, 1958, p. 65.

¹⁵ See also CARCOPINO, J. La vida cotidiana..., cit., p. 71; HOMO, L. Rome Impériale et l'Urbanisme dans l'Antiquité. L'Antiquité Classique. Année 1952, 21-2, p. 361 ss.

¹⁶ CARCOPINO, J. La vida cotidiana..., cit., p. 71, 72. See also D. 43.10.

such as the via Appia, the via Latina, the via de Ostia, etc. The other streets were called vicus. Well, the viae oscillated in the Imperial Rome between four meters eighty centimeters and six meters wide, not much more than what was prescribed by the XII Tables – that is, a maximum width of sixteen feet or, what is the same, four meters eighty centimeters approximately. The rest of the streets encompassed under the only name of vici did not even reach three meters wide

It is evident that in these circumstances in Rome it is necessary mainly for security reasons, above all to avoid the constant danger of fires, the intervention of the State in urban matters, monitoring the mode of construction of private buildings. These will observe a series of limitations that will vary throughout the different historical stages, becoming more numerous in the post-classic and Justinian period. These rules are mainly related to the legal distances that must be kept by other buildings, the limits of height and from the aesthetic point of view, the conservation and maintenance of the same.

2. URBAN CONSTRUCTIONS AND THEIR LEGAL LIMITATIONS

The first limitations to which we are going to refer concern the legal distance that has to separate buildings from each other. The first news we have of the existence of such limitations are found in the Law of the XII Tables, specifically in a provision that denied the possibility of building with a common wall, being obligatory to leave between the buildings a free space that apparently was set at five feet; it was the so called *ambitus*¹⁷, who has its twin in the *iter limitare* for rustic farms¹⁸; so that the Roman farm

¹⁷ See also D. 10.1.3 (Gaius, IV Leg. XII Tab.); Varro, *De lingua latina* (5.22): *etiam ambitus iter, quod circumeundo territor, nam ambitus circuitus; ab eoque duodecim tabularum interpretes <ambitus parietis> circuitum esse describunt.* See SCARLATA-FAZIO, M. *Distanze legali. Diritto Romano.* – In: *Enciclopedia del Diritto*, Vol. 13, p. 280; PATAULT, A. M. *Réflexions sur les limitations au droit de propriété à Rome jusqu'à la fin de la République.* – In: *Revue Histoire de droit Française et Étrangère*, 4. sér., Vol. 55, 1977, p. 242 ss.

¹⁸ See also Cicero, *De legibus*, I, 21.55: *Usus capionem XII Tabulae intra V pedes esse noluerunt;* D. 8.3.8 (Gaius lib. 7 ad ed. prov.); D. 43.8.2.21–22 (Ulp. lib. 68 ad ed.), Varro, *de L. Lat.* 5.143, *Serv. ad Aen.* 5, 755. SEGRÉ, G. *Corso di Diritto Romano. Le cose, la proprietà, gli altri diritti reali ed il possesso.* Vol. 3. Torino, 1930, p. 165; PACCHIONI, G. *Corso di Diritto Romano.* Vol. 2. Torino, *Le Istituzioni di Diritto Privato*, 1910, p. 196–197; BONFANTE, P. *Corso di Diritto Romano.* Vol. 2. La proprietà. Roma, 1926, reimp. 1966, p. 330; BURDESE, A. *Manuale di Diritto Privato Romano.* Torino, 1975, p. 333–334; BRUGI, B. *Le dottrine giuridiche degli Agrimensori Romani. Compare a quelle del Digesto.* Roma, 1968, p. 233 ss.; Id., *Studi sulla dottrine delle servitù prediali.* – *AG*, Vol. 25, 1880, p. 326 ss.; GARCÍA SÁNCHEZ, J. *El origen de las servidumbres prediales y su vinculación con las relaciones de vecindad en Derecho Romano.* *RDN*, Vol. 85-86, 1974, p. 40, 41. BEAUDOUIN, E. *La limitations des fonds de terre dans ses rapports avec le droit de propriété.* –

was isolated, it was a closed and autonomous territory that had nothing to do with the other farms, no matter how close they were.

Well, in the same way in the city, the *ambitus*, allowed free access and passage around the house isolating it and thus guaranteeing its independence in relation to the neighboring houses. Segre highlights that the ancient house (*domus*) was a kind of *templum*, a *tutissimum cuique refugium*. The *ambitus* not only isolated the house, but also ensured access to it and facilitated the drainage of water to the outside, waters that were subsequently poured into the interior¹⁹.

However, in the classical era the *ambitus* falls into uselessness (although it was never expressly repealed) and the houses will be attached to a common wall, “*sesquipedalis paries*” – that is, to a wall with a maximum thickness of one and a half feet (about forty-five centimeters), so that it was always free even if it was a small part of the *ambitus*²⁰. It was the Emperor Nero who, in his desire to see the city rebuilt, wanted to impose again the observance of the *ambitus* in the constructions without finally achieving it, because the *paries communis* turned into an indispensable measure of space saving, so necessary at that time to make it feasible that the city could accommodate an increasingly large population that was crammed into *insulae* adhered to each other²¹.

Furthermore, the rules regarding the obligatory nature of leaving a free space between buildings were always present throughout the history of Roman Law, starting with a rescript by Marco Aurelio and L. Vero in which it is established that *in area, quae nulli servitutem debet, posse dominum vel alium voluntate eius aedificare intermisso spatio a vicina insula*. That is to say, that any person can build on a plot of land with the authorization of its owner, when the latter does not have to be bonded and always respecting the legal space between the neighboring house. The last words (*intermisso*

In: *Revue Historique de Droit français et étranger*, Vol. 17, 1893, p. 397 ss.; CARAVELLA, R. Le limitazioni del dominio per ragioni di vicinanza in *Diritto Romano*. Roma, 1971, p. 37.

¹⁹ SEGRÈ, G. Corso di diritto romano. Le cose, la proprietà, gli altri diritti reali ed il possesso. III parte. Anno Accademico 1929-30. Torino, 1930, p. 166.; PALMA, A. *Iura vicinitatis*. Torino, 1968, p. 64. See also VARRO, *De lingua latina* 6,161.

²⁰ See also VITRUBIO, *De archit.* 2.8.17; See BIONDI, B. La categoria romana delle servitutes. Milano, 1938, p. 41; BONFANTE, P. Corso di Diritto Romano, cit., p. 317; SEGRÈ, G. Corso di Diritto Romano, cit., p. 160.

²¹ See also TACITUS, *Ann.* 15.43.

legitimo spatium a vicina insula) surely were object of an interpolation on the part of the compilers of Justinian²².

In effect, it is in the legislation of the Lower Empire that this matter will be dealt with more thoroughly. In the first place, we find ourselves with a norm established by Constantine that punished with the confiscation of all his patrimony to the one who built a work without observing a minimum distance of one hundred feet from public warehouses²³.

Later, more stringent provisions were established²⁴. Thus in a constitution of Arcadio, Honorius and Theodosius, it is fixed in fifteen feet the distance that it must keep with respect to the public buildings and imperial palaces, that one that wants to build next to them²⁵. This norm was reinforced by another constitution, this time by Honorius and Theodosius²⁶, according to which you must leave at least ten feet of distance between the balconies and ledges of private buildings. Later, in a Leon constitution about whose location we are not aware, it is necessary that between a building and a new one, twelve feet of distance must be respected.²⁷ However, the greater rigidity in this delicate matter was introduced by the Zeno emperor with a new constitution²⁸ in which in addition to pick up the norm of the Leon constitution mentioned above, established among other provisions the obligation not to build in Constantinople remote buildings less than one hundred feet from existing ones, when the new work prevented the former enjoy the Seaview. Justinian, extended these provisions to all the cities of the empire.²⁹

²² See also BIONDI, B. *La categoria romana delle servitutes*. Milano, 1938, p. 42; SEGRÈ, G. *Corso di Diritto Romano*, cit., p. 160; BONFANTE, P. *Corso di Diritto Romano*, cit., p. 317; SCIALOJA, V. *Diritto Romano. La proprietà*. Lezioni compilate dal dottor Guido Storch. Università di Roma, 1908–1909, p. 353 ss.

²³ CTh. 15.1.4. This law isn't included in Justinean Code.

²⁴ See VARELA MATEOS, E. *El grave problema de la conservación de los edificios*. – In: *Homenaje a Juan Berchmans Vallet de Goytisolo*, Vol. 4, 1988, p. 849.

²⁵ CTh. 15.1.46–47. Only the first norm about the distance between public buildings is included by Justinian in his Code. See also C. 8.10.9.

²⁶ C. 8.10.11.

²⁷ See ROTONDI, M. *L'abuso di diritto*. – In: *Rivista di diritto civile*, Vol. 15, 1923, Reimp. Padova, Cedam, 1979, p. 50.

²⁸ C. 8.10.12. See also MALAVÉ OSUNA, B. *La legislación urbanística en la Roma Imperial*. A propósito de una Constitución de Zenón. Málaga, 2000.

²⁹ C. 8.10.13.

In this regard, reference should also be made to the third fragment of the D. 50.10 (Macer, lib. 2 *de officio praesidis*), which includes the principle by which individuals are not allowed to build new works without special permission from the prince when they do *ad aemulationem alterius civitatis* – that is, with emulation of other cities or when the work gave reasons for sedition, or was a circus, a theater or an amphitheater³⁰. It was this text, surely interpolated, next to that which appears in C. 12,59 (58).1, from which the medieval doctrine of emulation acts took its name³¹.

Another limitation is related to the height of buildings. Indeed, an excessive height could sometimes damage the lights or remove the air to other buildings in the city and even become dangerous in the case of dilapidated buildings. However, during the Republic the principle that informed the *ius civile* in this matter was that the owner could build *ad infinitum*, although we could say that it was not the taste of the citizens of then to build skyscrapers. In addition, there was a limitation of ethical-social nature against the excessive height of buildings; that is, the republicans viewed with suspicion and distrust the neighbor who wanted to stand out from the others even if it was in the aspects of life more everyday, as the fact of raising one's own house above the others. In his thoughts, was the idea that who acted like this, deep down what he wanted was to restore the feared Monarchy, hated after the experience of the Etruscan kings, especially Tarquinius “the Superb”. In short, it was the censors who exercised ample control of the most daring owners, imposing the decrease in the height of the most outstanding buildings;³² which shows that it was not a legal limitation but an ethical one. Remember in this sense, which was the primordial function of the censors, apart from the preparation of the census, the moral control of the customs of citizens whose behavior could be the subject of value judgments in the censorship note³³.

³⁰ We understand the jurisconsulte refers to buildings of public utility, as it is deduced in the Title X's rubric of Book L of the Digest and the nature and context of the Macer writing. (*De operibus publicis*).

³¹ See JIMÉNEZ SALCEDO, C. El régimen jurídico de las relaciones de vecindad en Derecho Romano, cit., p. 166 ss.; SEGRÉ, G. Corso di Diritto Romano, cit., p. 162; PACCHIONI, G. Corso di Diritto Romano, cit., p. 320, 324; ATZERI VACCA, F. Sulla dottrina degli atti ad emulazione. Cagliari, Timon, 1886, p. 21; ROTONDI, M. L'abuso di diritto..., cit., p. 48. NICOLINI, Ugo. La proprietà, il principe e l'espropriazione per pubblica utilità. Studi sulla dottrina giuridica intermedia. Copertina rigida – 1952. Milano, 1952, p. 63 ss. BONFANTE, P. Corso di Diritto Romano, cit., p. 349; VALIÑO, A. La aemulatio en el Derecho Romano: su examen en sede de las relaciones de vecindad y de calumnia procesal. 2002, p. 75 ss.

³² See CUGUSI, G. Teoria della proprietà. Napoli, 1907, p. 207 ss.; BIONDI, B. La categoria romana delle servitutes, p. 43.

³³ See FERNÁNDEZ de BUJÁN, A. Derecho Público Romano, p. 117 ss.

We could say that it is in imperial law that limitations for reasons of public interest in this sense are encountered for the first time. In this way, we find ourselves first with the legislation of Augustus who set the maximum height of a building, in seventy feet; later reduced by Trajan to sixty feet³⁴.

In the Lower Empire, Zenon's constitution already referred to,³⁵ definitively established the maximum height of a construction in one hundred feet (about thirty meters), provided that certain distances were observed: [...] *item quum prior lex sanciat, ut liceat centum pedes in altum extollere domos* [...].

As it is known, this constitution was applicable in principle only to Constantinople although, surely, similar limits were imposed in the local statutes of the other cities³⁶ and finally, Justinian, as he did with the limitations regarding distances between buildings, extended the rule of Constantinople to all the cities of the empire.

Finally, limitations were also established in relation to the conservation and maintenance of buildings, forcing their owners to rebuild them if their condition were ruinous. Thus, Paulus in D. 39.2.46 (lib. 1 *Sententiarum*) tells us that *Ad curatoris reipublicae officium spectat, ut dirutae domus a dominis exstruantur*. That is to say, it is up to the curator of the city that the owners reconstruct the demolished houses³⁷. Ulpian also informs us that the governor of the province is entitled to force the owner of a damaged building to repair it and in case of failure to provide repair to the damage with the appropriate remedy: *Praeses provinciae inspectis aedificiis, dominos eorum causa cognita reficere ea compellat, et adversus detrectantem competenti remedio deformati auxilium ferat*³⁸.

In the same sense, the Justinian Code includes a constitution of Valentinian, Valens and Gratian addressed to the *pretorian prefect* in which it is imposed on owners

³⁴ See also Tacitus, Ann. 15.43; Suetonius, Aug. 89; Strabo, 5.37; D. 39.1.1.17 (Ulp. lib. 52 ad ed.). See VARELA MATEOS, E. El grave problema de la conservación de los edificios privados en la Roma clásica, cit., p. 850–851; SCIALOJA, V. Diritto Romano, La proprietà, cit., p. 35.

³⁵ See C. 8.10.12.14. See also MALAVE OSUNA, B. Legislación Urbanística en la Roma Imperial. A propósito de una Constitución de Zenón (Estudios y Ensayos). Málaga, 2000.

³⁶ We must bear in mind that the limitations related to the height of the buildings will probably vary according to the cities due to the topographic characteristics where they are being built. The measurements of which the sources speak to us relate only to the city of Rome. See also SCIALOJA, V. Diritto Romano, La proprietà, cit., p. 358.

³⁷ See also FERNÁNDEZ de BUJÁN, A. Derecho Público Romano, cit., p. 243; PONTE, V. Régimen jurídico de las vías públicas en Derecho Romano, p. 191 ss.; 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), p. 107 ss.

³⁸ D. 1.18.7 (Ulp. lib. 3. Opinionum).

located within the city to repair them even against their will. the competent judicial authority enforce this precept.³⁹

In the fragment 52.10 of D. 17.2 Ulpian, picking up the opinion of Papinian, tells us that it is sanctioned with the loss of their quota to the co-owner who refuses to contribute to defraying the expenses entailed in the repair of an *insula* if after four months since the restoration had not paid its corresponding share of the paid-in capital plus interest to the one who carried it out.

On the other hand, and probably in order to prevent demolitions of buildings from being carried out frequently, limitations in this regard were also established from very old. In fact, the XII Tables prohibited the owner of a beam embedded in a foreign building (*tignum iunctum*) to remove it from it, being able to demand compensation in return for it.⁴⁰

The *senatusconsultum Hosidianum* (44–46 AD) and *senatusconsultum Volusianum* (56 AD)⁴¹ imposed on the owners the prohibition of demolishing their buildings in order to speculate with the materials; as well as selling the buildings themselves when the sale was made not in response to them but to their materials, being therefore foreseeable demolition. Systematically ordering the regulation collected in the text from the *Sc Hosidianum*, *Sc Volusianum*, we could establish those regulations in the following way: the prohibition of demolishing the noble buildings is established to negotiate with their materials. If someone buys a building for this purpose, the penalty imposed is double the price paid, amount that will enter the *aerarium publicum*. If the seller, even knowing the buyer's motivation when buying the property, sells it, he is sanctioned making the sale null, so if he collected the price he has to return it. Finally, if not only the buyer has a desire to speculate in contravention of the prohibition, but also the seller alienates with this intention, the penalty is imposed on both, who must pay the fine at the price *simplum*, in addition to the nullity of the sale.⁴²Said prohibition is picked up by *Justinian* in his compilation, although this time

³⁹ See also C. 8.10.8 and D. 39.2.46.pr. (Paulus lib. 1. Sententiarum).

⁴⁰ ALBURQUERQUE, J. M. Observaciones a propósito de la tabula picta en Gayo 2,78: Tabulae picturae cedit. – In: *Estudios Jurídicos en conmemoración del X Aniversario de la Facultad de Derecho de la UCO*, 1991, p. 10.

⁴¹ See RICCOBONO, S. *Fontes Iuris Romani Antejustiniani. Pars prima. Leges*, Florentiae, 1968, p. 289.

⁴² VARELA MATEOS, E. El grave problema de la conservación de los edificios, p. 853–854. MALAVÉ OSUNA, B. La legislación urbanística en la Roma Imperial. A propósito de una Constitución de Zenón, p. 201 ss. SARGENTI, M. Due senatoconsulti. Política edilizia in primo seculo dell'impero

an exception was taken into account, that is: it will be lawful the separation of the materials of a building when they will be destined to public works.⁴³

In the year 122 d.C. another Senate consulted by the consuls Acilio Aviola and Cornelio Pansa and known by the name of S.C. Aciliano also prohibited the legacy of columns, marble and any material that is attached to a building. This is what Ulpiano expresses in D. 30.41.1–5 (Ulpian, lib. 21 ad Sabinum): *Sed ea, quae aedibus iuncta sunt, legari non possunt, quia haec legarinnon posse Senatus censuit Aviola et Pansa Consulibus.*

In the same sense the legislator pronounces itself in the municipal dispositions, as the *Lex Municipii Tarentini* (90-92 a.C) according to which it is prohibited, unless there is authorization from the Senate, to destroy or remove the roof of a building unless it is for its future restoration. And with only formal differences, the same prohibitions are imposed in the laws *Coloniae Genetivae Iuliae* (44 a.C) and *Municipii Malacitani* (81-84 d.C.).⁴⁴

It is clear that all these limitations are intended to avoid speculation with the materials of buildings to the detriment of the conservation of buildings and therefore, it is clear that *domus* as well as villas and palaces are the ones to which these limitations are directed, since poverty and the low value of the materials with which the *insulae* were built should not have made them very attractive for sale⁴⁵.

In short, we could conclude that urban policy since the time of Augustus experienced great progress in Rome and was aimed at safeguarding the public interest and also to regulate relationships between neighbors. The Romans, with an advanced regulation achieved, despite the shortcomings that had the most humble private buildings, a developed city in whose urban elements such as the remarkable conception of space, the advancement in construction and its great aesthetic qualities,

e tecnica normativa. – In: *Studi in onore a Cesare Santfilippo*. Milano, 1982;. ARIAS BONET, J. Sobre el Senadoconsulto Hosidano. – In: *AHDE*, Vol. 50, 1980; MAY, G. Les Senatusconsultes Hosidien et Volusien. – In: *RDH*, Vol. 14, 1935; MOLLÁ, S. et LLANOS, J. M. Prohibición de demolición de edificaciones. – In: *RIDA*, Vol. 42, 1995.

⁴³ See D. 18.1.52 (Paulus, lib. 54 ad ed.); D. 30.1.41.5 (Ulp. lib. 21 ad Sabinum); D. 39.2.48 in fine (Marcianus, lib. singulari de Delatoribus) and C. 8.10.2.

⁴⁴ See also RICCOBONO, S. *Fontes Iuris Romani Antejustiniani*, cit., p. 166 ss., p. 177 ss., p. 208 ss. respectively; LEÓN, R. y CANALES, A. *Lex Flavia Malacitana*. Málaga, 1969, p. 21–57; D'ORS, A. *Epigrafía jurídica de la España Romana*. Madrid, 1953, p. 312–341. *CORPUS de inscripciones latinas de Andalucía*. Vol. I: Huelva (Ed. J. González Fernández. Sevilla, 1989). Vol. II: Sevilla (Ed. J. González Fernández): Tomo I: La Vega (Hispalis) (Sevilla, 1991), Tomo II: La Vega (Italica; (Sevilla, 1991). Tomo III: La Campiña (Sevilla, 1996), 611.

⁴⁵ VARELA, E. *El grave problema...*, cit., p. 850.

you can appreciate the Roman spirit of assimilation and organization that turned Rome into a symbol of prosperity and development. In the words of Rostovzev, "Rome, the splendid and magnificent city of the world was, of course, the most admired and flattered of the cities of the Empire. And it fully deserved the admiration of the contemporaries, as much as it forces ours."⁴⁶

3. NATURE OF THE RESPONSIBILITY FOR DAMAGES CAUSED BY BUILDINGS IN POOR CONDITION.

As we have already pointed out in the previous section, the Roman Law *ab antiquo* collects precepts that have as objective to avoid damage due to the bad state of the buildings.⁴⁷ However, originally the damages produced by a dilapidated house or by a tree that threatened to collapse on the adjacent estate, and in general, by any inanimate thing, were not compensable as long as the Aquilian fault budgets were considered to be lacking. It could happen that the *dominus* of an estate neglected its assets and let its bad state be harmed by a neighbor without him having at his disposal any means of forcing him to repair the damages suffered. All this without prejudice to the fact that, in accordance with the principles of fairness and justice, he was allowed to retain the ruinous materials that had fallen from his estate (*ius retentionis*)⁴⁸. This situation was particularly worrisome in Rome where, as has already been seen, these damages often occurred due to, among other circumstances, the instability of the buildings that the humidity used to end up weakening and the poor resistance of the land.⁴⁹ In addition, although the houses were isolated from each other by the *ambitus*,

⁴⁶ ROSTOVZEV, M. Historia social y económica del Imperio Romano. Tomo I. Traducida del Inglés por L. López Ballesteros. Madrid, 1981, p. 268.

⁴⁷ D. 39.2.46 (lib. 1 Sententiarum) de Paulus; D. 1.18.7 (lib. 3 ad ed.) de Ulp. and C. 8.10.8.

⁴⁸ See also BRANCA, G. Danno temuto e danno da cose inanimate nel Diritto Romano. Padova, 1937; See also SEGRÈ, G. Corso di Diritto Romano, le cose, la proprietà, gli altri diritti reali ed il possesso. III Parte, p. 206; MASI, A. Denuncia di nuova opera e di danno temuto. – In: *Enciclopedia del Diritto*. Vol. 12, p. 162; JIMÉNEZ SALCEDO, C. El régimen jurídico de las relaciones de vecindad en Derecho Romano, cit. p. 216 ss. GUTIERREZ MASSÓN, L. Agere cum retentione ad effectum solutionis. Seminarios Complutenses de Derecho Romano. – In: *Seminarios complutenses de derecho romano: revista complutense de derecho romano y tradición romanística*, Vol. 22, 2009, p. 155–189.

⁴⁹ See ALBURQUERQUE, J. M. La protección o defensa del uso colectivo de las cosas de dominio público, cit., p. 107 ss.; VARELA MATEOS, E. La reconstrucción de los edificios privados en la Roma clásica y un discutido Senadoconsulto de la época de Marco Aurelio. – In: *Estudios en homenaje al profesor Francisco Hernández-Tejero*, 1994, p. 539 ss.; Id., El grave problema de la conservación de los edificios privados en la Roma clásica. – In: *Estudios Homenaje a Juan Berchmans Vallet de Goytisolo*, Vol. 4, p. 847 ss.; MURGA, J. L. Un enigmático edicto del emperador Vespasiano sobre materia urbanística. – In: *AHDE*, Vol. 47, 1997, p. 43 ss.; MALAVÉ

this was not enough to prevent injections from one another. On the contrary, instead of offering security guarantees, the existence of a space of free land between the buildings used to imply an incentive for the owners who, freed from the duty to take into consideration the interests of their neighbors, exercised their rights in an even more exclusive way⁵⁰. This situation made necessary the search for a quick solution that is undoubtedly in the payment of compensation by the owner of the ruined building; something else is the means by which responsibilities can be demanded in this sense⁵¹.

The Roman jurists of the late classical period had already warned of the existence of obligations that were not born of perfectly lawful facts nor born of crimes and on the contrary; that although not born of wrongful acts, nor did they have their origin in a contract. To this, Gaius refers to Institutions 3.38 or in D. 44.7,1, pr., when he alludes to a somewhat imprecise category of obligations arising *variae causarum figurae*. In fact, there are numerous cases of liability that have a different foundation in which guilt gives way to other factors (risk, guarantee, etc.), which suppose an objectification of the behavior, escaping from the general criterion of subjective responsibility. This substantivity of responsibility for some kind of misfortune, has been given modernly call objective responsibility and more specifically, when the compensation for damages is based on the existence of facilities or behaviors that carry special risks to the community, receives the name of responsibility for risk⁵².

In this sense, among the obligations born *ex variae causaum figurae* could include all those cases in which the person responsible for the damage is exempt from fault and nevertheless, is obliged to repair it if it occurs as a consequence of his own performance or of animals (*actio pauperie*), slaves (*actio noxalis*) and even inanimate things (*ius retentionis*) that were in their custody or if it could have been foreseen (*cautio damni infecti*). It suffices a causal relationship between the act of the agent and

OSUNA, B. Régimen jurídico financiero de las obras públicas en el Derecho Romano tardío: los modelos privado y público de financiación. Madrid, 2007, p. 120 ss.; JIMÉNEZ SALCEDO, C. Algunas reflexiones sobre urbanismo en Derecho Romano. – In: Revista *Derecho y Opinión*, Vol. 7, 1999, p. 405 ss.

⁵⁰ See MAZODIER, J. Droit Romain. La cautio damni infecti. Paris, 1890, p.15. PONTE, V. Régimen jurídico de las vías en Derecho Romano, cit., p. 73 ss.

⁵¹ SCIALOJA, V. Diritto Romano. La proprietà, cit., p. 519.

⁵² See ALBALADEJO, M. Comentarios al Código Civil y a las Compilaciones Forales. Tomo XXIV, artículos 1887 a 1929 del Código Civil comentados por Gullón Ballesteros y Santos Briz. Madrid, 1984, p. 134, 618; ALBACAR, J. L. y SANTOS BRIZ, J. Código Civil. Doctrina y Jurisprudencia. Tomo VI. 1993, p. 1098.

the damage even if there is no fault, so that the obligation to compensate arises, being able to recognize perhaps in these cases the notion of strict liability.

A sector of the doctrine, however, shows that the reparative function of the damage attributed to the *cautio damni infecti*, the *actio noxalis*, the *actio pauperie*, the *ius retentionis* and the praetorian actions of the *positum et suspensum*, *effusum et diectum* it supposes an exception introduced by the *ius civile* or by the Edict of the Praetor to the legal axiom that without fault it is not possible to obtain the repair of the damages suffered. Hence, it has been wanted to build by some doctrinal sector the idea of the existence of a parallel arrangement of objective liability or without fault in the legal sources of Roman Law.⁵³

In our opinion, if Roman Law exists the possibility of demanding an objective liability without fault, all the aforementioned assumptions that include the noxal actions and the *cautio damni infecti* would have been grouped into a single action, which did not really happen. Moreover, the differences between noxal action and feared damage are irreconcilable because noxal actions are actions *in personam* and the *cautio damni infecti*, still bounded to the *voluntas domini*, is based on the current state of a thing, on a *vitium loci*. In addition, the regime of damages for inanimate things is preventive; sanctions a responsibility by own fact, which shows not only its autonomy in Classic Law, but also a different origin. The only text (D. 39.2.7.1 lib. 53 ad ed.) that assimilates *vitio aedium* damage to those produced by animals is clearly interpolated⁵⁴. On the other hand, it is completely impossible to speak of objective responsibility in these cases in the oldest Roman Law, in which the bail bond figure had not yet been introduced, only the *legis actio damni infecti* had a marked criminal character and, therefore, demanded the presence of a responsible subject. The exclusion of liability when intervening in the production of damage any external element or force majeure justifies and reinforces this statement⁵⁵. The *vitium*, only the *vitium*, is for classical jurists the only cause of damage and situations in which the *damnum* is a direct consequence of a person's intentional actions would also be excluded and considered *within* the scope of the *actio legis Aquiliae*. Thus it is deduced from some texts of the

⁵³ See also MOZZILLO, A. Denuncia di nuova opera e di danno temuto. – In: *NNDI*, Vol. 5, 1960, p. 459; MARTÍNEZ SARRIÓN, A. Las raíces romanas de la responsabilidad por culpa. Barcelona, 1993, p. 270.

⁵⁴ See BRANCA, G. Damno temuto e damno da cose inanimate, cit., p. 293–297.

⁵⁵ BRANCA, G. La responsabilità per danni nei rapporti di vicinanza e il pensiero dei veteres. – In: *Studi in memoria di Emilio Albertario*. Vol. I. Milano, 1953, p. 349, 350.

sources in which the *vitium*, objective element, is opposed to the fault, subjective element. See D. 39.2.24.7 (Ulp. lib. 81 ad ed.) who states that *Praeterea si furni nomine damni infecti fuerit cautum, deinde furnarii culpa damnum datum fuerit, non venire in hanc stipulationem plerisque videtur* that is to say, that if bail had been loaned because of a furnace and then the damage had been caused by the baker, the majority considers that this case does not fall within the stipulation⁵⁶. Servius, whose opinion is collected by Ulpian in D. 19.2.15.2 (lib. 32 ad ed.), opposes the material desires to the intervention of external factors not attributable to anyone when it enumerates what damages it must bear the tenant of a farm and which must affect the owner himself because it is of an extraordinary nature.⁵⁷ Bonfante⁵⁸ is very enlightening when he states that the statement usually made about the fact that primitive law and Roman law in matters of civil and criminal responsibility do not blame are not totally accurate; in reality, this is not totally accurate. In his opinion, it would be better to say that in the feeling of primitive people there is always guilt in the act of the agent, even if he does not know how to discern the meaning of his actions because he is an irrational being or even an inanimate being. Therefore, for criminal liability – vengeance and composition – as well as for civil liability – recovery of harm – it is not that guilt is ignored, but that research about its existence is neglected, because it is admitted as a necessary and concomitant element. In short: the primitive system is not characterized as much by the indifference to guilt as by the fact of presuming guilt in the act of man that causes harm to another. However, both in the Civil Law (*actio noxalis, actio pauperie and ius retentionis*) and in the Pretoria Law (*actio de posito et suspense, effusis et deiectis, adversus nautas, stabularios caupones, etc.*), the relationships that do without the guilt are very numerous.

One of the fundamental derogations and perhaps the most important of all in this matter occurs in the area of neighborhood relations. It could be said that in this field, in which modern law struggles in inextricable difficulties, the Roman Law would have solved the problem of responsibility by recognizing it independently of the guilt regarding any damage caused to the neighbor and ordering it at the same time. more liberal and ingenious. This order is represented by the *stipulatio or captio damni infecti*.

⁵⁶ See also D. 9.2.52.3 (Alfen, lib. 2 Digestorum).

⁵⁷ D. 19.2.15.2 (lib. 32 ad ed). See also D. 19.2.13.5 (Ulp., lib. 32 ad ed.) and D. 39.2.24.3, 4 (Ulp., lib. 7 ad Sabinum).

⁵⁸ BONFANTE, P. Corso di Diritto Romano, cit., Vol. II, Parte I. La proprietà. Milano, 1966, p. 382 ss.

That is, if the ruin of a building or the activity carried out by the neighbor in the exercise of his right came to be damaged, according to the general and classic principles of responsibility, should suffer in peace the damage, as it is caused by an inanimate thing or as a consequence of a legitimate and not guilty activity of the neighbor. The negative action could be exercised when an immission has taken place but as Bonfante asks, how can one complain with the *actio legis aquiliae* for the damage? It is clear that we are in a field in which the logic of principles leads to wicked results. What would be the appropriate resource then? Without a doubt, the *cautio damni infecti*. The individual is the best judge of their own interests and freedom, the spontaneous protection of these by individuals is entrusted the Roman law. The Praetor obliges the one who is afraid of the damage, to promise – when the neighbor pretends it – that he will compensate it if the feared damage occurs. Once this has been accomplished, the damage has been verified, the one who suffers it can exercise the *actio ex stipulatu*, in which he is not obliged to have to prove the existence of guilt.

Indeed, it is a fact that the Roman Law does not recognize the possibility of demanding liability in these cases through the application of the *Lex Aquilia* because there is no fault in the owner of the dilapidated building, nor does he know the call currently the strict liability or the result⁵⁹. The Roman Law provides the solution to this type of problem with the adoption of preventive security measures that are substantiated in an administrative procedure⁶⁰ in the one that the Praetor requires, at the request of the affected party, the owner of the dilapidated building to repair it and in case of refusal in this sense to answer for the damage that occurred later in a judicial process initiated by the exercise of the derivative *actio ex stipulatu* of the pretoria stipulation in which the consists of *cautio damni infecti*⁶¹. Therefore, this institution

⁵⁹ See MASI, A. Denuncia di nuova opera e di danno Temuco. – In: *Enciclopedia del Diritto*. Vol. 12, p. 162; MARTÍNEZ SARRIÓN, A. Las raices romanas de la responsabilidad por culpa, cit., p. 264.

⁶⁰ See also BRANCA, G. Sulla terminologia actio damni infecti. – In: *Studi in memoria di Umberto Ratti*. Milano, 1934, p. 170 ss.

⁶¹ About damni infecti see BRANCA, G. Danno temuto e danno da cose inanimate nel Diritto Romano. Padova, 1937; Id., Sulla terminologia actio damni infecti. – In: *Studi in memoria di Umberto Ratti*. Milano, 1934, p. 160 ss., Id., La responsabilità per danni nei rapporti di vicinanza e il pensiero dei veteres. – In: *Studi in memoria di Emilio Albertario*, Vol. I. Milano, 1953, p. 349, 350, BURCKHARD, M. Commentario alle Pandette de Gluck. Vol. 126. Lib. 39, Parte II, trad. e annotata da P. Bonfante. La cautio damni infecti. Milano, 1905–1906; WATSON, A. The Law of property in the later roman republic. Cap. 6. Oxford, 1968, repr. 1984, p. 125 ss.; GIARO, T. Il limite della responsabilità ex cautione damni infecti. (Contributo allo studio della forza maggiore nel Diritto Romano Classico). – In: *BIRD*, Vol. 78, Milano, 1975, p. 271 ss; MAZODIER, J. Droit Romain. La cautio damni infecti, p. 5 ss; MACCORMACK, G. The cautio damni infecti: Buyer and Seller. – In: *ZSS*, 1971, p. 300 ss; CARAVELLA, R. Le limitazioni del dominio per ragioni di vicinanza in Diritto Romano, cit., p. 99

ignored in modern law, constituted in the Roman Law an important resource of complementary tutelage of the relations between neighboring owners and consists of⁶², as it has already been seen, a promise or extraprocesal stipulation that the praetor obliges to lend to the owner of a property, at the request of his neighbor, imposing the duty to compensate him for the damages that may be caused in the future by having in poor condition the buildings and constructions of its land.

ss.; MOZZILLO, A. Contributi allo studio delle stipulationes praetoriae. Napoli, 1960, p. 54 ss.; Id., Denuncia di nuova opera e di danno temuto. – In: *NNDI*, Vol. 5, p. 457 ss.; MASI, A. Denuncia di nuova opera e di danno temuto, cit, p. 155 ss.; BONFANTE, P. Corso di Diritto Romano, cit., p. 381 ss.; SCIALOJA, V. Diritto Romano. La proprietà, cit., p. 518 ss.; Id., Teoria della proprietà nell Diritto Romano, cit., p. 388 ss.

⁶² FERNÁNDEZ de BUJÁN, A. Jurisdicción y arbitraje en Derecho Romano. Madrid, 2006, p. 182 ss.; D'ORS, Á. Derecho Privado Romano. Pamplona, 1967–1997, p. 203.